[redacted]

[redacted]

[redacted]

[redacted]

Elmer L. FLUCHT *v.* Judy VILLAREAL (Flucht)

CA 88-328 770 S.W.2d 187

Court of Appeals of Arkansas
Division I
Opinion delivered May 17, 1989

Wm. B. Brady, for appellant.

No brief filed.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Pulaski County Chancery Court, Second Division. Appellant, Elmer L. Flucht, appeals from the chancellor's order of April 7, 1988, requiring him to reimburse appellee, Judy Villareal (Flucht), $11,110.00 for improvements made by her while in possession of their marital home. We reverse and remand.

The parties were divorced in 1983 and appellee was awarded temporary use and possession of the parties' home located at 4524 Club Road, Little Rock, Arkansas. The decree required the home to be sold or allowed Mrs. Flucht the option to purchase Mr. Flucht's equity in the parties' marital home on or before September 15, 1983. The parties subsequently agreed that appellee could remain in the home beyond the September 1983 deadline without offering the property for sale or without an equity buy out. On October 28, 1987, appellant petitioned the court to sell the home as provided in the original decree after a redetermination of the equities. A hearing was heard on the motion on March 8, 1988.

The chancellor ordered the property sold and further held:

> 5) Defendant [appellee] is found to have made improvements after March 15, 1983, to the marital residence in the amount of $11,110.00, for which plaintiff [appellant] shall reimburse her from the proceeds of any sale (private or public). Costs of the sale shall likewise be deducted from the proceeds of such sale, and the balance then remaining divided equally between the parties.

It is from the chancellor's treatment of this division of improvements that appellant brings this appeal. For reversal, appellant argues that the chancellor's order misapplies Arkansas Code Annotated Section 9-12-315 (Supp. 1987) regarding division of property upon divorce.

The issue for resolution is whether the court erred in ordering appellant to reimburse appellee $11,110.00 from his half of the proceeds from the sale of the marital home for improvements made by her after March 15, 1983. Appellant contends that the amount of the improvements is reflected in the present value of the residence and the net proceeds should be divided equally without his being required to bear the entire cost of the improvements. Based on our *de novo* review of the record, *Callaway v. Callaway*, 8 Ark. App. 129, 648 S.W.2d 520 (1983), the testimony at the hearing reveals that appellee began making improvements to the marital home in December of 1985 after an oral agreement she allegedly entered into with appellant whereby she could remain in the marital home beyond the September 1983 date set out in the divorce decree. Appellee testified at length regarding approximately $26,000.00 worth of various improvements, renovations, additions and deletions made to the home, as well as professional decorating performed by a local interior decorator on the interior of the residence. Appellee presented verbal testimony and cancelled checks at the hearing for the expenditures and the chancellor required that she explain them item by item. After hearing all testimony, the chancellor stated in pertinent part:

> Based upon the age of the improvements and the nature of the improvements that were made, giving consideration to the fact that the wife has been a resident of the home and has apparently one hundred percent of the supervision and

> control of what redecorating and improvements were made, I'm going to allow her eleven thousand one hundred ten dollars (11,110.00) for her expenditures toward the home.

Upon these facts, we think the chancellor erred in basing his finding on the amount appellee spent in making the improvements rather than utilizing the proper method to establish value.

In the case at bar, the property in question was held by the parties as tenants in common because the final decree entered by the chancellor did not specifically provide otherwise. Ark. Code Ann. § 9-12-317 (1987). Courts, including Arkansas, generally award a co-owner, who makes improvements to the property, the resulting increase in the value of the estate, and not the actual costs of the improvements. *See, e.g., Dodds* v. *Dodds*, 246 Ark. 313, 438 S.W.2d 54 (1969). The factors considered by courts in awarding the value of improvements are discussed in 59A Am. Jur. 2d *Partition* § 232 (1987) as follows:

> A right to an equitable allowance does not arise merely because an improvement was made. In determining whether an improving cotenant should be recompensed for his improvements, as reflected in the increased value of the common premises, all the circumstances attending their erection, their nature, and their relation to the estate improved and to the other cotenants are to be considered. Thus, in granting an allowance, the courts consider such matters as whether the improvements are permanent and useful to the common estate. Improvements need not be permanent, so long as they substantially enhance the value of the property. However, expenditures which do not increase the value of the property are not treated as improvements, although an allowance for taxes and maintenance expenses may be made in an accounting.
>
> The improvements must not be foolish or improvident. Only the enhanced value of the land due to the improvement is allowed, because allowing its cost might result in the other owners being improved out of their property by an extravagant or unbusinesslike cotenant. Thus, when determining to grant an equitable allowance, a court will note that the interests of the other cotenants have not been

diminished. (Citations omitted.)

Originally, no exception was made for allowance of improvements by a person who erroneously believed himself to be the true owner. Because of the harshness of this rule, courts of equity adopted a doctrine requiring the value of improvements in such cases to be offset against the rents and profits when the owner seeks an accounting. Recognition of the rights of a good faith occupant of land resulted in the enactment of a statute commonly known as the "Betterment Act."

Because the Betterment Act was enacted to grant good faith occupants rights equivalent to those granted co-owners by common law, the underlying principles and theories are analogous. Thus, as we stated in *Neal* v. *Jackson*, 2 Ark. App. 14, 616 S.W.2d 746 (1981):

> The measure of the value of betterments is not their actual cost, but the enhanced value they impart to the land, without reference to the fact that they were desired by the true owner, or could not be profitably used by him.

Upon the record in the present case, it appears that of the $26,000.00 spent by appellee on the home, the chancellor disallowed reimbursement for decorating expenses and for those expenses incurred by her to make the home more convenient and allowed reimbursement for actual money expended (cost) on capital improvements. Because of the chancellor's error in allowing actual cost of the improvements rather than the amount by which the improvements enhanced the value of the land, that portion of his April 7, 1988, order is reversed and the cause remanded with directions to permit the taking of proof regarding the enhanced value. To enable the court to properly determine the amount to be awarded appellee, proof must be presented to establish current value of the property as enhanced by the improvements as well as the current value of the property had no improvements been made. Once the enhanced value relative to improvements is established, the court should award appellee the full value of the improvements, not merely the portion of such value which corresponds to her ownership. *See Crouch* v. *Crouch*, 251 Ark. 1047, 476 S.W.2d 248 (1969). The balance of the proceeds should be equally divided between the parties.

Reversed and remanded.

CRACRAFT, J., agrees.

COOPER, J., concurs in result but disagrees that the Betterment Act has any application.

Kenneth Ray IRVIN *v.* STATE of Arkansas

CA CR 88-252 771 S.W.2d 26

Court of Appeals of Arkansas
Division I
Opinion delivered May 17, 1989
[Rehearing denied June 14, 1989.]

[redacted]

[redacted]

[redacted]

[redacted]

William C. McArthur, for appellant.

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

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Desha County Circuit Court. Appellant, Kenneth Ray Irvin, appeals his conviction of murder in the second degree. We find no error and affirm.

A felony information was filed charging appellant with murder in the first degree, a violation of Arkansas Code Annotated Section 5-10-102 (Supp. 1987). A jury trial was held in which appellant was found guilty on the reduced charge of murder in the second degree in violation of Arkansas Code Annotated Section 5-10-103 (1987) and was sentenced to twenty years in the Arkansas Department of Correction and was to pay restitution in the amount of $7,000.00. From the conviction comes this appeal.

Appellant asserts eight points for reversal; however, we will address his challenge to the sufficiency of the evidence prior to considering any alleged trial error as required by *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984).

I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT.

The court must consider all evidence, including any which may have been inadmissible, in the light most favorable to the appellee and affirm if there is substantial evidence to support the verdict. *Id.* Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable and material certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. *Phillips* v. *State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986).

Viewed in the light most favorable to appellee, the evidence reflects that on October 10, 1987, an incident occurred which culminated in the death of Benny Rana. On that evening, appellant, the victim, and a woman were drinking at a club. The three of them left the club at approximately 3:00 a.m. and went to appellant's mobile home to "party." While there, the victim became agitated and broke out the windshield of appellant's truck. He and the appellant began fighting and the woman ran to the back of the mobile home. Appellant went inside the mobile

home, got his rifle, came out the front door and admittedly fired a shot in the air. Appellant testified that his purpose in getting his gun was to scare the victim. He also testified that he was holding the gun with one hand and fighting the victim with the other at which time the gun accidently discharged several times. The victim was struck in the chest by one of the bullets and fatally injured.

Other evidence presented at trial revealed that before he left the bar on the evening in question, appellant told another person that he wanted to "whip" the victim. A neighbor testified that he heard three shots fired in rapid succession with the last shot sounding distinctly different from the first two. An investigation of the scene indicated that three spent shell casings were found in close proximity to the victim's body. One casing was found beneath the victim's hand and two were found immediately south of the victim's hand. An officer at the scene test fired appellant's gun three times to determine how far the weapon would eject the casings. The casings ejected distances ranging from 5'6" to 7'3½". The shirt worn by the victim was tested in the trace evidence laboratory for gunpowder residue; however, none was found. The criminologist who examined the shirt testified that he reached this negative conclusion after performing microscopic examination, infrared photography, sodium rhodizonate, modified griess, and x-ray fluorescence testing procedures. To determine the proximity of the weapon to the victim, the criminologist conducted test firing procedures which indicated that the gun would have to be fired five or six feet from the target to leave no gunpowder residue. A forensic expert also testified that the bullet which struck the victim was not fired from contact range but based upon his investigation could have been fired from as close as two feet.

Appellant argues that the facts of this case are insufficient to support his conviction. We disagree. Guilt need not always be proven by direct evidence. Circumstantial evidence can present a question to be resolved by the trier of fact and be the basis to support conviction. *Yandell* v. *State*, 262 Ark. 195, 555 S.W.2d 561 (1977). We have often said that the fact that evidence is circumstantial does not render it insubstantial. *See, e.g.*, *Ashley* v. *State*, 22 Ark. App. 73, 732 S.W.2d 872 (1987). The jury is allowed to draw any reasonable inference from

circumstantial evidence to the same extent that it can from direct evidence. *Payne* v. *State*, 21 Ark. App. 243, 731 S.W.2d 235 (1987). Furthermore, the jury was not required to believe appellant's version of the events surrounding the shooting because he was the person most interested in the outcome. *Core* v. *State*, 265 Ark. 409, 578 S.W.2d 581 (1979).

Viewing the above and all evidence of record in the light most favorable to appellee, we find substantial evidence from which the jury could have found appellant guilty of second degree murder without resorting to surmise or conjecture. Therefore, we affirm as to appellant's first point for reversal.

II.

THE TRIAL COURT ERRED IN DENYING A CHALLENGE FOR CAUSE OF TWO PROSPECTIVE JURORS.

Appellant sought to dismiss for cause prospective jurors Marvin Pennington and Jewell Freeman. The court denied appellant's motions and appellant contends that the denials constitute reversible error. Appellant's argument must fail because in order to preserve this point for appeal, appellant must show that one of the jurors actually seated should have been excused for cause. In order to make that showing, appellant must demonstrate that after exhausting all of his peremptory challenges, he was forced to accept a juror against his wishes. We will not consider arguments concerning jurors either accepted by appellant while he had peremptory challenges remaining or those not accepted by appellant but excused by peremptory challenges. *Gardner* v. *State*, 296 Ark. 41, 754 S.W.2d 518 (1988). Here, appellant's abstract of voir dire does not reveal if his peremptory challenges were exhausted. In fact, appellant only abstracted a very small portion of the jury voir dire and on this record, we are unable to determine how many, if any, of his challenges (peremptory or for cause) were utilized. On appeal, the record is confined to that which is abstracted, *Sutherland* v. *State*, 292 Ark. 103, 728 S.W.2d 496 (1987). Furthermore, when an error is alleged, prejudice must be shown, since we do not reverse for harmless error. *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied*, 470 U.S. 1085 (1985). Because appellant has not shown

that he exhausted his peremptory challenges and was forced to take a juror he otherwise would have excused, he has not shown that he was prejudiced by the court's denial of his motions to exclude the jurors for cause.

III.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION IN LIMINE TO EXCLUDE THE SHIRT ALLEGEDLY WORN BY THE DECEDENT AT THE TIME HE WAS SHOT.

In this argument, appellant basically contends that the shirt was not properly authenticated as the one worn by the victim when he was shot and there was evidence of tampering. We disagree. The shirt challenged by appellant upon these grounds is a blood-soaked red and blue plaid shirt with gunshot holes corresponding to the wounds sustained by the victim. At a pretrial hearing, appellant presented numerous witnesses who testified that appellant was not wearing a plaid shirt on the night of his death. Contrarily, the state put on evidence that the plaid shirt was one removed from the victim's body at the scene. Deputy Sheriff Ed Gilbert testified that he was involved with removing the red plaid shirt from the victim's body at the scene, packaging it into evidence and submitting it to Gerald Curtis, an investigator for the medical examiner's office of the state crime laboratory. Mr. Curtis testified that he received the shirt, along with other items of evidence relating to the victim, and took it to the evidence room in the morgue pending completion of the autopsy. Dr. Fahmy Malak, Chief Medical Examiner, testified that after his department received the shirt, he photographed it, gave it an autopsy number and then released it to the trace evidence department for further testing and examination. Dr. Malak's testimony revealed that the bullet holes in the plaid shirt corresponded to the entrance and exit wounds on the victim. He further testified that he received the shirt when he received the body for autopsy, and that the shirt was numbered and marked. Although appellant argues that the holes in the shirt could have been made to match the gunshot wounds, he presented no evidence of tampering or suspicious circumstances.

The purpose of the rule requiring a chain of

custody is to prevent the introduction of evidence which is not authentic. If the trial court is satisfied that in reasonable probability the evidence has not been tampered with, it is not fatal that the state did not eliminate every possibility of tampering. *Gardner* v. *State*, 296 Ark. 41, 754 S.W.2d 518 (1988). Evidentiary matters regarding chain of custody are left to the sound discretion of the trial court and rulings in this regard will not be reversed on appeal absent an abuse of discretion. *Hoback* v. *State*, 286 Ark. 153, 689 S.W.2d 569 (1985). Minor uncertainties in the proof of chain of custody are matters to be argued by counsel and weighed by the jury, but they do not render evidence inadmissible as a matter of law. *Gardner*, 296 Ark. at 65, 754 S.W.2d at 530. Moreover, when an object is subject to positive identification, the proof of chain of custody need not be as conclusive as it should be with respect to interchangeable items such as blood samples or drugs. *White* v. *State*, 290 Ark. 130, 717 S.W.2d 784 (1986). Here, a chain of custody had been established and appellant presented no evidence of tampering, suspicious circumstances or break in the chain of custody. Therefore, we cannot say the judge abused his discretion in denying appellant's motion to exclude the shirt worn by the victim on the night he was shot.

IV.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO USE INFLAMMATORY PHOTOGRAPHS NOT PROVIDED APPELLANT PRIOR TO TRIAL.

On this point, appellant contends the trial court erred in admitting into evidence various photographs taken of the victim at the crime scene and autopsy photographs depicting the entrance and exit wounds on the victim. In support of this contention, appellant alleges that the pictures are inflammatory and the state failed to make them available to him prior to trial.

As regards the discovery issue, appellant concedes that photographs were mentioned in the state's discovery response; however, he alleges reversible error for the state's failure to produce them prior to trial. The discovery file provided appellant indicated that the crime scene was preserved by photographs

taken by Investigator McCord and that they would become a permanent part of the case file. The evidence reveals that the state did not have the pictures until the day of trial and appellant was given an opportunity to view the photographs outside the presence of the jury and make objections to their introduction into evidence.

Arkansas Rules of Criminal Procedure 17.1 requires that the prosecuting attorney disclose to defense counsel, upon timely request, any material and information the prosecutor intends to use in any hearing or trial. Rule 17.2(a) provides that the prosecuting attorney shall perform his obligations under Rule 17.1 as soon as practicable. In *Fisk* v. *State*, 5 Ark. App. 5, 631 S.W.2d 626 (1982), this court stated that a trial court is not required to prohibit the introduction of evidence where there has been a failure to comply with discovery procedures unless there is a likelihood that prejudice will result. Also, the party alleging error is required to demonstrate that prejudice did in fact exist. *Smith* v. *State*, 10 Ark. App. 390, 664 S.W.2d 505 (1984). In the instant case, appellant failed to show that he was prejudiced by the fact that he did not see the photographs prior to trial. The existence of the photographs and the custodian's identity was made known to appellant in the state's discovery response several weeks prior to trial. For these reasons, the court found that appellant had notice of this information and allowed the photographs into evidence. An appellant cannot use the discovery rules as a substitute for his own investigation. *David* v. *State*, 295 Ark. 131, 748 S.W.2d 117 (1988).

Appellant also alleges that the autopsy pictures revealing the entrance and exit wounds on the victim were unnecessary and prejudicial. The admissibility of photographs is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Fitzhugh* v. *State*, 293 Ark. 315, 737 S.W.2d 638 (1987). Even inflammatory photographs are admissible if they tend to shed light on any issue, enable a witness to better describe the objects portrayed, permit the jury to better understand testimony, or corroborate testimony. *Bussard* v. *State*, 295 Ark. 72, 747 S.W.2d 71 (1988).

This purpose was served here. The photographs corroborated the testimony of Dr. Fahmy Malak concerning the

crime scene, the location of the wounds, and appellant's position at the time of the shooting. Accordingly, the trial court did not abuse its discretion by admitting the photographs into evidence.

V.

THE TRIAL COURT ERRED IN ALLOWING ADMISSION INTO EVIDENCE OF A REPORT FROM THE ARKANSAS STATE CRIME LABORATORY INSTEAD OF PRESENTING WITNESSES.

The report being challenged by appellant is a certified report from the Arkansas Crime Laboratory establishing that the rifle found at the scene was the weapon which fired the fatal shot. The court and both counsel discussed appellant's objection outside the hearing of the jury. Appellant was willing to stipulate to the findings in the report but objected to that portion of the report which classified the death as a homicide, thereby implying there was a murder. On appeal, appellant argues the report was excludable as hearsay; however, the record reveals that the basis for his objection at trial is as follows:

> In the first place, I disagree with the State. I don't think that this is, in fact, admissible because it is an opinion, an expert opinion, without any qualifications having been presented or testified.
>
> Secondly, I don't like their usual wording on the lab form where they seem to be making a conclusion that an offense has occurred. I believe we can handle it by stipulation and yet get the pertinent information in before them and not put that report in, which I think is objectionable.

Only specific objections made at trial are preserved for appeal and all others are waived. *Hart* v. *State*, 296 Ark. 290, 756 S.W.2d 451 (1988). Therefore, based on the above, appellant failed to preserve a hearsay argument for appeal. However, appellant also argues he was prejudiced by the notation on the report classifying the death as a homicide. It is well settled that appellant carries the burden to demonstrate prejudice, *Smith* v. *State*, 10 Ark. App. 390, 644 S.W.2d 505 (1984), and this court will not reverse absent demonstrated prejudicial error. *Bing* v.

State, 23 Ark. App. 19, 740 S.W.2d 156 (1987).

Black's Law Dictionary defines homicide as "The killing of one human being by the act, procurement, or omission of another." Further, it states that homicide is not necessarily a crime and that the term "homicide" is neutral because while it describes the act, it pronounces no judgment on its moral or legal quality. Therefore, we cannot conclude that appellant demonstrated how he was prejudiced by the introduction of the report.

VI.

THE TRIAL COURT ERRED IN ALLOWING TESTIMONY OF A WITNESS CONCERNING THE DECEDENT'S LACK OF AGGRESSIVE PERSONALITY.

Appellant contends it was reversible error for the court to allow Rosalyn Blagg to testify concerning the victim's behavior, whether drunk or sober. Appellant challenged her testimony on the fact that it was irrelevant character testimony since Ms. Blagg had had no contact with the victim for the past eleven or twelve years. The state called for Ms. Blagg's testimony to rebut prior testimony attacking the victim's character. The court allowed the testimony determining that the amount of time that had passed related to the weight of the testimony rather than its admissibility.

Arkansas Rules of Evidence 404(a)(2) provides that once character of the victim has been attacked by an accused, the state may offer rebuttal testimony. Additionally, Rule 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. A ruling on the relevancy of the evidence is discretionary with the trial court and its decision will not be reversed absent an abuse of discretion. *Willett* v. *State*, 18 Ark. App. 125, 712 S.W.2d 925 (1986).

Here, the court found the witness' testimony relevant after she testified that the victim was a lifetime family friend whom she had dated. The court allowed the testimony noting that the fact that Ms. Blagg had not seen the victim regularly through

the years was a factor for the jury to consider in determining the weight to be accorded her testimony. We cannot say the trial court abused its discretion in allowing her testimony.

VII.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S OFFERED INSTRUCTION AMCI 4002.

Although appellant raises this argument on appeal, he concedes in his brief that he did not include the proffered instruction in the record and therefore did not abstract it in his brief. The record on appeal is confined to that which is abstracted and arguments based on material not abstracted will not be considered. *Sutherland* v. *State*, 292 Ark. 103, 728 S.W.2d 496 (1987). The appellant bears the burden to bring up a record sufficient to demonstrate error below. *McLeroy* v. *Waller*, 21 Ark. App. 292, 731 S.W.2d 789 (1987). Therefore, we will not consider appellant's challenges to the court's denial of the proffered instruction.

VIII.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PROCEED WITH MATTERS OF RESTITUTION POST-TRIAL WITHOUT NOTICE.

Appellant alleges the court erred in allowing the state to proceed with a hearing on restitution after the jury returned its guilty verdict. Appellant objected upon the basis of lack of notice which prohibited him from preparing a reasonable defense. Regarding this issue, Arkansas Code Annotated Section 16-90-305 (1987) provides as follows:

> (a) To enable the court or jury, as the case may be, to properly fix the amount of restitution or reparation, the prosecuting attorney shall, after appropriate investigation, recommend an amount that would make the victim whole with respect to the financial injury suffered, including value of property loss or injury, cost of medical care, burial expenses, if applicable, and all other measurable monetary damages directly related to the offense.

> (b) If the defendant disagrees with the recommendation of the prosecuting attorney, he shall be entitled to introduce evidence in mitigation of the amount recommended.

Appellant relies on subsection (b) above to support his contention that he was due prior notice to prepare his defense; however, none of the above statutes relating to restitution matters require that any prior notice be given. The evidence reveals that the family of the victim approached the prosecuting attorney inquiring into this matter while the jury was deliberating its verdict. The court in making its ruling, noted the difficulty of reassembling the jury at a future date for the purpose of determining an amount of restitution.

A criminal defendant should know that when he is charged with a crime in this state, he is put on notice that upon conviction by a trial before the court or jury, he is susceptible to a term of imprisonment and/or a fine. Everyone is charged with knowledge of the criminal law. *Michalek* v. *Lockhart*, 292 Ark. 301, 730 S.W.2d 210 (1987). Since the passage of the restitution statutes, a criminal defendant is put on notice that he is also subject to the sanction of restitution in addition to imprisonment and/or a fine. Arkansas Statutes Annotated Sections 16-90-301 to -305 (1987) establish that the state's purpose in the passage of the restitution statute is to provide a means of making restitution to the victim. Under these statutes, the court has an affirmative duty, as far is practicable, to require the responsible offender to make restitution to his victim so as to make that victim whole with respect to the financial injury suffered. Appellant could have requested a continuance requiring the jury to return and utilize discovery procedures to obtain information as to the amount of restitution, if any, sought by the state.

Although we acknowledge that the better practice would be to give advance notice of intent to request restitution, we find no error in the case at bar in the court allowing the state to proceed with matters of restitution.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

William BARLOW *v.* STATE of Arkansas

CA CR 88-168 770 S.W.2d 186

Court of Appeals of Arkansas
Division I
Opinion delivered May 17, 1989

Dan Harmon, for appellant.

Steve Clark, Att'y Gen., by: *Ann Purvis*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was convicted by a jury of possession of marijuana with intent to deliver in violation of Ark. Stat. Ann. § 82-2617 (Supp. 1985) (now codified at Ark. Code Ann. § 5-64-101 (1987)), and sentenced to four years in the Arkansas Department of Correction. On appeal he argues that the trial court erred in refusing to suppress the marijuana because it was found pursuant to a warrantless search of a duffel bag he had in his car, and that the trial court erred in refusing to suppress money which was found in his eight-year-old son's underwear. We affirm.

Trooper Myron Hall of the Arkansas State Police testified at the hearing on the appellant's motion to suppress that, on July 29, 1987, he received a call which described a car and gave a license

plate number. He was informed that the car had just left a rest area with a "load of dope."

Trooper Hall soon spotted the car approaching him. He testified that he clocked the car on radar at 66 miles per hour in a 55 mile per hour zone. He pulled the car over, checked the appellant's license, told him he was under arrest for speeding, and placed the appellant in his patrol car.

He then returned to the appellant's car and noticed that it was "trashy." He also saw a duffel bag that he found suspicious because it was clean. Inside the bag he found five bags of leafy vegetable matter. The officer also placed the appellant's eight-year-old son in the car and transported both of them to the sheriff's office, where a large bulge was noticed in the back of the child's pants. A matron searched the child and discovered $880.00 in cash in his underwear.

At trial the appellant testified that he had been a regular user of marijuana for the last ten years and that, although he usually does not buy it in large quantities, he did so this time because it was a good deal and he had been having difficulty buying it. He admitted that he planned to store the four pounds, ten ounces of marijuana and keep it for himself. He stated that he withdrew about $4400.00 from his savings account and bought the marijuana in Hot Springs for $3500.00. The remainder of the money he stuffed in his son's pants when he was stopped and told him to give it to his mother.

Because the appellant took the stand and gave a judicial confession to his actions which clearly constituted commission of the offense with which he was charged, the jury had conclusive proof of his guilt, and the allegedly improper evidence was of no consequence to the appellant and not prejudicial. *Riggins* v. *State*, 17 Ark. App. 68, 703 S.W.2d 463 (1986); *Trollinger* v. *State*, 14 Ark. App. 184, 686 S.W.2d 796 (1985); *Hays* v. *State*, 268 Ark. 701, 597 S.W.2d 821 (Ark. App. 1980), *cert. denied*, 449 U.S. 837 (1980); *Mize* v. *State*, 267 Ark. 743, 590 S.W.2d 75 (Ark. App. 1979); *see Johnson* v. *State*, 298 Ark. 617, 770 S.W.2d 128 (1989), and *Richardson* v. *State*, 288 Ark. 407, 706 S.W.2d 363 (1986). Because of the overwhelming evidence of guilt, the error was harmless, even though the

admission of the evidence may have violated the appellant's constitutional rights. *Mize, supra.* We have said many times that we will not reverse when an error is harmless beyond a reasonable doubt. *Gage* v. *State*, 295 Ark. 337, 748 S.W.2d 351 (1988).

Affirmed.

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

Shirley York DOBY *v.* STATE of Arkansas

CA CR 88-236 770 S.W.2d 666

Court of Appeals of Arkansas
Division I
Opinion delivered May 17, 1989

John M. Holstine, for appellant.

Steve Clark, Att'y Gen., by: *Tim Humphries*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was charged with theft of property valued in excess of $200.00. She was convicted of that offense on June 14, 1988, by the trial judge sitting as the fact finder, and was found to be an habitual offender. She was sentenced to twenty-four years in the Arkansas Department of Correction. On appeal the appellant argues that the State failed to meet its burden of proof with regard to the value of the property and that the testimony regarding the value of the property was inadmissible hearsay. We agree with the appellant's argument and reverse and remand.

The State argues that the appellant has waived his right to challenge the sufficiency of the evidence on appeal because he failed to request a directed verdict at the close of the State's case. However, a defendant is not required to request a directed verdict in a bench trial to preserve the sufficiency of the evidence. Ark. R.

Crim. P. 36.21(b).

Where the sufficiency of the evidence is challenged on appeal of a criminal conviction, we review the sufficiency, including the inadmissible evidence, prior to considering the trial errors. *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984). In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State and affirm if there is substantial evidence to support the verdict. *Id.*

A person commits theft of property if he knowingly takes or exercises unauthorized control over the property of another with the purpose of depriving the owner thereof. Ark. Code Ann. § 5-36-103(a)(1) (1987). Theft is a class C felony if the value of the property is more than $200.00 but less than $2,500.00. Ark. Code Ann. § 5-36-103(b)(1)(C) (1987).

Louis Nickens, the security manager for Stein Mart, testified that on January 12, 1988, he saw the appellant in the ladies' department. Nickens stated that he went to an observation booth and saw the appellant remove a blue dress and a pink dress from the hangers and move behind a rack out of his view. When she reappeared, she did not have either dress. He then saw her take another dress and put in inside her girdle. She then selected a jumper, went to the checkout stand, and paid only for the jumper. When he apprehended her she was still inside the store but had gone through the checkout stand.

Mark Jones, the assistant store manager, testified that the prices of the three dresses on the day the appellant was apprehended were $89.97, $63.88, and $49.77. He also stated that two of the dresses had been marked down and that their value was more than what he had stated. He said that he arrived at the value of the dresses from the price tags that were on the dresses when the appellant was apprehended. On cross-examination, Mr. Jones admitted that he did not personally price the items and that he had no other knowledge of what the values were other than what was on the price tags. The price tags were not entered into evidence.

Clearly, the evidence will support a conviction for theft of property; however, we agree with the appellant's argument that Mr. Jones's testimony regarding the value was inadmissible

hearsay. In *Lee* v. *State*, 264 Ark. 384, 571 S.W.2d 603 (1978), the Supreme Court reversed and remanded a case with a similar fact situation. In that case the security guard testified about the price of three suits Lee had allegedly stolen. As in the present case, the only knowledge that the security guard had about the value of the dresses was what was on the price tags and the price tags were not entered into evidence. The Court stated:

> No salesperson or any other employee, who had knowledge of the property's value from the business books or records of the store, was called as a witness. The security guard's testimony, to which a sufficient objection was made, must be characterized as inadmissible hearsay.

264 Ark. at 385 (citations omitted). Because the store manager's testimony about the value of the dresses taken from the price tags was inadmissible hearsay, and because it was the only evidence of value presented to the trial, the error was prejudicial and we reverse and remand. In *Lee*, the Supreme Court also stated that because the only evidence regarding value was inadmissible, the evidence was also insufficient; that case was decided in 1978, six years prior to *Harris, supra*. It is interesting to note in light of the State's assertion that the appellant did not preserve the sufficiency of the evidence issue that the Supreme Court raised it on its own in *Lee*. From our reading of the opinion it appears that Lee only challenged the admissibility of the hearsay evidence.

The State argues that the conviction should be affirmed because the appellant's objection about the hearsay was untimely. We disagree. An objection must be made at the first opportunity. *Hill* v. *State*, 285 Ark. 77, 685 S.W.2d 495 (1985). Mr. Jones first testified about the value of the dresses. It was not until cross-examination that it was revealed that he was solely relying on the price tags to arrive at the value, and at that point the appellant objected. Clearly, the appellant's objection was timely because it was made as soon as it became evident that the testimony was hearsay.

The State also requests, should we decide the sufficiency of the evidence issue, that we reduce the appellant's conviction to a misdemeanor because theft of property less than $200.00 is a lesser included offense of felony theft. However, the error that occurred was trial error, and the appellant is not

entitled to a reduction for trial error. The appellant is only entitled to a new trial. *See Harris, supra.*

Reversed and remanded.

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

Erma HENSLEY and Henry Hensley *v.* WHITE RIVER MEDICAL CENTER

CA 88-351 770 S.W.2d 190

Court of Appeals of Arkansas
Division II
Opinion delivered May 17, 1989

Larry Dean Kissee and *Tom Garner*, for appellants.

Barrett, Wheatley, Smith & Deacon, by: *Paul D. McNeill*; and *J.C. Acchione*, for appellee.

JOHN E. JENNINGS, Judge. Appellee, White River Medical Center, sued appellant, Henry Hensley, for nonpayment of an $8,800.00 hospital bill. Hensley filed a counterclaim for medical malpractice alleging that while he was a patient in the hospital, "a nurse or other employee of White River Medical Center, Inc., improperly placed and improperly removed an intravenous catheter or similar device from" his "left arm and hand resulting in permanent injury to his left arm and hand with paresthesis." Hensley's wife joined in the counterclaim to seek loss of consortium. One paragraph of the counterclaim stated:

> A copy of a "Notice of Intent to Sue" pursuant to the applicable Arkansas statute addressed to the administrator of White River Medical Center, Inc., which is being mailed concurrent with the mailing of this answer is attached hereto and after the running of the appropriate sixty (60) day period of time, defendants will amplify their counterclaim filed herein; that until the running of the requisite notice period and an opportunity be had for defendants to further amplify their counterclaim herein, this matter should be held in abeyance.

The "wherefore" clause of the counterclaim also prayed that "this matter be held in abeyance pending the filing of an amplified counterclaim after the running of the statutory notice period required for malpractice actions; . . ."

The counterclaim was filed on September 15, 1986. On October 20, 1986, Paul McNeill, the attorney representing the hospital, wrote to David Laser, the attorney for the Hensleys:

> Dear David:
>
> You and I talked once about this matter and you said you were still checking into it and there was no reason for us to make any formal reply to your counterclaim. Likewise, I am not planning on doing anything until I hear further from you. If I need to go ahead and do anything at this time, I will be glad to; but I do not plan on filing a pleading at this time unless you feel it is necessary.

By March 13, 1987, the Hensleys were no longer represented by Mr. Laser but had retained John Norman Harkey. On that date, Mr. Laser wrote to Mr. McNeill:

> Dear Paul:
>
> I am sending a copy of this letter to Norman[Mr. Harkey] so he will know that per your and my agreement you are not in default on the counterclaim we filed in the collection case and that it was your and my agreement that if and when we decided to pursue the malpractice action you would meet the issues with an appropriate pleading at that time.

Also on March 13, 1987, Mr. Harkey filed, on the Hensleys'

behalf, a motion for a default judgment. The record reflects that the motion was never acted upon and there is no indication in the record that appellants ever sought a ruling on the motion. On April 17, 1987, Mr. McNeill filed, on behalf of the hospital, an "Answer to Counterclaim." On May 21, 1987, McNeill wrote this letter to Harkey:

> I was unaware that in March you had filed a motion for a default on counterclaim in this matter. J.C. Acchione sent this to me. As I'm sure you are aware, when David Laser filed the counterclaim, I discussed with David whether we need to file an answer and he told me that we did not because he was investigating the matter. I enclosed for you a copy of my October 20, 1986 letter to David Laser confirming that agreement.
>
> Furthermore, on March 13, 1987, David Laser wrote me with a copy to you confirming that as our agreement and we weren't in default. Immediately upon receipt of that, I wrote you a letter of March 16th that I would file an answer if you wanted me to at that time. You wrote back on April 1 telling me to file a response which I did on April 17th.
>
> I assume from all this that the motion for default judgment is moot. If you disagree with my assessment of the status of the pleadings, let me know and I will immediately file a response to the motion by formal pleading for ruling on by the judge.

A motion for summary judgment on the counterclaim was filed by the hospital on September 11, 1987, supported by affidavits. The court held a pretrial conference on November 5, 1987, at which time Mr. Hensley appeared *pro se*, Mr. Harkey having withdrawn as counsel. The court set the case for trial for March 9, 1988. Requests for admissions were filed on January 20, 1988, asking that Mr. Hensley admit or deny the correctness of the hospital bill. The requests were never answered. A motion for summary judgment on the bill was filed February 26, 1988. On the day of trial Mr. Hensley again appeared *pro se*, advised the court that he was not represented by counsel and was not prepared for trial, and sought a continuance. The court then granted summary judgment for the hospital on its claim and against the Hensleys on their counterclaim.

On appeal, the Hensleys contended that the trial court erred in granting the hospital's motions for summary judgment and that the trial court erred in not granting their motion for a default judgment. We affirm.

Appellants' argument that the trial court erred in not granting their motion for default judgment is based primarily on Ark. R. Civ. P. 55(a) and the cases interpreting that rule. Rule 55 provides that "when a party against whom a judgment for affirmative relief is sought has failed to appear or otherwise defend as provided by these rules, judgment by default shall be entered by the court."

In *Webb* v. *Lambert*, 295 Ark. 438, 748 S.W.2d 658 (1988), the supreme court held that in the absence of excusable neglect, unavoidable casualty, or other just cause for delay, it is an abuse of discretion for the trial court to refuse to grant a default judgment. In *Lewis* v. *Crowe*, 296 Ark. 175, 752 S.W.2d 280 (1988), the court reaffirmed its holding in *Webb*. The court also rejected the appellant's contention that the plaintiff's counsel had "waived" the right to a default judgment by offering to permit an answer after the defendant was already in default. The court in *Lewis* also said that there was no provision under Arkansas law for a waiver of the right to a default judgment.

There are obvious differences between the facts in the case at bar and those in *Lewis* and *Webb*. For instance, the counterclaim in this case expressly asked that it be "held in abeyance" until an "amplified counterclaim" was filed, which was never done. We need not decide, however, whether the trial court would have been obliged under *Lewis* to grant the motion because appellants never sought or obtained a ruling on the motion. The burden is on the party making a motion to obtain a ruling from the court and failure to do so constitutes a waiver of the motion precluding its consideration on appeal. *See Rea* v. *Ruff*, 265 Ark. 678, 580 S.W.2d 471 (1979) and *Flake* v. *Thompson, Inc.*, 249 Ark. 713, 460 S.W.2d 789 (1970).

The sole reason advanced for appellant's contention that the trial court erred in granting summary judgment to the hospital on its bill is that there was a motion for default judgment pending. Because appellants never sought a ruling on the motion, the court did not err in granting summary judgment on the bill.

Finally, appellants contend that the trial court erred in granting summary judgment to the hospital on appellants' malpractice claim. We disagree. The general principles governing the granting of summary judgment have been clearly stated. In *Walker* v. *Stevens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981), we said:

> On [a motion for summary judgment] the moving party has the burden of demonstrating that there is no genuine issue of fact for trial and any evidence submitted in support of the motion must be reviewed most favorably to the party against whom the relief is sought. 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. (Citations omitted.)

3 Ark. App. at 210.

In *Wolner* v. *Bogaev*, 290 Ark. 299, 718 S.W.2d 942 (1986), the supreme court said:

> [Summary judgment] is an extreme remedy. The object of a summary judgment is not to try the issue but to determine if there are issues to be tried. If there is any doubt whatever, it should be denied. (Citations omitted.)

290 Ark. at 302.

Although affidavits for summary judgment are construed against the moving party, once the movant makes a prima facie showing of entitlement the respondent must meet proof with proof by showing a genuine issue as to a material fact. *Pruitt* v. *Cargill, Inc.*, 284 Ark. 474, 683 S.W.2d 906 (1985).

In the case at bar, the hospital submitted three affidavits with its motions. The affidavit of Shirley Roberts stated that she was a licensed practical nurse and employed by the hospital. The affidavit stated that she removed the intravenous catheter from Mr. Hensley's left arm, that it was a simple procedure, and that she removed it without causing any injury. In another affidavit, Myra Looney stated that she was the director of nurses at the hospital and that at no time during Mr. Hensley's hospitalization did any hospital employee place an intravenous catheter in his left

arm. The affidavit of Dr. J. D. Allen recited that he was Mr. Hensley's treating physician during his hospitalization in March of 1985. It stated that the intravenous catheter was transferred from Mr. Hensley's left arm to his right on March 20, 1985, that Mr. Hensley did not sustain an injury to the ulnar nerve of the left arm while a patient at the hospital and that in his opinion, the hospital did not breach the standard of care in the treatment of Mr. Hensley, causing an injury to his left arm involving the nerve.

When the affidavits are read together, and in context, we think that they establish a prima facie showing of entitlement to summary judgment on the hospital's part. The burden of "meeting proof with proof" then rested with the appellants. This burden was not met and the trial court did not err in granting summary judgment.

Appellants contend that *Wolner* v. *Bogaev*, cited above, dictates a contrary result. We cannot agree. *Wolner* was also a medical malpractice case and there the motion for summary judgment rested essentially on the affidavits of two doctors. The court in *Wolner* characterized those affidavits as "merely conclusory assertions that they were not at fault" and said that when such conclusory assertions are virtually all the supporting strength behind a motion for summary judgment a prima facie showing of entitlement has not been made. All the affidavits in the case at bar contain statements which are, to a certain extent, conclusory. However, they also contain relevant statements of fact. For instance, Ms. Roberts stated that she removed the intravenous catheter without causing any injury. Likewise, Ms. Looney's statement that no hospital employee inserted a catheter into Mr. Hensley's left arm is a statement of fact, not a "conclusory assertion."

Our conclusion is that the affidavits were sufficient to establish a prima facie showing of entitlement to summary judgment. Because appellants failed to file an affidavit in response to the motion for summary judgment showing a genuine issue of material fact, summary judgment was appropriate.

Affirmed.

MAYFIELD and ROGERS, JJ., agree.

Hugh C. KARNES and Dorothy J. Karnes *v.* Arthur Howell TRUMBO and Trumbo Equipment, Inc.

CA 88-184 770 S.W.2d 199

Court of Appeals of Arkansas
En Banc
Opinion delivered May 17, 1989

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

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

JOHN E. JENNINGS, Judge. This multi-party litigation began as a suit on a debt. After the underlying litigation was settled, all that remained of the case was the pending cross claim by the co-debtors, Hugh Karnes and Dorothy Karnes, the appellants here, against appellee Trumbo Equipment, Inc., and the Karnes' third-party complaint against appellee A.H. Trumbo. In both claims the Karnes sought reimbursement for the attorney's fees they incurred in defending the suit on the debt and in pursuing their claims for indemnity. The chancellor entered an order denying the Karnes' motion for summary judgment and dismissing their claims, and the Karnes have appealed. We affirm.

The plaintiff in the underlying litigation, Big Dutchman, filed its complaint on September 2, 1987. Big Dutchman is a general partnership composed of Hershey Agritech Inc., a Pennsylvania corporation, and Meerpohl Limited Partnership, a Pennsylvania limited partnership. The suit alleged that Trumbo Equipment (formerly AMKO Equipment Inc.) had purchased poultry equipment on open account from Big Dutchman and had given Big Dutchman a lien on inventory and accounts receivable.

The Karnes were originally the sole shareholders in AMKO Equipment, Inc. On November 10, 1986, they sold their stock to A.H. Trumbo through a stock purchase agreement to which AMKO and J&H Investments were also parties. The name of the corporation was changed to Trumbo Equipment, Inc., in April 1987.

The complaint further alleged that in 1984, AMKO signed a promissory note for $300,000.00 payable to First State Bank of Springdale. The note was extended several times but the last due date was December 15, 1986. As collateral for the $300,000.00 note, First State Bank took a first lien on AMKO's inventory and accounts receivable together with a second mortgage on fifty acres of land owned by the Karnes. Big Dutchman alleged that its lien was subject to the first lien of the bank. There was a provision for attorney's fees upon default in both the contract between Big Dutchman and Trumbo Equipment and the promissory note from AMKO to the bank. The note to the bank was personally guaranteed by the Karnes.

The complaint further alleged that the bank had assigned its interest in the $300,000.00 promissory note to the plaintiff, Big

Dutchman. It alleged that Trumbo Equipment had breached its agreement with Big Dutchman and was liable on the promissory note. The complaint sought judgment for $465,000.00, together with interest and attorney's fees.

In response to the complaint, the Karnes filed an answer and a cross claim against Trumbo Equipment. In the cross claim they asked to be held harmless from any liability relying on the following two provisions of the stock purchase agreement:

> Sect. 1.2 — At the Closing, the Surety will assume all contracts and accounts payable of the Surety, and a promissory note payable owed by the Surety to First State Bank of Springdale, Arkansas, in the approximate amount of ONE HUNDRED EIGHTY-ONE THOUSAND DOLLARS ($181,000.00).
>
> . . .
>
> Sect. 7 — Indemnification: Sellers agree to defend, indemnify, and hold harmless the Buyer from any debt, claim, damage, liability or expense of the Surety that was undisclosed to the Buyer prior to the Closing Date. The Surety agrees to defend, indemnify, and hold harmless the Sellers from any other debt, damage, liability or expense that may arise after the Date of Closing.

The Karnes also filed a third-party complaint against A.H. Trumbo, again seeking to be held harmless from liability. The stock purchase agreement, to which A.H. Trumbo had been a party, contained this provision:

> Sect. 9 — Howell Trumbo agrees to personally guarantee Hugh and Dorothy Karnes in regard to the existing bank note at First State Bank as long as First State Bank requires the personal guarantee of Hugh and Dorothy on said note. A copy of the form of such guarantee is attached hereto as Exhibit "B" and made a part hereof.

The subsequently executed guaranty dated November 11, 1986, provided that A.H. Trumbo "unconditionally guarantees to Karnes, the prompt payment of each monthly payment" on the First State Bank note, "for so long as Karnes is personally obligated on said note, including without limitation, all principal,

late charges and other charges, together with any and all expenses incident to collection of such sums including, without limitation, attorney's fees and court costs." The guaranty also provided that "Karnes must exhaust its remedy against AMKO Equipment, Inc., before invoking the benefits of the Guaranty."

In his answer to the third-party complaint, A.H. Trumbo alleged that the guaranty had been obtained by fraud.

On September 28, 1987, the chancellor entered an "Order of Delivery," in which Big Dutchman was granted judgment for $153,000.00 on the promissory note and $313,000.00 on open accounts, together with interest and a 10% attorney's fee. It appears that the collateral was subsequently sold and that the debt to the plaintiff, Big Dutchman, was satisfied in full and its attorney's fees were paid.

With the underlying litigation resolved, the sole remaining issue was the Karnes' entitlement to reimbursement for their own attorney's fees from Trumbo Equipment or A.H. Trumbo, or both.

The chancellor set the matter for trial for April 14, 1988. On April 13, 1988, the Karnes filed a motion for summary judgment claiming that as a matter of law they were entitled to reimbursement for their own attorney's fees. Copies of the stock purchase agreement and the guaranty were attached. Also attached were the affidavits of Hugh and Dorothy Karnes, both to the effect that their "understanding of the Guaranty Agreement and" their "intent in entering into" it was that if they were forced to defend on the note to First State Bank, Mr. Trumbo would pay their attorney's fees. Also filed on the 13th of April was a document entitled "Stipulated Facts," signed by attorneys for all parties involved. In that document the parties stipulated that the stock purchase agreement and guaranty were the genuine documents signed by the parties; that the Karnes "did not draft and were not responsible for drafting" either document; that neither A.H. Trumbo nor Trumbo Equipment had paid the attorney's fees incurred by the Karnes in defending the lawsuit brought by Big Dutchman; and that Trumbo Equipment had paid $21,000.00 for plaintiff's attorney's fees and $4,000.00 as the receiver's fees. No response was filed to the motion for summary judgment.

On April 14, 1988, the chancellor entered the following order:

> Now on this 14th day of April, 1988, this matter comes on for hearing, the only issue being the question of attorney's fees for Hugh C. Karnes and Dorothy J. Karnes from Trumbo Equipment, Inc., and/or Arthur Howell Trumbo.
>
> The parties filed herein a document entitled "Stipulated Facts" on April 13, 1988, and Hugh C. Karnes and Dorothy J. Karnes filed a Motion for Summary Judgment in this matter on April 13, 1988.
>
> The Court finds that no attorney's fees should be awarded from Trumbo Equipment, Inc., or Arthur Howell Trumbo to Hugh C. Karnes and Dorothy J. Karnes, that the Motion for Summary Judgment should be denied, and that all claims of Hugh C. Karnes and Dorothy J. Karnes against Trumbo Equipment, Inc., and Arthur Howell Trumbo should be dismissed.
>
> IT IS SO ORDERED.

After the court made its ruling, counsel for the Karnes made a record. Essentially, counsel argued that the court's ruling was wrong as a matter of law. It is clear that no evidence was presented on the date set for trial, no request for a continuance made, and there is no contention on appeal that the trial court prevented the appellants from presenting evidence on the day of trial.

The arguments made on appeal are purely legal ones: first, that the trial court was obliged to grant summary judgment because no response to the motion was filed, and second, that the Karnes were entitled to summary judgment for their attorney's fees as a matter of law. Neither argument has merit.

Ordinarily an order denying a motion for summary judgment is not an appealable order. *Jaggers* v. *Zolliecoffer*, 290 Ark. 250, 718 S.W.2d 441 (1986). In the case at bar, however, the order is appealable because it was combined with a dismissal on the merits that effectively terminated the proceedings below. *See* Ark. R. App. P. 2(a)(2); *Robinson* v. *Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987).

It is true, as appellant contends, that if a prima facie entitlement to summary judgment is made by a timely motion, the respondent risks the entry of summary judgment if he fails to respond. *See* Ark. R. Civ. P. 56(e). It has been said many times that in such a case, the respondent must discard the shielding cloak of formal allegations and meet proof with proof by showing a genuine issue as to a material fact. The difficulty with applying that rule in the present situation is two-fold: (1) the motion for summary judgment was untimely and, (2) it did not, in our view, establish a prima facie showing of entitlement to summary judgment.

Ark. R. Civ. P. 56(c) provides that a motion for summary judgment "shall be served at least ten days before the time fixed for the hearing." Here, the motion was filed one day before the date set for trial. In *Purser* v. *Corpus Christi State National Bank*, 258 Ark. 54, 522 S.W.2d 187 (1975), the supreme court said that the notice requirements for summary judgment are not mere formalities and that there are sound reasons for permitting the opposing party ten days in which to respond. Undoubtedly, the trial court could have denied the motion for summary judgment in this case solely on the basis of its untimeliness. In any event, the appellee's failure to respond to the motion did not obligate the trial judge to enter summary judgment for appellants.

We can find no cases in this state which have enunciated the standard for review when an order denying a motion for summary judgment is appealed. In *McLain* v. *Meier*, 612 F.2d 349 (8th Cir. 1979), Judge Henley, speaking for the court, said:

> Returning to a motion for summary judgment as opposed to a motion attacking the sufficiency of a pleading as such, a district court in passing on a Rule 56 motion performs what amounts to what may be called a negative discretionary function. The court has no discretion to *grant* a motion for summary judgment, but even if the court is convinced that the moving party is entitled to such a judgment the exercise of sound judicial discretion may dictate that the motion should be *denied*, and the case fully developed. (Emphasis in original.)

612 F.2d at 356.

We agree with the conclusion of the court in *McLain. See also National Screen Service Corp.* v. *The Poster Exchange, Inc.*, 305 F.2d 647 (5th Cir. 1962); 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice*, ¶ 56.24 (2d ed. 1987); H. Lemley, *Summary Judgment Procedure under Rule 56 of the Federal Rules of Civil Procedure — Its Use and Abuse*, 11 Ark. L. Rev. 138 (1957).

The test is, therefore, whether the trial court abuses its discretion in denying the motion for summary judgment. We have said many times that summary judgment is an extreme remedy which should 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). The burden is on the moving party to demonstrate that there is no genuine issue of fact for trial, and evidence submitted in support of the motion must be viewed most favorably to the party resisting the motion. *Chick* v. *Rebsamen Insurance-Springdale*, 8 Ark. App. 157, 649 S.W.2d 196 (1983). Even if the facts are not in dispute, if reasonable minds might differ as to conclusions to be drawn from those facts, summary judgment may not be entered. *The Fausett Co.* v. *Rand*, 2 Ark. App. 216, 619 S.W.2d 683 (1981).

The Karnes' cross claim against Trumbo Equipment was based on the language of the stock purchase agreement. When the language of that agreement is read in context, it is certainly not clear that the indemnification provision would obligate AMKO (now Trumbo Equipment) to reimburse the Karnes for attorney's fees in defending the suit by Big Dutchman and in prosecuting their own cross claim and third-party complaint.

There are at least two serious difficulties with the contention that the guaranty executed by A.H. Trumbo entitles Karnes to reimbursement of attorney's fees incurred in defending the claims of the creditor, Big Dutchman. The first is that a common sense reading of the language of the guaranty leads to the conclusion that the agreement to pay "attorneys fees" "incident to collection" of the note means that A.H. Trumbo would be obligated to pay the *creditors*' attorney's fees, not those of Karnes. This seem to be the correct interpretation notwithstanding the "understanding" by the Karnes as to what this language means, or the stipulation that the Karnes did not draft

the guaranty. In any event, the chancellor could not have granted summary judgment on the guaranty because there was a pending allegation that it was obtained by fraud.

Appellants contend that because it was stipulated that they did not draft the guaranty agreement, the trial court was obliged to infer that it was drafted by A.H. Trumbo, and to construe any ambiguity against him. Even if the inference is available, there is a conflicting rule of construction, i.e., that guarantees are strictly construed in the guarantor's favor. *See McCaleb* v. *National Bank of Commerce of Pine Bluff*, 25 Ark. App. 53, 752 S.W.2d 54 (1988). Furthermore, if the guaranty is deemed ambiguous, then a question of fact would be presented for the trial court to decide, and the matter would not be appropriately resolved by summary judgment. *See Gibson* v. *Heiman*, 261 Ark. 235, 547 S.W.2d 111 (1977).

It is clear that the appellants chose to rest on their motion for summary judgment. They presented no evidence on the date set for trial and did not seek a continuance. Instead, they have appealed only the court's denial of their motion for summary judgment. This they are entitled to do but we cannot say, under the circumstances presented here, that the court abused its discretion in denying the motion for summary judgment or erred in dismissing the claim on the merits. We do not reach the issue of the applicability of the principal that attorney's fees may not be allowed, absent authorization by statute. *See Halford* v. *Southern Capital Corp.*, 279 Ark. 261, 650 S.W.2d 580 (1983).

Affirmed.

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

DONALD L. CORBIN, Chief Judge, dissenting. To avoid repetition, I agree with the substance of Judge Mayfield's dissenting opinion, but would dispose of the case in a different manner. Briefly, I believe that the trial court was correct in denying appellants' motion for summary judgment and agree with the majority in that respect, but I do not agree that the appellants chose to rest on their motion for summary judgment. A stipulation of facts, to which a copy of the contracts in question were attached, was filed for consideration by the court. The trial court found that no attorney's fees should be awarded and that

appellants' claim should be dismissed. I believe the court's ruling was clearly erroneous and would reverse, despite counsel's failure to couch his argument in those terms. When we review chancery cases, we do not remand a case where we can plainly see the equities of the parties. *See Ferguson* v. *Green*, 266 Ark. 556, 587 S.W.2d 18 (1979).

The equities require that appellants prevail on their claim despite counsel's failure to request the proper relief on appeal. The contracts in question were drafted by appellees and had they intended to exclude appellants' attorney's fees they could have done so. Furthermore, the purpose of the guaranty agreement, to insure that appellants would not be disadvantaged by appellees' assumption of the obligation, is defeated by the chancellor's disposition, and the attorney's fee provision is rendered a nullity. I would find in favor of appellants and render the decree on appeal that should have been rendered below.

MELVIN MAYFIELD, Judge, dissenting. I dissent from the majority decision affirming the trial court's dismissal of the appellants' claim seeking to recover attorney's fees under the terms of a guaranty agreement. The trouble with the trial court's dismissal is that it was done in violation of the rules of procedure as interpreted by the appellate courts of Arkansas, and without any findings of fact, conclusions of law, or stated reason for the court's action.

The majority opinion sets out the trial court's order which simply states that this matter came on for a hearing with the only issue involved being the question of appellants' right to attorney's fees. The order then states that the parties had filed a document entitled "Stipulated Facts," that appellants had filed a "Motion for Summary Judgment," and concludes with the announcement the the court finds the motion for summary judgment should be denied and appellants' claim for attorney's fees should be dismissed.

I agree with the majority opinion that the trial court was correct in holding that the motion for summary judgment should have been denied, but I do not agree that the trial court was correct in summarily dismissing the appellants' claim. Ark. R. Civ. P. 56(d) sets out the procedure to be followed if a motion for summary judgment is not granted. Briefly stated the procedure is

for the trial court to determine "what material facts exist without substantial controversy" and make an order specifying those facts and "upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly." *See Fausett Company* v. *Rand*, 2 Ark. App. 216, 619 S.W.2d 683 (1981). Here, however, the court denied the appellants' motion for summary judgment and then just dismissed the claim they had filed seeking to recover attorney's fees under a guaranty agreement. The dismissal was made without any findings of fact or conclusions of law as contemplated by Ark. R. Civ. P. 52(a) and despite the fact that this court has held that Ark. R. Civ. P. 56 does not authorize the trial court "to summarily dismiss a complaint where there are matters before the court that show there is an issue of fact to be decided." *Maas* v. *Merrell Associates, Inc.*, 13 Ark. App. 240, 244, 682 S.W.2d 769 (1985).

In *Griffin* v. *Monsanto Company*, 240 Ark. 420, 400 S.W.2d 492 (1966), the Arkansas Supreme Court reversed a trial court dismissal of a complaint and stated:

> If a complaint states a cause of action our code of procedure does not permit the defendant to single out a fact essential to the plaintiff's case, file affidavits denying that fact, and on the strength of those affidavits seek an order dismissing the action without a trial on the merits.

240 Ark. at 421-22. The supreme court then treated the pleading that asked that the complaint be dismissed as a motion for summary judgment, found the motion should have been denied, and reversed the trial court's dismissal of the complaint. In *Findley Machinery Co.* v. *Miller*, 3 Ark. App. 264, 625 S.W.2d 542 (1981), the Arkansas Court of Appeals relied upon *Griffin* to reverse a trial court's dismissal of a complaint on an oral motion, made in chambers just prior to the start of a trial, claiming that a written contract attached to the complaint was an agreement for sale and purchase and not a lease. And in the recent case of *Battle* v. *Harris*, 298 Ark. 241, 766 S.W.2d 431 (1989), the Arkansas Supreme Court said:

> We first note that Rule 12(b)(6) provides for the dismissal of a complaint for failure to state facts upon which relief can be granted. . . . Here, the trial court made no mention of treating the appellee's Rule 12(b)(6)

> motion as one for summary judgment. Therefore, in considering a motion for judgment on the pleadings for failure to state facts upon which relief can be granted under ARCP 12(b)(6), the facts alleged in the complaint are treated as true and viewed in the light most favorable to the party seeking relief. *McAllister* v. *Forrest City St. Imp. Dist.*, 274 Ark. 372, 626 S.W.2d 194 (1981).

298 Ark. at 243-44.

In view of the established procedure as shown by the cases cited above, it seems clear to me that the trial court erred in the present case when it denied the appellants' motion for summary judgment and then simply dismissed their cause of action without trial, further hearing, findings of fact, conclusions of law, or stated reason of any kind. Nor do I agree that it is enough to say, as does the majority opinion, that "the appellants chose to rest on their motion for summary judgment." Nowhere does the record state that they rested on that motion. The trial court's judgment does not so state and neither party makes that contention in the briefs filed in this court. In addition, the trial court's judgment does not state that the case was submitted upon what the judgment called a document entitled "Stipulated Facts." To assume this case was submitted on that stipulation is to engage in sheer speculation. In fact, it would seem more logical to assume that the stipulation was filed for the court's consideration when passing upon the motion for summary judgment filed the same day the stipulation was filed.

However, on appeal, the appellants argue only that they were entitled to summary judgment. While I agree with the majority decision that appellants' motion should not have been granted, that does not mean the trial court should have simply dismissed appellants' cause of action. But since appellants ask no other relief, I would remand this matter to the trial court. If, in fact, the appellants chose to rest on their motion for summary judgment, or the parties agreed to submit the case upon the "Stipulated Facts," the trial court can make such a finding and dispose of the case accordingly. Otherwise, the case would simply be in the trial court for further proceedings.

ROGERS, J., joins in this dissent.

Theressa BIDDLE *v.* SMITH & CAMPBELL, INC., and Rockwood Insurance Company

CA 88-394 773 S.W.2d 840

Court of Appeals of Arkansas
Division I
Opinion delivered May 17, 1989

William F. Magee, for appellant.

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

JUDITH ROGERS, Judge. The Arkansas Workers' Compensation Commission found that the appellant, Theressa Biddle, had made an election of remedies and had knowingly been receiving workers' compensation benefits from the State of Louisiana. Accordingly, the Commission found that it was without jurisdiction and denied and dismissed her claim. We affirm.

On September 21, 1985, appellant was injured in Louisiana while working for the appellee, Smith & Campbell, which has its principal place of business in Springhill, Louisiana. Appellant testified that she had lived in Bradley, Arkansas, all of her life and that she and Rollie Biddle worked as independent contractors for appellee, cutting, hauling and delivering wood. As a result of that injury, appellee has been receiving benefits pursuant to Louisiana workers' compensation law through appellee's insurance carrier.

A hearing was held before an administrative law judge on September 4, 1987, to determine whether the Arkansas Workers' Compensation Commission had jurisdiction over this claim. The administrative law judge found that appellant made an election of remedies and had knowingly been receiving workers' compensation benefits from the State of Louisiana. The full Commission affirmed and adopted the administrative law judge's decision. Appellant argues that the Commission erred in denying and dismissing her claim based upon that finding.

The determination as to whether an election of remedies has been made depends upon whether the claimant actively initiated the proceedings or knowingly received benefits pursuant to the laws of another state. In *Houston Contracting Co.* v. *Young*, 267 Ark. 322, 590 S.W.2d 653 (1979), the supreme court addressed the issue of whether payments of compensation made to the injured worker under the laws of one state toll the statute of limitations as to a claim later filed in another state. Even though the question presented to this court differs, the underlying principles and reasoning involved are the same. In *Houston Contracting Co.*, 267 Ark. at 326, 590 S.W.2d at 654, the supreme court agreed with the reasoning of a New York case, *Auslander* v. *Textile Workers Union of America*, 397 N.Y.S. 232, 59 A.D.2d 90 (1977).

There the court undertook to reconcile the conflicting

> results in other states. The court reasoned that the claimant on the one hand should be bound by his acceptance of an official award of compensation in one state if he had actively participated in the procurement of the award and if the employer or insurance carrier had not improperly or in bad faith channeled the claim into that state. If the claimant, on the other hand, did not know that the payments he was receiving were pursuant to the laws of another state, and the payments were not made under an official award, "an employer's or carrier's contention that the payment is 'under the laws of another state' is a self-serving claim which should not be given effect." The New York court concluded that the issue there was one of fact and remanded the cause to the compensation board for further proceedings.

The threshold inquiry in *Houston Contracting Co., supra*, was whether the claimant made an election of remedies to proceed under the laws of the first state. Only if no such election was made was it necessary to address the issue of whether the statute of limitations had been tolled. A claimant should be held to his affirmative acts and the resulting consequences of making an election of remedies.

The Commission made a factual determination that this appellant made an election of remedies by knowingly receiving benefits pursuant to Louisiana workers' compensation law. On appeal this court is required to view the evidence in the light most favorable to the findings of the Commission and give the testimony its strongest probative value in favor of the order of the Commission. The issue on appeal is not whether the evidence would have supported a finding contrary to the one made. The question is solely whether the evidence supports the finding made by the Commission, and the decision must be upheld if supported by substantial evidence. *College Club Dairy* v. *Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988).

Appellant testified that she had been receiving her benefit checks from Louisiana by mail. Opal Jones, appellee's office manager, testified that she telephoned appellant shortly after the injury to get information to file the report in Louisiana. Ms. Jones testified that she told appellant that she was seeking the

information to file a claim in Louisiana. Notably, appellant testified that a rehabilitation worker from Louisiana had visited her in her home on more than one occasion. Upon review of the evidence, we cannot say that there was no substantial evidence to support the Commission's decision that appellant had made an election of remedies and had knowingly been receiving workers' compensation benefits from the State of Louisiana.

AFFIRMED.

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

Freda B. COUNCIL *v.* Edward M. OWENS, Trustee

CA 88-419 770 S.W.2d 193

Court of Appeals of Arkansas
Division II
Opinion delivered May 17, 1989

Ramsay, Cox, Bridgforth, Gilbert, Harrelson & Starling, for appellant.

Bridges, Young, Matthews, Holmes & Drake, for appellee.

JUDITH ROGERS, Judge. The appellant, Freda B. Council,

appeals the decision of the Jefferson County Chancery Court in favor of the appellee, Edward M. Owens, Trustee of the McGregor Family Trust (hereinafter "Trust"). This lawsuit was instituted by the appellee against the appellant and the beneficiaries of the Trust as an action for declaratory judgment. The appellee sought a determination as to whether the Trust was a spendthrift trust, and whether the interest of Henry C. McGregor, a beneficiary of the Trust, was subject to the claims of the appellant, who was formerly Mr. McGregor's wife.

The appellant and Henry C. McGregor were divorced by decree of the Pulaski County Chancery Court, First Division, filed on April 14, 1982. The parties had entered into a property settlement agreement signed by both parties, which was approved by the court and incorporated into the decree of divorce. The agreement provided in pertinent part:

> HUSBAND covenants and agrees with WIFE to pay WIFE, as monthly support, an amount equal to one-half of HUSBAND'S net income per month from all sources, whether the same be from Commissions, bonuses, draws, annuities, trusts or other sources, or the amount of $700.00 per month, whichever amount is greatest for each month.

Pursuant to an order of the Pulaski County Chancery Court dated July 18, 1986, appellant was granted judgment in the amount of $26,800 for an arrearage in the payment of alimony.

The Trust was established by Mrs. Mary Odell McGregor on December 21, 1976, for a duration of forty years. The Trust, at paragraph eight, contains the following language:

> Except as to the powers of appointment provided for herein, each and every beneficiary hereof, is hereby enjoined and restrained from anticipating, assigning, selling or otherwise disposing of his or her interest in this Trust and is without the power to do so, and no such anticipation, assignment, transfer, sale, or other disposition shall be recognized by the Trustee nor shall the same pass any right, title or interest herein of any beneficiary hereof, and none of the interests of the beneficiaries hereunder shall be subject to the claims of creditors or other persons, bankruptcy proceeding or the liabilities or obligations of any

beneficiary.

The appellant filed an answer and counterclaim to appellee's complaint for declaratory judgment, and subsequently amended her counterclaim on June 28, 1988. In her original counterclaim, appellant requested that she be allowed to satisfy the outstanding judgment for alimony by either an equitable decree requiring performance by the appellee on behalf of the beneficiary, McGregor, or by garnishing or attaching his interest. She denied that the Trust was a spendthrift trust, but claimed that if it were found to be a spendthrift trust, public policy demanded that her claim be satisfied from McGregor's interest in the trust, notwithstanding the spendthrift provision. In her amended counterclaim, she sought a declaration that the appellee trustee may not protect funds otherwise distributable from attachment for past due payments of alimony.

Appellant again amended her counterclaim on the day of trial, August 10, 1988, after having received the previous day the answers to interrogatories and requests for the production of documents, which appellee was compelled to provide by court order. In this third amended counterclaim, appellant asserted that the distributions of income were mandatory, or non-discretionary, and that pursuant to public policy, she again claimed the right to enforce the judgment and attach the distributions until her claim was satisfied, and that she additionally be allowed to attach future distributions. Additionally, she asserted arguments of waiver and estoppel.

The chancellor found that the Trust was a valid spendthrift trust, and ruled, based on the decision of *Driver* v. *Driver*, 187 Ark. 875, 63 S.W.2d 274 (1933), that the Trust was not subject to the claims of the appellant. The chancellor also struck appellant's third amended counterclaim upon finding that it was filed in open court on the day of trial; that appellee would be prejudiced; that one continuance had already been granted appellant; and that a further continuance would be required which would have unduly delayed the disposition of the case.

On appeal, the appellant contends that the chancellor erred in applying the rule of *Driver* v. *Driver*, *supra*, to defeat appellant's claim for support obligations against the obligor's beneficial interest in the Trust, and in striking appellant's third

amended counterclaim. We reverse and remand.

On appeal, the status of the Trust as a spendthrift trust is not contested, and it is undisputed that pursuant to the terms of the trust instrument, the appellee, as Trustee, is absolutely required to make annual disbursements of income to the trust beneficiaries.

The validity of spendthrift trusts has long been established in this state, in recognition of the free and unlimited right of a person, of sound mind and otherwise competent, to dispose of his property according to his pleasure. *Bowlin* v. *Citizens Bank & Trust Co.*, 131 Ark. 97, 198 S.W. 288 (1917). Here, we are addressing the narrow question of whether the income of a spendthrift trust, which under the facts of this case is required to be distributed without discretion, may be attached in the hands of the Trustee to satisfy an arrearage in alimony. We are of the opinion that the case of *Driver* v. *Driver*, *supra*, which was relied upon by the chancellor, is not dispositive of the issue presented in this case. In *Driver*, it was held that the *corpus* of a spendthrift trust was not subject to execution for the debt of the beneficiary for an arrearage in child support (emphasis ours). There, the court was primarily concerned with the question of whether a codicil revoked an inconsistent provision in the original will. In holding that the codicil, which established the trust, revoked the earlier provision in the will, the court determined that, pursuant to the terms of the codicil, title to the corpus of the trust was vested in the Trustee, and thus the court reasoned that the corpus of the trust was not subject to claims against the beneficiary. The court in *Driver* was not squarely confronted with the question posed in this case, and this particular issue seems to be one of first impression in this state. We note that our state legislature has not spoken on this issue.

We have reviewed the decisions from other jurisdictions where this question has been examined, and it is apparent that there is a split of authority. However, subject to a variety of limitations and based on differing theories, the prevailing view is that the income distributable from a spendthrift trust can be reached to satisfy claims for unpaid child support and alimony, in the absence of a state statute to the contrary. *See Hurley* v. *Hurley*, 107 Mich. App. 249, 309 N.W.2d 225 (1981). In

reaching this decision some courts find an intent on the part of the settlor not to shield the beneficiary's interest from the claims of his dependents, *Dillon* v. *Dillon*, 244 Wis. 122, 11 N.W.2d 628 (1943); *Keller* v. *Keller*, 284 Ill. App. 198, 1 N.E.2d 773 (1936), while others have concluded that such claims are not a "debt" as contemplated by the spendthrift provision of a trust. *Marsh* v. *Scott*, 2 N.J. Super. 240, 63 A.2d 275 (1949); *Clay* v. *Hamilton*, 116 Ill. App. 214, 63 N.W.2d 207 (1945). *See generally* Note, *Trusts — Garnishment of Spendthrift Trust For the Enforcement of Court-Ordered Alimony or Child Support: A Public Policy Decision — Bacardi v. White*, 13 Fla. St. U. L. Rev. 433 (1985). Still other courts hold that on grounds of public policy the provision in a spendthrift trust must yield to claims for child support and alimony. *Seidenberg* v. *Seidenberg*, 225 F.2d 545 (D.C. Cir. 1955); *Safe Deposit & Trust Co. of Baltimore* v. *Robertson*, 192 Md. 653, 65 A.2d 292 (1949); *Bacardi* v. *White*, 463 So.2d 218 (Fla. 1985); *Shelley* v. *Shelley*, 223 Or. 328, 354 P.2d 282 (1960).

The Restatement (Second) of Trust § 157(a) (1959) provides:

> Although a trust is a spendthrift trust or a trust for support, the interest of a beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary,
>
> (a) by the wife or child of the beneficiary for support, or by the wife for alimony.

We agree with the position adopted in the Restatement, and conclude, that founded upon considerations of public policy, spendthrift provisions in a trust cannot be given effect to bar claims for arrearages in child support and alimony. In reaching this decision it was necessary to balance the competing interests of public policy where one, there is a recognized right of a settlor to dispose of his property as he pleases, and where also, there is a decided policy in favor of the enforcement of obligations for child support and alimony. In holding that the beneficiary's interest in a spendthrift trust was subject to claims for alimony, as well as child support, the court in *Safe Deposit Trust & Co. of Baltimore* v. *Robertson*, *supra*, stated:

> The result has been reached on the ground that it is against

> public policy to permit the beneficiary to have the enjoyment of the income of the trust while he refuses to support his dependent children whom it is his duty to support. The claim of a wife and dependent children to support is based upon the clearest grounds of public policy. They are in quite a different position from ordinary creditors who have voluntarily extended credit.

We pause, however, to acknowledge that there is a stronger public interest in subjecting such trusts to claims for child support than perhaps there is for alimony. Without question, public policy dictates that a beneficiary's interest in a trust can be reached to satisfy claims for child support. In Arkansas, it is recognized that child support is a family duty, and one which would be incumbent on a father, even though there was no order requiring such support, *Brun* v. *Rembert*, 227 Ark. 241, 297 S.W.2d 940 (1957), and likewise the mother is not exempt from the obligation to provide support for her children. *Barnhard* v. *Barnhard*, 252 Ark. 167, 477 S.W.2d 845 (1972). While child support issues are accorded more favor in light of the state's interest and the overriding concern of the courts for the welfare of children, it has been said that the right of support for alimony, and children, are construed in the same manner. *Brun* v. *Rembert*, *supra*; *see also Bethell* v. *Bethell*, 268 Ark. 409, 597 S.W.2d 576 (1980). Arkansas Code Annotated § 9-12-313 (1987) specifically provides for the enforcement of written agreements between husband and wife made and entered into in contemplation of either separation or divorce, or orders for alimony or maintenance by sequestration of the property of either party, or that of his or her sureties, or by such other lawful ways and means, including equitable garnishments or contempt proceedings, as are in conformity with rules and practices of courts of equity. We also note that an independent action for alimony exists in Arkansas. *Woods* v. *Woods*, 285 Ark. 175, 686 S.W.2d 387(1985); Ark. Code Ann. § 9-12-302 (1987). With regard to claims for alimony, we are also persuaded by the court's reasoning in *Shelley* v. *Shelley*, *supra*, where it was found that the same policy justification exists as to alimony as it does for child support, in that unless the interest of the beneficiary can be reached, the state may be called upon for their support.

The privilege of disposing of property is not absolute, and is

hedged with various restrictions where there are counterveiling policy considerations warranting the limitation. *Shelley* v. *Shelley*, *supra*; *see also Seidenberg* v. *Seidenberg*, *supra*. In sum, we find that the legal obligation for support, regardless of whether it is for alimony or child support, is more compelling and outweighs the intent of the settlor to shelter the beneficiary's interest in the trust. As further stated in *Shelley*, "[o]ne who wishes to dispose of his property through the device of a trust must do so subject to these considerations of policy and he cannot force the courts to sanction his scheme of disposition if it is inimical to the interests of the state." In deciding this question, it appears that this result is supported by the great weight of authority and represents a better reasoned approach, as it serves to relieve the public of a potential financial burden, and to uphold the authority of courts in the enforcement of their orders, as well as to give effect to agreements for support freely entered into by parties to divorce.

■ We hold then that the income from this spendthrift trust may be reached by means of equitable garnishment or other available means in the hands of the appellee Trustee to satisfy the judgment for an arrearage in alimony. Our holding is confined to the facts of this case where the Trustee has no discretion to withhold the distribution of trust income to the beneficiaries. However, we agree with the opinion expressed in *Payer* v. *Orgill*, 191 N.E.2d 373 (Ohio Misc. 1963), that "[e]quity should not feed the husband and starve the wife no more than equity should feed the wife and starve the husband." In view of the settlor's intent to provide for support of the beneficiary, the trial court may in its discretion equitably apportion the amount of distributable income between the respective parties, as may be justified under the circumstances. *See* Comment, Restatement (Second) of Trusts § 157 (1959). This result comports with the position taken in the Restatement, and is made in recognition that jurisdiction over the administration of trusts is logged in courts of equity. In view of our disposition of the case on these grounds we find it unnecessary to address the second argument raised by appellant. We reverse and remand for proceedings not inconsistent with this opinion.

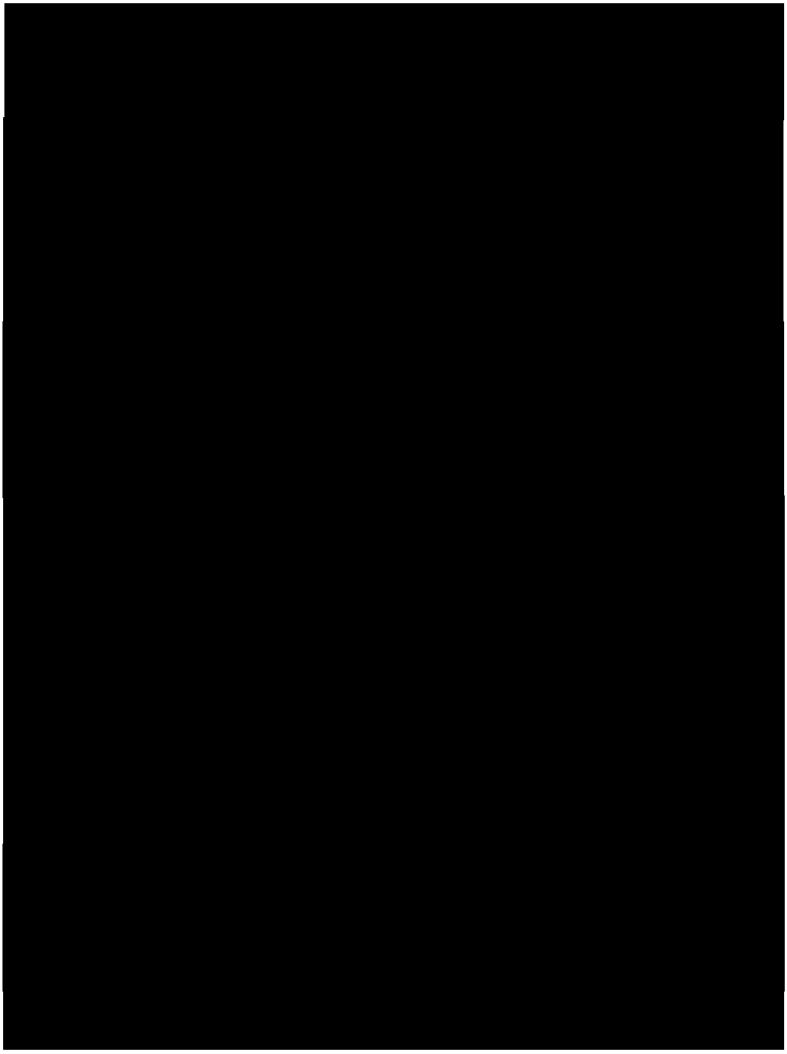
REVERSED and REMANDED.

MAYFIELD and JENNINGS, JJ., agree.

Lloyd D. SMITH *v.* Donna K. SMITH

CA 88-339 770 S.W.2d 205

Court of Appeals of Arkansas
Division II
Opinion delivered May 17, 1989



[redacted]

[redacted]

Villines & Lacy, by: *M. Watson Villines II*, for appellant.

Russell L. "Jack" Roberts, for appellee.

JUDITH ROGERS, Judge. This appeal arises from an order of the Faulkner County Chancery Court involving a custody dispute between the appellant, Lloyd David Smith, and the appellee, Donna Kaye Smith. Appellant argues that the chancellor erred in refusing to change custody of the parties' minor children, in finding him in contempt for failing to return the children after visitation, and in awarding attorney's fees to appellee's attorney. We disagree and affirm as modified.

The parties were divorced on May 7, 1986, and the appellee was awarded legal custody of the two children, Lloyd John and Jeremy. The appellant was awarded visitation every other weekend, one half of the holidays, and two months in the summer.

The present matter was commenced on March 27, 1987, by the Appellant's Petition for Change of Custody. On September 14, 1987, appellee filed three separate petitions: Petition for Citation alleging that appellant's petition for change of custody was frivolous; Petition for Increase in Child Support; and a Petition for Contempt alleging appellant failed to pay child support. The next petition, Amended Petition for Change of Custody and Petition for Temporary Relief, was filed by appellant on December 28, 1987. Appellee then filed a petition citing appellant for contempt for refusing to return the minor children after visitation.

The hearing on this matter was held on January 13, 1988, but was continued until March 22, 1988. The chancellor found that appellant had failed to prove the needed elements for a change of custody and denied his petition. The chancellor also found that appellant was in arrears in his child support payments in the amount of $620. The court also increased appellant's child support payments to seventy-two dollars per week from sixty-two dollars. The court found that appellant failed to return the children after visitation and found him in contempt. Appellant was also ordered to pay attorney's fees.

The first issue on appeal is whether the chancellor erred in denying appellant's petition for change of custody. The appellant had the burden of proof to show changes in circumstances warranting a change of custody. *Norman* v. *Norman*, 268 Ark. 842, 596 S.W.2d 361 (Ark. App. 1980). In custody matters, the chancellor's finding of fact will not be disturbed unless clearly erroneous. *White* v. *Taylor*, 19 Ark. App. 104, 717 S.W.2d 497 (1986).

Appellant argues that the children, Lloyd John, age thirteen, and Jeremy, age eleven, have a better relationship with him and have indicated a preference to live with him in Conway. Appellant argues that the preference of the children can be "significant" in custody cases, citing *DeCroo* v. *DeCroo*, 266 Ark. 275, 583 S.W.2d 80 (1979). One of the factors considered by the

supreme court in that case, was the testimony of the parties' thirteen year old daughter that she was closer to her mother and wanted to be with her. The court stated that "[s]uch an expression of preference is not entirely without weight." *DeCroo*, 266 Ark. at 277, 583 S.W.2d at 82. The primary consideration in awarding the custody of children is the welfare and best interest of the children involved. Other considerations are secondary. *Digby* v. *Digby*, 263 Ark. 813, 567 S.W.2d 290 (1978).

Appellant basically argues that appellee has "no time for the boys at this time and is leaving them to basically fend for themselves." Appellant contends that appellee does not ensure the boys have proper meals and clothing, does not encourage them in sports, and leaves them alone or with a young babysitter. Appellant also expresses concern over the suitability of appellee's present husband, Jack Jackson, noting that he is a recovering alcoholic and suggesting that he is an unstable individual.

As appellee notes, there was no testimony that the children have experienced any behavioral, disciplinary, or academic problems while in appellee's custody. In response to the testimony by appellant, appellee stated that she had never left the boys alone all night. She also testified that she provides them with clothing, but is unable to afford the popular brands which the appellant purchases for them. Appellee also maintained that the children are provided with proper meals. As to the reference made to appellee's husband, he testified that he had been sober for seven years.

[redacted] The chancellor heard lengthy and often conflicting testimony in this matter. Since the question of preponderance of the evidence turns largely on the credibility of the witnesses, the appellate court defers to the superior position of the chancellor, especially in those cases involving child custody. *Rush* v. *Wallace*, 23 Ark. App. 61, 742 S.W.2d 952 (1988); Ark. R. Civ. P. 52(a). We cannot say that the chancellor's decision that appellant failed to prove changes in circumstances warranting a change of custody was clearly erroneous.

The second issue on appeal is whether the chancellor erred in finding appellant in contempt for failing to return the children after visitation. The chancellor found appellant had wrongfully kept the children for eighty-four days and treated each day as a

separate offense, and sentenced appellant to ten days for each offense for a total of 840 days. The chancellor suspended 756 days of the sentence, leaving appellant eighty-four days to serve in jail.

It is well settled that suspension of a contempt citation amounts to a remission. *Jolly* v. *Jolly*, 290 Ark. 352, 719 S.W.2d 430 (1986); *Higgins* v. *Merritt*, 269 Ark. 79, 598 S.W.2d 418 (1980). Appellant was sentenced to an unconditional penalty, a definite term of eighty-four days in jail, which constitutes criminal contempt. The character of the relief, rather than the trial court's characterization of the substantive proceeding, becomes the critical factor in determining the nature of the proceeding for due process purposes. *Fitzhugh* v. *Fitzhugh*, 296 Ark. 137, 752 S.W.2d 275 (1988). An unconditional penalty is criminal in nature because it is "solely and exclusively punitive in character." *Id. See also, Hicks ex rel. Feiock* v. *Feiock,* 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988).

In *Rowell* v. *State*, 278 Ark. 217, 218, 644 S.W.2d 596, 597 (1983), the supreme court stated:

> At the outset we observe that although the trial judge must be convinced beyond a reasonable doubt that a criminal contempt was committed, that is not the standard of review in this court. We view the record in the light most favorable to the trial court's decision and formerly sustained that decision if supported by substantial evidence. *Dennison* v. *Mobley*, 257 Ark. 216, 221, 515 S.W.2d 215 (1974); *Songer* v. *State*, 236 Ark. 20, 364 S.W.2d 155 (1963). Now we sustain the decision unless it is clearly erroneous. ARCP Rule 52.

The cases decided after it, however, have held that the appellate court affirms a judgment finding criminal contempt unless there is no substantial evidentiary support. *Warren* v. *Robinson*, 288 Ark. 249, 252, 704 S.W.2d 614 (1986). *See also*, *Yarborough* v. *Yarborough*, 295 Ark. 211, 748 S.W.2d 123 (1988), which also held the trial judge's decision should be affirmed if supported by substantial evidence. Therefore, the standard of review in a criminal contempt case is the same as in any criminal case. In criminal cases, whether tried by judge or jury, we will affirm if there is substantial evidence to support the finding of the trier of fact. *Harris* v. *State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985);

see also, *Milburn* v. *State*, 262 Ark. 267, 555 S.W.2d 946 (1977).

Appellant appears to challenge the sufficiency of the evidence by arguing that the sentence was excessive "particularly when there was no indication that appellant had intended any ill will or disrespect to the Court." The purpose of a criminal contempt proceeding is that it is brought to preserve the power and vindicate the dignity of the court and to punish for disobedience of its order. *Fitzhugh, supra.* Appellee was given legal custody of the children by the decree, yet appellant did not return them after visitation. Appellee testified that appellant phoned her after she unsuccessfully tried to pick the children up and that he stated that he was keeping them. Appellee further testified that appellant did not in fact return the children until three weeks prior to the second hearing. The chancellor found that appellant willfully violated his orders by keeping the children. We cannot say that there was no substantial evidence to support that finding.

Appellant argues that the trial court erred in finding him in contempt because the petition which was filed January 12, 1988, was vague, and he could not defend against it because it was not served as required by law. The Due Process Clause, as applied to criminal proceedings, requires that an alleged contemnor be notified that a charge of contempt is pending against him and be informed of the specific nature of that charge. *Fitzhugh, supra.* Although the certificate of service indicated the petition had been sent to appellant's attorney on December 28, 1987, appellee's attorney hand delivered a copy of the petition to him on January 13, 1988, the day of the first hearing.

A defense of insufficiency of process is waived if not asserted in the responsive pleading or by motion. *See, Searcy Steel Co.* v. *Merchantile Bank of Jonesboro*, 19 Ark. App. 220, 719 S.W.2d 277 (1986); Ark. R. Civ. P., Rule 12(h)(1). Appellant's attorney received the petition the morning of the January 13, 1988, hearing, and did not object to service until after he had called three witnesses at the hearing. After appellant's objection, the court and attorneys retired to chambers, and the case was continued until March 22, 1988. At no time during the interim did appellant raise the issue of the sufficiency of service again before the hearing resumed. Thus appellant waived any defect or irregularity in the service of process. Appellant proceeded with

actual notice of the pending contempt charges and had over two months to prepare for the hearing. Appellant thus received notice comporting with the requirements of due process.

Appellant next argues that he was entitled to a jury to decide his criminal contempt case since he was sentenced to 840 days in jail. We disagree. As we have already noted, it is well settled that suspension of a contempt amounts to a remission. *Jolly, supra.* Therefore, we need only consider the eighty-four days to which appellant was actually sentenced. Petty contempt, like other petty criminal offenses may be tried without a jury and contempt of court is a petty offense when the penalty actually imposed does not exceed six months or a longer penalty has not been expressly authorized by statute. *Taylor* v. *Hayes*, 418 U.S. 488 (1974).

[Although appellant does not raise the issue of whether the chancellor had the authority to sentence him to eighty-four days of incarceration, the question arose during our conference and we note that the chancellor was acting pursuant to the inherent power of the court. It has long been recognized that courts have the inherent power to punish contempt in disobedience of their process. *Spight* v. *State*, 155 Ark. 26, 243 S.W. 860 (1922). The supreme court discussed the development of the law of contempts in *Edwards* v. *Jameson*, 284 Ark. 60, 63, 679 S.W.2d 195, 196 (1984), and reviewed prior decisions.

> The matter of contempt of court was treated rather extensively in the case of *Freeman* v. *State*, 188 Ark. 1058, 69 S.W.2d 267 (1934). The court in *Freeman* reviewed prior cases and derived the following rules: (1) the power of punishment for contempt is independent of statute and inherent in and an immemorial incident of judicial power, which conclusions are to be reached by the court without a jury; (2) this inherent power is entrusted to the conscience of the court alone but should never be exercised except where the necessity is plain and unavoidable if the authority of the court is to continue; and (3) the court's contempt proceedings are to preserve the power and dignity of the court and to punish for disobedience of orders and to preserve and enforce the rights of the parties.

See also, Pace v. *State*, 177 Ark. 512, 7 S.W.2d 29 (1928).

Article 7, § 26 of the Arkansas Constitution provides, "The General Assembly shall have power to regulate by law the punishments of contempts not committed in the presence or hearing of the courts, or in disobedience of process." The legislature enacted Ark. Code Ann. § 16-10-108(a)(3) (1987), which provides that courts of record shall have the power to punish "willful disobedience of any process or order lawfully issued or made by it," and subsection (b)(1) provides for a maximum punishment of ten days imprisonment, or a maximum fine of fifty dollars, or both. The Arkansas Supreme Court has interpreted the foregoing statutory provisions and has held they are not a limitation on the power of the court to inflict punishment for disobedience of process. *Yarborough*, *supra*.

An order of a court is process, and while the constitution delegated authority to the legislature to regulate punishment for contempt, this delegation has been construed by the supreme court to be in addition to and not in derogation of the inherent power of the court. Pursuant to its inherent power, the court may also punish for contempt, which includes disobedience of process. The term "process" has been defined broadly by our statutes and caselaw. Ark. Code Ann. § 16-55-102(a)(16) (1987) provides that "[p]rocess means a writ or summons issued in the course of judicial proceedings." Subsection (a)(23) of that provision defines "writ" as meaning an order or precept in writing, issued by a court, clerk or judicial officer. The supreme court has stated that "[p]rocess in the sense of the statutes is a comprehensive term which includes all writs, rules, orders, executions, warrants or mandates issued during the progress of an action." *Henderson* v. *Dudley*, 264 Ark. 697, 709, 574 S.W.2d 658, 665 (1978).

In finding appellant in contempt, the chancellor was acting pursuant to the inherent power of the court. The supreme court has stated that inherent power to punish for contempt resides in all courts. This necessarily includes the right to inflict reasonable and appropriate punishment upon an offender against the authority and dignity of the court. Such power cannot be removed by enactment of laws to the contrary. *Edwards*, 284 Ark. 60, 62, 679 S.W.2d 195, 196 (1984). As noted earlier, the nature of the punishment imposed rather than the nomenclature used governs the determination of whether the

contempt is civil or criminal, and in turn the protections to be afforded a contemner in the respective proceedings. A chancery court is empowered to punish for criminal contempt, but the court must provide the appropriate protections comporting with the standards of due process, as in other criminal proceedings.

Appellant argues that the chancellor miscalculated the number of days that he had the children, contending that he only had them sixty-four days rather than eighty-four days. Upon review, we find that the chancellor did make an error in calculating the number of days and modify appellant's sentence to comport with the chancellor's findings and rationale in finding each day to be a separate offense. It is undisputed that appellant retained the children on December 27, 1987. Appellee testified that appellant did not return them until three weeks prior to the March 22, 1988, hearing, which is approximately sixty-four days from the time appellant kept them. We have the power to modify punishment imposed for contempt and affirm the chancellor's decision with the modification that appellant's sentence be reduced to sixty-four days rather than eighty-four days to comport with his intention that the sentence actually served be one day for each ten day sentence assessed. *See*, *Page* v. *State*, 266 Ark. 398, 83 S.W.2d 70 (1979).

Finally, appellant argues that the chancellor erred in awarding attorney's fees to the appellee's attorney. The chancellor is in a much better position to evaluate the services of counsel than an appellate court, and unless a clear abuse of discretion is evident, the chancellor's action in fixing attorney's fees will not be disturbed on appeal. *Warren* v. *Warren*, 270 Ark. 163, 603 S.W.2d 472 (1980).

The court awarded appellee's attorney $1,137 in attorney's fees for this matter. Appellant argues that it was excessive because an insufficient record was made as to the value and amount of the services. We disagree. Appellee's attorney stated that his fees had totalled $650 prior to the hearing, and the chancellor found that he had spent six and a half hours in the matter the day of the hearing. The chancellor appeared to award the attorney an additional fee of less than $500 for the six and one-half hours spent that day in the hearing. The chancellor stated the amount of $1,137.50 would be a reasonable fee; the written order

stated the amount to be $1,137. We cannot say the chancellor abused his discretion in determining this to be a reasonable fee.

Appellant also argues that the attorney's fees were impermissibly based upon the criminal contempt. The instant case was commenced by appellant's petition to change custody and resolved several disputes including custody, child support, and the contempt citations. The court did not state and we cannot determine from the record before us that it was awarding attorney's fees based upon the contempt. We cannot say that the chancellor abused his discretion in determining and awarding attorney's fees in this matter.

AFFIRMED as MODIFIED.

MAYFIELD, J., agrees.

JENNINGS, J., concurs.

JOHN E. JENNINGS, Judge, concurring. I concur but would prefer not to discuss the issue of the chancellor's authority because, as the majority opinion notes, the issue is not raised.

Patricia GARNER, Administratrix of the Estate of Ilia Frank Hill, Jr. *v.* Robert LIMBOCKER and the City of Fort Smith, Arkansas

CA 88-392 770 S.W.2d 673

Court of Appeals of Arkansas
Division I
Opinion delivered May 24, 1989

Pryor, Barry, Smith & Karber, by: *Debra Armstrong-Wright*, for appellant.

Daily, West Core, Coffman & Canfield, for appellee City of Fort Smith.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Sebastian County Circuit Court. Patricia Garner, appellant and administratrix of the estate of Ilia Frank Hill, Jr., appeals from the trial court's award of $3,000.00 from appellee, City of Fort Smith, for attorney's fees and costs under 42 U.S.C. § 1988. We affirm.

This action arose from an altercation which occurred on April 18, 1981, wherein appellant's brother, Frank Hill, was arrested. The record indicates that on that evening, three police officers responded to a disturbance call involving the deceased at an apartment complex in Fort Smith. Upon arrival the officers learned that the deceased left the complex and went to the residence of a friend across the street. The police confronted the deceased and a heated conversation developed which culminated in a physical altercation when the deceased tried to flee. During the fight, the deceased sustained internal injuries which appellant contends were primarily due to the actions of Officer Robert Limbocker. The deceased was subsequently arrested and charged with numerous offenses involving the altercation. The deceased became ill after his arrest and was transported to a local hospital where he underwent surgery for a ruptured intestine. Due to complications, the deceased underwent a second surgery the following day during which he expired.

On June 9, 1981, appellant filed suit for $2,650,000.00 in damages against the three Fort Smith police officers involved in the arrest of her deceased brother. Appellant alleged that the

officers committed unjustifiable assault and battery upon her brother and that the officers negligently failed to provide medical attention resulting in his death. In July of 1982, the court granted appellant's motion to dismiss without prejudice the portion of the complaint as to the two officers other than Robert Limbocker. Thereafter, appellant also filed a medical malpractice claim against the physician who performed the surgery alleging that the doctor proximately caused the death of her brother by his negligent disregard of the deceased's condition. Appellant received a $30,000.00 settlement from the doctor which she put into accounts for the children of the deceased.

In 1983, appellant amended the original complaint on two occasions to join appellee, City of Fort Smith, as a defendant in the litigation, alleging it failed to provide sufficient medical care and to supervise police officers. Additionally, appellant alleged the city retained Robert Limbocker as an officer with knowledge of his propensity to use excessive force. Five years later the case proceeded to trial on February 24, 1988. At appellant's request and over appellees' objections, the case was submitted to the jury on four interrogatories with all interrogatories answered unanimously. The jury found that the city did not have a policy or custom regarding provision of medical care to detainees which proximately caused injury to the deceased. It also found that appellant failed to prove that Fort Smith did not provide adequate training to its officers which caused injury to the deceased. Next, the jury found that appellant proved the existence of a pattern of use of excessive force by Officer Limbocker or other officers which appellee either condoned or did not correct. Lastly, the jury awarded zero damages for the pain and suffering, physical injury, and loss of earnings of the deceased.

The trial court entered judgment in favor of appellant against the City of Fort Smith and awarded attorney's fees and costs of $3,000.00 to appellant as prevailing party pursuant to 42 U.S.C. § 1988. It is from this award of attorney's fees that appellant brings this appeal. As her only point for reversal, appellant argues that the trial court abused its discretion by awarding only $3,000.00 in fees and costs for the alleged 353.90 hours accrued by three attorneys between May 1, 1981, and March 6, 1988.

We readily agree with appellant's reliance upon *Shakopee Mdewakanton Sioux Community* v. *City of Prior Lake*, 771 F.2d 1153 (8th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986) that the purpose behind § 1988 is to encourage litigation of meritorious civil rights actions and to encourage the enforcement of constitutional rights through the award of fees which adequately attract competent counsel. However, we also note that under 42 U.S.C. § 1988 (1982) "the court, in its discretion, *may* allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."(Emphasis added.)

In the case at bar, although the court was not required under § 1988 to award any attorney's fees to appellant as prevailing party, it elected to award the amount of $3,000.00. In making this award, the court in this case relied on *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983) which announced certain guidelines for calculating reasonable attorney's fees under § 1988. The factors considered by the court are as follows:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

In making its award, the court found that appellant succeeded on a significant issue in the suit in that the jury concluded that the deceased's "constitutional rights were violated by defendant City of Ft. Smith." The court recognized that the issue before it involved community interest as well as the rights of plaintiff/appellant. However, the court stated, "plaintiff's [appellant's] recovery was extremely slight when the complaint is reviewed and when other interrogatories submitted to the jury are reviewed and for that reason the fee herein is diminished to reflect the will and decisions of the jury." It was stated that the fact that the jury awarded appellant no damages had a bearing on the

court; however, it stated that the attorney's fees of $3,000.00 were awarded after a review of Supreme Court decisions.

We acknowledge that it was within the jurisdiction of the trial court whether to award any attorney's fees. However, once an award is made, the reasonableness of the attorney's fees awarded is to be judged by the abuse of discretion standard. *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). Therefore, the issue for resolution by this court becomes whether the trial court abused its discretion in awarding fees of $3,000.00.

In *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), the Supreme Court found that the initial estimate of reasonable attorney's fees is properly calculated by multiplying the number of hours expended on litigation times a reasonable hourly rate. However, the court recognized that upward or downward adjustments to that fee may be necessary based upon the particular facts of a given case. *Hensley* emphasized that the most critical factor to be considered in determining the reasonableness of a fee award is the "degree of success obtained." *Id.* at 436. The Court further stressed that in making an award, the focus should be on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on litigation. Additionally, *Hensley* held that although there is no precise rule or formula for making these determinations, an award may be reduced to account for limited success. Furthermore, in *Riverside* v. *Rivera*, 477 U.S. 561, 574 (9th Cir. 1986) the Court acknowledged that although the amount of damages is only one of the factors to be considered by a court when calculating attorney's fees, the damage amount is "certainly relevant to the amount of attorney fees to be awarded under § 1988."

In the instant case, appellant as the plaintiff below has the burden of proving entitlement to an award of attorney's fees. *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The record reveals that although appellant sought $2,650,000.00 in damages, no evidence was put on to establish proof of the damages sought. The jury awarded appellant zero damages for the deceased's pain and suffering, physical injury, and loss of earnings. Additionally, appellant prevailed on only one of four claims presented to the jury on interrogatories. In

making its award of $3,000.00, the court reviewed Supreme Court cases and generally took into consideration that no damages were awarded and appellant achieved only limited success in the litigation. Based on our review of the record, we agree that the findings of the court below were reasonable and the court did not abuse its discretion in awarding attorney's fees of $3,000.00.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

James F. WARD *v.* FAYETTEVILLE CITY HOSPITAL and Second Injury Fund

CA 88-288 770 S.W.2d 668

Court of Appeals of Arkansas
En Banc
Opinion delivered May 24, 1989
[Rehearing denied June 21, 1989.]

Jay N. Tolley, for appellant.

David L. Pake, for appellee Second Injury Fund.

JAMES R. COOPER, Judge. The appellant was injured on March 22, 1985, while employed by the appellee Fayetteville

City Hospital. He subsequently suffered two additional injuries on February 6, 1986, and September 22, 1986. On March 20, 1987, the appellant entered into a joint petition settlement with the employer and its insurer. Prior to the hearing on the settlement, the appellant requested that the Second Injury Fund be joined as a party. The appellant was notified that settling with the employer would be a final adjudication of all the issues and would affect the rights and obligations of all the parties.

At the conclusion of the hearing the administrative law judge approved the joint petition. The Fund was not present at the hearing or included as a party in settlement. The appellant then requested a hearing to determine the liability of the Second Injury Fund, which was denied based on our decision in *Sayre* v. *State of Arkansas Second Injury Fund*, 12 Ark. App. 238, 674 S.W.2d 941 (1984). The administrative law judge stated that he lacked jurisdiction to set further hearings or enter additional orders. The appellant appealed to the full Commission, and the Fund filed a motion to dismiss which the Commission granted. On appeal the only issue is whether the appellant is precluded from proceeding against the Second Injury Fund after entering into the joint petition settlement with the employer and its insurance carrier. We find that he is precluded and affirm.

The Commission, in dismissing the appellant's claim, relied on *Sayre*, *supra*, where we said that Ark. Code Ann. § 11-9-805 (1987) clearly and unambiguously prohibited the claimant from proceeding against the Second Injury Fund because the joint petition eliminated the Commission's jurisdiction over the claim. Section 11-9-805 states in pertinent part:

> (b) If the commission decides it is for the best interests of the claimant that a final award be made, it may order an award that shall be final as to the rights of all parties to the petition. *Thereafter the commission shall not have jurisdiction over any claim for the same injury or any results arising from it.*

[Emphasis supplied.]

We have, as suggested by the appellant, reexamined our position as stated in *Sayre*. We have surveyed cases from other jurisdictions, and find several differing views. Several of the cases

have applied the doctrine of *res judicata* and held that since the Funds involved were not parties to the settlements they are excluded from the effects of *res judicata* and the claimants could proceed against them. *Bailey* v. *Industrial Commission*, 137 Ill. App. 3d 366, 484 N.E.2d 376 (1985); *Subsequent Injury Trust Fund* v. *Alterman Foods, Inc.*, 162 Ga. App. 428, 291 S.E.2d 758 (1982). Other courts have denied the claimants the right to proceed against the funds because the Funds' liabilities were derivative of the employers' liabilities, and thus the joint petition agreements, which neither admitted or denied liability, precluded any actions against the Funds. In other words, unless there is a determination that the employer is liable, there is no right to proceed against the Funds. *Arduser* v. *Daniel International Corp.*, 7 Kan. App. 225, 640 P.2d 329 (1982); *White* v. *Weinberger Builders, Inc.*, 49 Mich. App. 430, 212 N.W.2d 307 (1973). In specifically rejecting the derivative theory, New Mexico permits claimants to proceed against its Subsequent Injury Fund after settling with the employer based on the coexistence of liability with the employer. *Romero* v. *Cotton Butane Co.*, 105 N.M. 73, 728 P.2d 483 (1986). In Kentucky, a claimant cannot proceed against its Special Fund because the agreement is a final award and the Fund can only be joined before the rendition of a final award. *Yokum* v. *Jordan Auto Parts Company*, 521 S.W.2d 519 (Ky. App. 1975).

In none of the cases our research has found have we discovered a statute similar to § 11-9-805. However, we remain convinced the settlement precludes proceeding against the Fund because of the clear language in that statute. We do not at this time need to apply any of the various principles used in other jurisdictions because the Commission is clearly divested of jurisdiction at the time the settlement is entered into. Furthermore, the legislature has met several times since our decision in *Sayre* and they have not modified or adjusted the statute in response, thus giving rise to the implication that our interpretation and application of the statute was in keeping with legislative intent on the issue. The statute was adopted in 1987 without modification when the Arkansas statutes were revised. The adoption or re-enactment of a statute that has received judicial construction adopts the construction given it. *McKenzie* v. *State*, 11 Ark. 594 (1851); *see Appleby Road Street Improvement*

District v. *Powell*, 282 Ark. 398, 669 S.W.2d 3 (1984). Therefore, we cannot agree with the appellant's assertion that the legislature did not intend a settlement to preclude subsequent proceedings against the Fund.

The Fund also argues that the appellant waived his right to proceed against it. At the hearing on the joint settlement petition the appellant testified that he understood that if the case was ended against the employer and its insurer it would also terminate his rights to proceed against the Second Injury Fund. He also stated in response to questioning by the administrative law judge that he understood the settlement would end his claims for all purposes. The Commission found that by making these statements the appellant had waived his right to proceed against the Fund. We do not find it necessary to address this issue in light of our reaffirmation of the holding in *Sayre*, where the claimant clearly and unambiguously attempted to preserve her right to proceed against the Fund.

The appellant also asserts that the Second Injury Fund is similar to a third-party tortfeasor and not permitting him to proceed against the Fund is similar to allowing him to settle around a third-party tortfeasor. The appellant compares the Fund to a workers' compensation insurance carrier who has a potential lien against a third-party tortfeasor. We disagree.

As the appellee points out, a third-party tortfeasor is not subject to the Workers' Compensation Act as is the Fund. For that reason the insurance carrier can settle the claim with the claimant and reserve its right to proceed against the tortfeasor. The purpose of the Second Injury Fund is to pay a portion of the obligation of the employer in accordance with the Workers' Compensation Act, and benefits both the employer and its insurance carrier. *See Second Injury Fund* v. *Mid-State Construction*, 16 Ark. App. 169, 698 S.W.2d 804 (1985). In the case of a third-party tortfeasor, the claimant may have two causes of action; he can proceed against the tortfeasor in a civil case and receive workers' compensation benefits. However, in the case of the Second Injury Fund, the claimant can only proceed before the Workers' Compensation Commission. We concur with the rationale argued by the Fund and agree that the two situations are not similar.

Affirmed.

MAYFIELD and ROGERS, JJ., concur.

MELVIN MAYFIELD, Judge, concurring. I concur in the majority opinion. The only real reason the appellant gives for faulting the provision of the Workers' Compensation Law giving finality to a joint petition settlement is "without giving the claimant the opportunity to have a 'hammer' over the Second Injury Fund, it can delay and have a potential veto on any possible settlement." Whatever that means, I see nothing in the Act to indicate that a claimant has a right to pursue a claim for an injury after the Commission has approved a joint petition settlement for that injury. Ark. Code Ann. § 11-9-805 (1987) clearly leaves the approval of the settlement to the discretion of the Commission except that it must find the settlement to be in the best interest of the claimant in order to approve it. And section 11-9-805(d) even provides that "no appeal shall lie from an order or award allowing or denying a joint petition."

Pursuant to Amendment 26 of the Arkansas Constitution, our first workers' compensation law was enacted by the General Assembly as Act 319 of 1939. Section 19 of that Act did not contain a provision for a joint petition settlement. However, Initiated Act No. 4, adopted by the people at the General Election in November of 1948, *see Acts of Arkansas 1949*, page 1420, amended section 19 of the 1939 Act to authorize a joint petition settlement. *See* Ark. Stat. Ann. § 81-1319(*l*) (Supp. 1949). That provision has remained unchanged to the present date, and it clearly provides that Commission approval of a joint petition settlement eliminates the Commission's jurisdiction over "any claim for the same injury or any results arising from it." Furthermore, we have said that while as a general rule the law favors compromise settlements, that rule does not apply to joint petition settlements. *See Odom* v. *Tosco Corporation*, 12 Ark. App. 196, 199, 672 S.W.2d 915 (1984). So, I am not persuaded that we should help the claimant to "have a hammer" over the Second Injury Fund in order to force it to make a joint petition settlement.

In addition to the statutory finality given to joint petition settlements, I would affirm the Commission's decision in this case for another reason. We stated a general rule in *Farmers and*

Merchant's Bank v. *Deason*, 25 Ark. App. 152, 155, 752 S.W.2d 777 (1988), that "we do not address issues raised for the first time on appeal," and cited for authority *C & L Trucking, Inc.* v. *Allen*, 285 Ark. 243, 686 S.W.2d 399 (1985), where the Arkansas Supreme Court said the same thing. *See* 285 Ark. at 247. The same rule applies in appeals from the Workers' Compensation Commission. In *Jeffery Stone Co.* v. *Raulston*, 242 Ark. 13, 412 S.W.2d 275 (1967), the court did not agree with the appellant's contentions for two reasons:

> First, the issue was not raised before the Commission and, under our well established procedural practice, it cannot be raised here.

242 Ark. at 17. *See also Hawthorne* v. *Davis*, 268 Ark. 131, 134, 594 S.W.2d 844 (1980); *Dedmon* v. *Dillard Department Stores, Inc.*, 3 Ark. App. 108, 111, 623 S.W.2d 207 (1981).

Here, I do not believe the appellant presented the issue to the Commission that it now attempts to present to this court. The record shows that on March 11, 1987, the appellant's attorney wrote a letter to an attorney for the employer's insurance carrier setting out his understanding of the terms of their agreement to settle the appellant's claim against the employer. A paragraph of that letter stated:

> By copy of this letter to the Springdale Division, I am requesting that they place official notice to the second injury fund of the time and place of the Joint Petition. Furthermore, by copy of this letter to the second injury fund, I am indicating that I am not waiving my right to proceed against the second injury fund but am only preparing the Joint Petition to preclude my right to proceed against the parties to the Joint Petition.

The letter shows a copy to James D. Emerson, A.L.J., at an address in Springdale. The next page of the record contains a letter from James D. Emerson, dated March 12, 1987, to appellant's attorney. The letter contains one paragraph which reads as follows:

> A joint petition, if approved, is a final adjudication of all issues and will affect the rights and obligations of all parties. With this in mind, please advise if you are ready to

proceed with a joint petition.

The record does not contain a response to this letter but on March 19, 1987, the appellant's attorney and the attorneys for the employer's carrier appeared at a hearing before Judge Emerson. At the conclusion of the hearing, the judge asked the appellant if he understood that an approval of the joint petition would end his claims. After receiving an affirmative reply, the record shows the following questions by the judge and answers by the appellant:

Q. It's the end of any and all benefits that you might expect to receive as a result of any of these injuries?

A. Yes Sir.

Q. And that if in fact in the future you do require additional medical treatment, although Dr. Runnels doesn't feel like you might, if you did it's going to be up to you?

A. Yes.

Q. Do you understand that?

A. Yes.

Q. That this will end any weekly benefits that you might receive, any rehabilitation benefits that you might be entitled to, in other words retraining into some sort of another job. Do you understand that?

A. Yes Sir.

Q. And it ends your right to see, to have determined the amount of permanent disability you would be entitled to. You might go to a hearing, you might receive more than this or less or about the same.

A. Yes Sir.

Q. But you're giving up your right to see. Do you understand?

A. Yes Sir.

Q. With those things in mind do you feel like that [sic] this settlement is in fact in your best interest?

A. Yes Sir.

Q. And do you want to proceed with this and end it all here today?

A. Yes Sir.

The judge then stated he would approve the joint petition and the record contains the Order signed by the judge. It recites that a hearing was held, sets out the amount that is to be paid, and concludes as follows:

> IT IS FURTHER ORDERED that upon payment of these sums by the respondents, this claim shall be forever barred and the Arkansas Workers' Compensation Commission loses any and all jurisdiction.

Nothing is said in the Order about any right to proceed against the Second Injury Fund, and it is clear by the last sentence quoted above that the law judge did not consider that such right existed. To make this even more clear, the appellant's attorney afterwards wrote the law judge, on April 1, 1987, and asked that this matter be set for a hearing against the Second Injury Fund. By letter dated April 10, 1987, the law judge answered and informed appellant's attorney that "I do not have jurisdictional authority to now set this case down for a further hearing, or enter any additional orders." Appellant's notice of appeal was from this "letter opinion."

Under the above factual circumstances, I do not think the issue the appellant seeks to raise in this appeal was raised before the Commission, and it should not be considered by this court on appeal. This case is not like the case of *Stratton* v. *Death and Permanent Total Disability Trust Fund*, 28 Ark. App. 86, 770 S.W.2d 678, decided today by this court. In that case the joint petition attempted to reserve the claimant's right to proceed against the Fund. Here, the joint petition, signed by appellant and his attorney, makes no mention of the issue the appellant now argues on appeal.

The only thing that could be considered an attempt to reserve the right to proceed against the appellee Fund in this case is the statement in the March 11, 1987, letter from appellant's attorney to the attorney for the employer's insurance carrier to

the effect that the right to proceed against the Fund was not being waived. Not only was this not addressed to the law judge, the letter from the judge to appellant's attorney setting the hearing on the joint petition made it very clear that approval of the petition would be a final adjudication. Without any objection to the position set out in the law judge's letter, I do not think the appellant can complain on appeal of the action of the law judge that appellant's attorney either consented to, or acquiesced in. *See Briscoe* v. *Shoppers News, Inc.*, 10 Ark. App. 395, 401, 664 S.W.2d 886 (1984). The issue appellant argues here was simply not raised below. So, for this additional reason, I agree to affirm the Commission.

ROGERS, J., joins in this concurrence.

Phillip A. MYLES *v.* PARAGOULD SCHOOL DISTRICT

CA 88-437 770 S.W.2d 675

Court of Appeals of Arkansas
Division II
Opinion delivered May 24, 1989

Fulkerson & Todd, P.A., by: *Jerry L. Lovelace*, for appellant.

Richard S. Smith, Public Employee Claims Division, Arkansas Insurance Department, for appellee.

JOHN E. JENNINGS, Judge. The facts in this workers' compensation case were stipulated to by the parties. Appellant sustained a compensable injury on August 24, 1983. On September 6, 1984, the appellee mistakenly failed to make a permanent partial disability payment. Permanent partial disability payments should have been stopped on September 26, 1984. The last medical benefits were paid to appellant on July 29, 1985. On July 10, 1986, the appellee paid the permanent partial disability payment which had been overlooked. On July 7, 1987, appellant filed a claim for additional benefits.

As the Commission correctly recognized, the sole issue is the applicability of the statute of limitations, Ark. Code Ann. § 11-9-702(b) (1987), which provides, in part:

> In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the Commission within (1) year from the date of the last payment of compensation, or (2) years from the date of the injury, whichever is greater.

The administrative law judge held that the statute did not bar the claim, relying on *Jones Furniture Mfg. Co.* v. *Evans*, 244 Ark. 242, 424 S.W.2d 880 (1968). The Commission reversed, relying primarily on our opinion in *Woodward* v. *ITT Higbie Mfg. Co.*, 271 Ark. 498, 609 S.W.2d 115 (Ark. App. 1980) and distinguishing *Jones*. We hold that the Commission's construction of the statute was erroneous and reverse.

[The law requires that the code provisions relating to the law of workers' compensation be construed liberally, in accordance with the remedial purposes of the legislation. Ark. Code Ann. § 11-9-704(c)(3) (1987). In *Jones Furniture Mfg. Co.* v. *Evans*, 244 Ark. 242, 245, 424 S.W.2d 880, 881 (1968), the court said:

> As previously stated, appellee's claim was filed June 16, 1966. According to Jones' calculations [which, for the purpose of this opinion, we conclude to be true] the last payment *due* appellee (for the 1964 injury) was June 4,

> 1965. It is therefore contended by Jones that, under the statute, appellee had to file his claim on or before June 4, 1966. For reasons stated below we do not agree.
>
> It is not disputed that, as a matter of fact, appellee received his last payment on June 17, 1965, which was less than one year before he filed his claim on June 16, 1966, being one day before it was barred under the statute quoted above. Even though, according to appellant's calculation, the last payment was *due* on June 4, 1965, still the *due* date is not controlling under the statute. The record discloses that the payment made on June 17, 1965, was in fact the *first* payment due appellee in 1964 but had been overlooked by *appellant* (not by appellee or the Commission) because of an office error. Basically, it would not be right to penalize appellee for something over which he had no control. [Emphasis in original.]

Under the language of the statute and the holding in *Jones*, the claim for additional benefits here was timely filed. *See also Southern Cotton Oil Co.* v. *Friar*, 247 Ark. 98, 444 S.W.2d 556 (1969). As we have said, the Commission relied on our opinion in *Woodward* v. *ITT Higbie Mfg. Co.*, 271 Ark. 498, 609 S.W.2d 115 (Ark. App. 1980). In that case we quoted Larson, *Workmen's Compensation Law*, § 78.43(b) (1976):

> Once the claim has been barred by the passage of time, it will not be revived and a new period will not be set in motion by the furnishing of medical service years after the injury. The objective of the statute being to protect the claimant who reasonably refrains from making a claim because of the receipt of benefits voluntarily supplied, no claimant can allege that his failure to make timely application was excused by something that happened after the claim was already barred. Moreover, since the employer was under no obligation to furnish such benefits once the right to them was barred, it cannot be said that he provided them as voluntary compensation payments. [Footnotes Omitted.]

We specifically said in *Woodward* that this was not an issue in the case and that we discussed it only in an attempt to "prevent confusion." We did not mention *Jones*, *supra*.

Our conclusion is that the case is controlled by the supreme court's decision in *Jones* and that we are without authority to overrule it. We reverse and remand to the Commission for further proceedings not inconsistent with this opinion.

Reversed and remanded.

CRACRAFT and COOPER, JJ., agree.

ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT *v.* G.W. GIDEON

CA 88-310 770 S.W.2d 677

Court of Appeals of Arkansas
Division II
Opinion delivered May 24, 1989

Robert L. Wilson and *Maria L. Schenetzke*, for appellant.

Neil V. Pennick, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision

of the Workers' Compensation Commission holding that the statute of limitations contained in Ark. Code Ann. § 11-9-702(b) (1987) [formerly Ark. Stat. Ann. § 81-1318(b) (Repl. 1976)], did not bar appellee's claim for additional compensation benefits. The Commission reversed the decision of an administrative law judge who had held that the claim was barred by limitations. The Commission remanded the case for the law judge "to determine the additional benefits, if any, to which [the appellee] may be entitled and to enter an order based on his findings."

The appellants contend that the Commission's decision is not supported by the evidence, is internally contradictory, and defeats the purposes to be served by the statute of limitations. However, we do not reach the merits of the Commission's decision because we find the decision is not a final, appealable order.

In a Per Curiam opinion handed down this date, we have fully discussed the definition and test of a final, appealable order in a workers' compensation case. *See Gina Marie Farms* v. *Jones*, 28 Ark. App. 90, 770 S.W.2d 680 (1989). In that case we applied the rule used in *Festinger* v. *Kantor*, 264 Ark. 275, 571 S.W.2d 82 (1978), that "to be final the decree must also put the court's directive into execution, ending the litigation or a separable branch of it." That rule applied to the instant case obviously means that the order of the Commission is not a final, appealable order since it only holds that appellee's claim for additional benefits is not barred by limitations and remands the claim to a law judge for a determination as to merit. No Commission decision has been put into execution; neither the litigation nor a separable branch of it has been ended.

We also point out that while the issue of a final, appealable order has not been raised by either party in this case, the issue pertains to our appellate jurisdiction and is a matter that we raise on our own. *H.E. McConnell & Son* v. *Sadle*, 248 Ark. 1182, 455 S.W.2d 880 (1970); *Samuels Hide & Metal Co.* v. *Griffin*, 23 Ark. App. 3, 739 S.W.2d 698 (1987).

Dismissed.

JENNINGS and ROGERS, JJ., agree.

Joseph R. STRATTON v. DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND

CA 88-414 770 S.W.2d 678

Court of Appeals of Arkansas
Division II
Opinion delivered May 24, 1989
[Rehearing denied June 21, 1989.]

Jay N. Tolley, for appellant.

David L. Pake, for appellee.

MELVIN MAYFIELD, Judge. The crucial issue in this appeal from a decision of the Workers' Compensation Commission is whether the claimant, appellant Joseph R. Stratton, can proceed against the Death and Permanent Total Disability Trust Fund after entering into a joint petition settlement with his employer and its insurer. (Prior to Act 393 of 1983, the name of the appellee Fund was the Death and Permanent Total Disability *Bank* Fund.)

On July 5, 1977, appellant suffered a compensable injury. On November 24, 1986, he entered into a joint petition settlement with the employer and its insurance carrier which was approved by an administrative judge on November 25, 1986, after consideration of the answers to interrogatories filed with the petition by the claimant. The joint petition agreement provided in part:

> Approval of this Joint Petition will be final between the claimant and respondent, but claimant reserves all rights to benefits from the Death and Permanent Total Disability Bank Fund. However, the claimant recognizes that the decision in the case of *Sayre* v. *State Second Injury Fund*,

> 12 Ark. App. 238, 674 S.W.2d 941 (1984), may impede the claimant's right to proceed further against the Permanent Total Disability Bank Fund, . . .

In his answers to interrogatories, appellant also answered, "Yes," to the question, "State whether you understand that settlement of this action may be construed by the Court to prohibit a further action against the Permanent Total Disability Bank Fund."

The order of the law judge approving the joint petition settlement contained the following provision:

> IT IS FURTHER ORDERED that upon payment of these sums by the respondent this claim shall be forever barred and the Arkansas Workers' Compensation Commission loses any and all jurisdiction.

On December 11, 1987, appellant's attorney requested a hearing before the Workers' Compensation Commission on the issue of the claimant's right to proceed against the appellee Fund. In January of 1988 the administrative law judge ruled by letter opinion that the Workers' Compensation Commission no longer had jurisdiction to take further action on the claim. Appellant then appealed that decision to the full Commission which held that the law judge had "properly refused to assume jurisdiction and take further action in this claim." On appeal to this court the appellant argues that the Commission erred as a matter of law in refusing to determine his right to receive benefits from the Fund.

On this day we have issued an opinion in the case of *Ward* v. *Fayetteville City Hospital*, 28 Ark. App. 73, 770 S.W.2d 668 (1989), which presents the same issue involved in the instant case, except there the appellant is attempting to proceed against the Second Injury Fund. However, the joint petition in *Ward* does not contain the language, which we have in this case, that attempts to reserve the claimant's right to proceed against the Fund. Thus it can be argued that the appellant's attempt in this case to reserve his rights to benefits from the Fund gives him standing to appeal the Commission's decision holding it had no jurisdiction over his claim. At any event, we hold here, as the majority does in *Ward*, that under Ark. Code Ann. § 11-9-805 (1987) the Commission's approval of a joint petition settlement eliminates its jurisdiction over "any claim for the same injury or

any results arising from it." *See Sayre* v. *Second Injury Fund*, 12 Ark. App. 238, 674 S.W.2d 941 (1984).

In addition to the decision in *Sayre*, we call attention to *Jacob Hartz Seed Co.* v. *Thomas*, 253 Ark. 176, 485 S.W.2d 200 (1972), where the court was discussing a joint petition settlement under Ark. Stat. Ann. § 81-1319(*l*) [now Ark. Code Ann. § 11-9-805]. The court said:

> The necessity for extreme caution in approving such settlements so clearly recognized by the commission's procedural rule lies in the fact that any award based thereon finally concludes all rights of the parties, even foreclosing any right of appeal from the order of approval. This is the only procedure under our act *which leaves the claimant* without any further remedy, regardless of subsequent developments.

253 Ark. at 179 (emphasis added). We agree with the appellee that the language quoted above makes it clear that the finality of a joint petition settlement is viewed from the claimant's standpoint. It is the claimant's right to proceed further that is extinguished.

The statute under consideration here was also before the Arkansas Supreme Court in *Cook* v. *Brown*, 246 Ark. 11, 436 S.W.2d 482 (1969), where the court affirmed the Commission's refusal to set aside its approval of a joint petition settlement. The court said:

> Our statute is unambiguous. It is fortified by the wording of Ark. Stat. Ann. § 81-1326 (Repl. 1960). That section provides for the modification of awards generally; however, it specifically excepts from its provisions those awards made under § 81-1319(*l*).

246 Ark. at 14. The purpose of the statute was explained in *Bradford* v. *Ark. State Hospital*, 270 Ark. 99, 603 S.W.2d 896 (Ark. App. 1980), when the court said:

> Conceding entirely that one avowed and worth-while objective of Section 19(*l*) is to protect the claimant in joint petition settlements, it should be noted that there is another objective of Section 19, also to be valued, and that is the achieving of finality where the parties have reached a

> fair compromise — hence, the proviso that the Commission will have no further jurisdiction.

270 Ark. at 105-06. The public's stake in this issue is explained by Larson as follows:

> The public has ultimately borne the cost of compensation protection in the price of the product, and it has done so for the specific purpose of avoiding having the disabled victims of industry thrown on private charity or public relief. To this end, the public has enacted into law a scale of benefits that will forestall such destitution. It follows, then, that the employer and employee have no private right to thwart this objective by agreeing between them on a disposition of the claim that may, by giving the worker less than this amount, make him a potential public burden. The public interest is also thwarted when the employer and employee agree to a settlement which unnecessarily increases the cost of the product by giving the worker more than is due.

3 Larson, *Workmen's Compensation Law*, § 82.41 (1988).

The appellee has arguments other than the interpretation of the statute involved. Particularly to be noted are those revolving around the amount of benefits that must be paid by the employer for permanent total disability before Trust Fund liability attaches; the allocation and characterization of the amounts to be paid under the joint petition settlement; and whether the claimant is in fact permanently totally disabled. However, we affirm the Commission's decision holding that the law judge had "properly refused to assume jurisdiction and take further action in this claim." This makes it unnecessary to discuss the other arguments advanced by the Fund.

Affirmed.

JENNINGS and ROGERS, JJ., agree.

GINA MARIE FARMS *v.* Charles E. JONES

CA 89-6 770 S.W.2d 680

Court of Appeals of Arkansas
En Banc
Opinion delivered May 24, 1989

Constance G. Clark, for appellant.

Jay N. Tolley, for appellee.

PER CURIAM. The appellant has filed this appeal from an opinion of the Arkansas Workers' Compensation Commission, and the appellee has filed a motion to dismiss the appeal. The opinion of the Commission reversed an opinion by an administrative law judge which held that the claimant had failed to prove by a preponderance of the evidence that his injuries arose out of and in the course of his employment. The Commission held that the claimant had sustained an injury arising out of and in the course of his employment and remanded the matter to the law judge with instructions to take "any additional evidence that may be necessary in order to determine the full extent of the benefits to which the claimant is entitled."

The motion to dismiss the appeal filed by the appellee-claimant contends that the Commission's decision is not a final order and, therefore, is not appealable. We agree. In *Samuels Hide & Metal Co.* v. *Griffin*, 23 Ark. App. 3, 739 S.W.2d 698 (1987), we said:

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

Cooper Industrial Products v. *Meadows*, 269 Ark. 966, 601 S.W.2d 275 (Ark. App. 1980).

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

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

We reiterated our ruling in *Samuels* in the very recent case of *Hope Brick Works* v. *Welch*, 27 Ark. App. 90, 768 S.W.2d 37 (1989), which involved the identical question presented in the motion now before us. In that case the Workers' Compensation Commission reversed a law judge's decision which held the evidence failed to show a causal connection between a claimant's illness and death and his employment. The Commission remanded the case to the 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." 27 Ark. App. at 91. We said the Commission's remand "is not a final determination but merely remands the case for an additional hearing to receive further evidence." 27 Ark. App. at 92.

The appellant in the instant case cites several cases in

support of its contention that the Commission's decision is an appealable order. One case cited is *Luker* v. *Reynolds Metals Co.*, 244 Ark. 1088, 428 S.W.2d 45 (1968), in which the Arkansas Supreme Court said:

> The record shows that on May 26, 1967, the Commission found (1) that the heart attack suffered by appellant Luker arose out of and in the course of his employment by appellee Reynolds Metals Company; and (2) that as a result of the heart attack claimant sustained total disability for a period yet to be determined. The order provided, ". . . the commission expressly retains jurisdiction of this claim for the further purpose of determining the end of claimant's healing period and the extent of his permanent disability, if any."

244 Ark. at 1089. The court in *Luker* said the appealability of a Commission order was not limited to the final disposition of the matter before the Commission. The court also observed:

> The benevolent purposes of the act requiring the employer to make payments of compensation and medical expenses during the healing period would be defeated if all contested claims were permitted to lie dormant until the Commission could determine the end of the healing period and the permanent partial disability.

244 Ark. at 1090. However, the court carefully explained its holding in the final paragraph of its opinion by pointing out that the order of the Commission had determined the employer's responsibility for the injuries and had only retained jurisdiction for the purpose of determining the *end* of the claimant's healing period and the extent of his permanent disability, if any. The court concluded:

> These determinations were sufficiently final for the employer to contest on review (1) its liability to the claimant, (2) whether the evidence established the termination of the healing period, and (3) whether the evidence established any permanent partial disability. To this extent we hold it was final for purposes of review.

Id. The distinction between *Luker* and the instant case is clear. Here the appellant is seeking to appeal the sole issue of its liability

to the claimant; in *Luker* that was only one of the three issues which combined to make that order appealable. Obviously, in *Luker*, it should not have been necessary to wait until the extent of the permanent partial disability could be determined before appealing the other issues which were final. But to allow an appeal from the sole determination that the injury arose out of and in the course of the claimant's employment is quite a different matter. However, the appellant argues that it should be permitted to appeal the Commission's finding that the appellee sustained an injury arising out of and in the course of his employment because the purpose of the Commission's remand—to determine the benefits to which the appellee is entitled— will not matter if the Commission's determination of liability is reversed. The converse of that is also true. But in *H.E. McConnell & Son* v. *Sadle*, 248 Ark. 1182, 455 S.W.2d 880 (1970), the court held that an appeal from the Commission's sole determination that Mrs. Sadle was the legal widow and dependent of Lou Sadle was not a final, appealable order since the Commission had held in abeyance the question of whether his death arose out of and during the course of his employment. Quoting from a prior decision, the court in *McConnell* said, "Cases cannot be tried by piecemeal, and one cannot delay the final adjudication of a cause by appealing from the separate orders of a court as the cause progresses." Whether that statement is a complete answer to appellant's argument in this case may itself be arguable; however, as we have pointed out, in *Hope Brick Works* v. *Welch*, *supra*, we decided the issue now before us contrary to the argument made by the appellant in this case. We think that decision is in keeping with *McConnell* and we are not persuaded that the *Hope Brick* decision was wrong.

The *McConnell* case said for an order to be final it "must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy." It can, of course, be argued that this definition is too restrictive, and at the time *McConnell* was decided, the Arkansas Supreme Court had, in fact, described a final order in somewhat less restrictive language. In *Festinger* v. *Kantor*, 264 Ark. 275, 571 S.W.2d 82 (1978), the court extracted from the early case of *Davie* v. *Davie*, 52 Ark. 224, 12 S.W. 558 (1889), the rule—"To be final the decree must also put the court's directive into execution, ending the litigation or a separable branch of it." 264

Ark. at 277. But even under that less restrictive rule, the appellant in the present case cannot appeal from the Commission's sole finding of liability because, without a determination of some benefit to be received, the Commission's decision cannot be put into execution, and the Commission has remanded this matter to the law judge to determine the benefits to which the claimant is entitled. The operation of the rule set out in *Festinger* is aptly demonstrated by *Ark. State Highway Comm.* v. *Kesner*, 239 Ark. 270, 388 S.W.2d 905 (1965), where the court pointed out that an order "which establishes the plaintiff's right to recover, but leaves for future determination the exact amount of his recovery, is not final." 239 Ark. at 278. We also note that the court said it had in the past "inadvertently" allowed a piecemeal review in several highway eminent domain cases, but it was going to "revert to the better practice of reviewing only judgments and decrees that are final." *Id.*

We think the rule as expressed in *Festinger* is a better definition of a final, appealable order in a workers' compensation case than the rule as expressed in *McConnell*. At least, it should be added to the rule set out in *McConnell*. We have followed the *Festinger* rule in other type cases. *See, e.g.*, *Scaff* v. *Scaff*, 5 Ark. App. 300, 635 S.W.2d 292 (1982); *Bonner* v. *Sikes*, 20 Ark. App. 209, 727 S.W.2d 144 (1987). Therefore, while our jurisdiction to hear appeals from the Workers' Compensation Commission is not based on the same foundation as that of the Arkansas Supreme Court, *see Davis* v. *C & M Tractor Company*, 2 Ark. App. 150, 617 S.W.2d 382 (1981), our jurisdiction is, nevertheless, appellate jurisdiction and we think it is proper for us to also apply the *Festinger* rule in workers' compensation cases.

When we apply the *Festinger* rule to *Weeks* v. *Coca Cola Bottling Co.*, 270 Ark. 151, 604 S.W.2d 566 (Ark. App. 1980), relied upon by the appellant, we do not think that case supports appellant's position. In that case this court specifically pointed out that "we do not review those portions of the Commission's decision which are remanded to the administrative law judge." The determinations that were reviewed in *Weeks* were the Commission's findings that (1) the claimant's healing period had ended, thus ending temporary total disability benefits, (2) the claimant had a permanent *anatomical* disability of fifteen percent to the body as a whole, and (3) the employer had contro-

verted benefits in excess of five percent permanent partial disability but had not controverted rehabilitation benefits. Not reviewed was the issue of loss of capacity of claimant to earn money, since that would depend upon "further evidence and determination by the administrative law judge after further exploration of rehabilitation for the claimant." 270 Ark. at 154. Thus, the issues the Commission's order put into execution— by establishing liability, or ending it, for the payment of money compensation for definite amounts— were reviewed on appeal. Clearly, these were separable parts of the litigation that had been ended. But those issues which depended upon determinations after rehabilitation were not reviewed because there were no final orders as to them because they were remanded to the law judge.

Also controlled by the rationale applied in the preceding paragraph is the case of *Model Laundry & Dry Cleaning* v. *Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ark. App. 1980), relied upon by the appellant. The only involvement in that case of the principle under discussion is the reference to the contention that certain medical bills were not controverted because the Commission had, apparently in an order previous to the one on review, remanded the case to a law judge and, therefore, the Commission's approval of the bills was not a final order. The appellate court held, however, that the Commission's order was final with respect to the medical claim and that the remand to the law judge was "solely for the purpose of determining the rehabilitation benefits question." *See* 268 Ark. at 777. Thus, that decision is like the decision in *Weeks* v. *Coca Cola Bottling Co.*, *supra*, insofar as the point under discussion is concerned.

■ We also point out that the same rationale can be applied to the cases of *Chandler Trailer Convoy, Inc.* v. *Henson*, 266 Ark. 760, 585 S.W.2d 370 (Ark. App. 1979), and *Lloyd* v. *Potlatch Corporation*, 19 Ark. App. 335, 721 S.W.2d 670 (1986), both relied upon by the appellee in support of his motion to dismiss this appeal. *Chandler* involved the simple question of whether an order of remand from circuit court to the Commission was a final, appealable order. (The remand was made at a time that Commission decisions were appealed to circuit court.) The appellate court held the order was not a final order. This is clearly in line with the definition of a final order found in *Festinger*. The same issue was involved in *Lloyd*. While that case is, as the first paragraph of the

opinion suggests, procedurally complex, the point under discussion is simply stated and explained—a Commission's order of remand to a law judge is not a final, appealable order. 19 Ark. App. at 343.

Lloyd does discuss *Bibler Brothers, Inc.* v. *Ingram*, 266 Ark. 969, 587 S.W.2d 841 (Ark. App. 1979), which might appear to be an exception to the definition or test of a final order that we have used in this opinion. In that case the judge of the circuit court to which the Commission's decision had been appealed personally investigated and found a therapeutic work program that was "available and suitable." The judge then reversed the Commission's determination of permanent partial disability awarded to the claimant and found that the claimant's healing period had not ended. There was no remand to the Commission, and the appellate court held the circuit judge's decision was a final, appealable order because the court "substituted its own determination and legal conclusion, and that is a final order." Thus, the case does not conflict with the view of a final, appealable order that we have taken in this opinion.

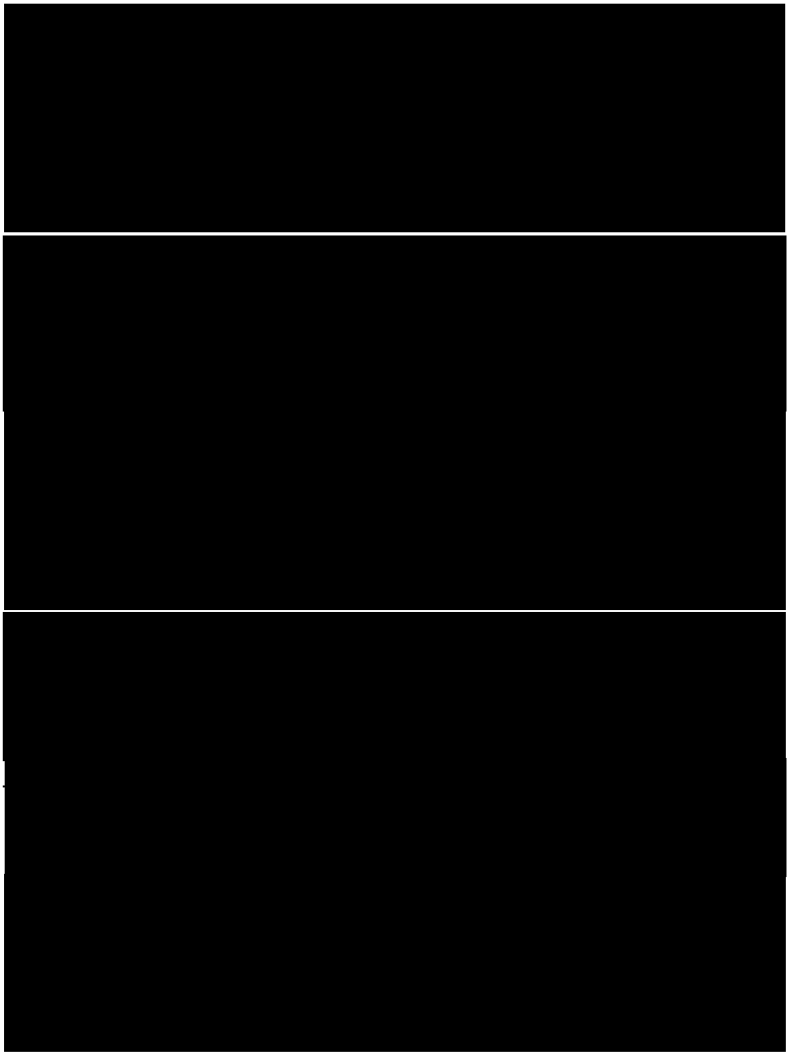
We have written at length because the point involved is a recurring matter in workers' compensation appeals. In the past, we have not always paid close attention to the point unless it was specifically raised by one of the parties. However, we take this occasion to call attention, as did our supreme court in *Arkansas State Highway Comm.* v. *Kesner*, *supra,* that we will in the future follow the "better practice" of reviewing only Commission orders that are final. This will mean, of course, that we will dismiss the appeal on our own motion in those cases where we realize there is no final, appealable order. For our authority to do this, see *H.E. McConnell & Son* v. *Sadle* and *Samuels Hide & Metal Co.* v. *Griffin*, *supra.*

The motion to dismiss the appeal in the instant case is granted. Appellee's request for attorney fees under Ark. Code Ann. § 11-9-715 (1987) is allowed. Although the statute provides for the fee if the "claimant prevails on appeal" and there has been no final order in this case, the appellee has in fact prevailed as the appeal has been dismissed. Therefore, we award appellee $500.00 attorney's fee under the provisions of the above statute. Appellee shall also recover his cost on appeal as provided by the rules of this court.

Lonnie Charles FOLLY *v.* STATE of Arkansas

CA CR 88-298 771 S.W.2d 306

Court of Appeals of Arkansas
En Banc
Opinion delivered May 31, 1989



Priscilla Karen Pope, for appellant.

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

GEORGE K. CRACRAFT, Judge. Lonnie Charles Folly appeals from his conviction of the crime of possession of a controlled substance for which he was sentenced to a term of ten years in the Arkansas Department of Correction and fined $10,000.00. On appeal, he contends that the trial court erred in not suppressing evidence seized from his person and vehicle at the time he was arrested, and during an inventory of the contents of his vehicle after he had been taken into custody. He contends that the evidence was seized as a result of an illegal arrest. We conclude that the evidence was properly admitted and affirm.

Where the validity of a warrantless search is in issue, this court makes an independent determination, based on the totality of the circumstances, whether the evidence obtained by means of a warrantless arrest or search should be suppressed. The trial court's finding will not be set aside unless it is found to be clearly against the preponderance of the evidence. As the preponderance of the evidence turns heavily on the question of credibility, we defer to the superior position of the trial court in making the determination of which evidence is to be believed. *State* v. *Osborn*, 263 Ark. 554, 556 S.W.2d 139 (1978).

The record reflects that on the morning of January 13, 1988, Anna Ralston called Lieutenant Upton of the Springdale Police Department and reported that appellant had a weapon and had threatened to shoot her, and stated that she was afraid of him. She also told the officer that appellant was with her sister and that she was afraid her sister was being held against her will. Lieutenant Upton testified that he was familiar with appellant because he had been mentioned in several criminal investigations and that

appellant's file reflected that his driver's license had been suspended. Lieutenant Upton checked and confirmed that the license had not been reinstated. At the afternoon briefing, he informed the duty officers of the threats on Ms. Ralston's life, gave them a description of appellant's pickup truck, and requested the officers to be on the lookout for appellant, who might also be driving without a license.

Later that evening, Ms. Ralston called Lieutenant Upton from a convenience store and was very upset. When he and another officer arrived, Ms. Ralston informed them that she had seen appellant's car parked in front of her apartment and was afraid that he was waiting for her in order to carry out his threats. She also expressed fear for the safety of her sister, who was alone in the apartment. The officers then accompanied Ms. Ralston to her apartment and, though appellant was not there, they found her sister in a room with the door locked. The sister informed them that appellant had left in his vehicle en route to the Holiday Inn and that he was armed. She was asked if he had any narcotics, and she replied, "Little, if any." Lieutenant Upton then radioed all units to be on the lookout for appellant's vehicle and advised them that he was armed and possibly in possession of drugs.

Appellant's vehicle was located at the Holiday Inn parking lot by another officer, and, under Lieutenant Upton's direction, the officer stopped appellant. The officer testified that, because of the information that appellant was armed, he first searched appellant's outer garments for weapons. During a pat-down, he felt something "long and hard" in appellant's jacket pocket and pulled out a plastic bag containing contraband. The officer then placed appellant under arrest. When he resumed the search, the officer found a six-inch lock blade knife in the same pocket.

After appellant was taken into custody and transported to the police station, but prior to towing appellant's vehicle to police storage, two officers conducted an inventory of the contents of the vehicle. During the inventory, the officers opened a large, unlocked, metal tool box affixed to the bed of appellant's pickup truck in which they found an unlocked "suitcase, duffel-bag type carrier." Inside the bag they found a black leather pouch containing a plastic bag of contraband.

First, appellant contends the trial court erred in not

suppressing evidence seized during the stop and pat-down search. We cannot agree. It is clear that the officer had a sufficient basis for an investigatory stop. Rule 3.1 of the Arkansas Rules of Criminal Procedure permits a police officer to stop and detain any person that he reasonably suspects has committed or is about to commit a felony or a misdemeanor involving danger of forcible injury to persons or property, where it is reasonably necessary to obtain or verify the identification of the party or to determine the lawfulness of his conduct. Reasonable suspicion means the suspicion based on facts and circumstances which, in and of themselves, may not constitute probable cause to justify a warrantless arrest, but which give rise to a suspicion that is reasonable as opposed to imaginary or conjectural. Ark. R. Crim. P. 2.1. The justification for the investigative stop depends on whether the police have a particularized, specific, and articulable reason indicating the person or vehicle may be involved in criminal activity. *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 285 (1982); *Reeves* v. *State*, 20 Ark. App. 17, 722 S.W.2d 880 (1987). Based on the evidence presented, the trial court found that the officer had reason to suspect that appellant was driving without a license and had committed the crime of terroristic threatening. We agree that this justified the stop.

It is equally clear that the officer had sufficient basis for conducting the pat-down search of appellant's person. Arkansas Rule of Criminal Procedure 3.4 permits an officer making a stop to search the outer clothing of the person if he reasonably suspects the person is armed and presently dangerous. Here, the officer had every reason to suspect that appellant was armed; therefore, the pat-down search was reasonable.

Appellant argues, however, that the officer making the arrest did so merely as a pretext for searching for contraband. This argument is based on the fact that appellant had been under police investigation and on the statement by the arresting officer that he had been informed that appellant was "heavily armed and dangerous and in possession of illegal narcotics."

An arrest may not be used as a pretext to search for evidence of other crimes; where the search and not the arrest is the officer's true objective, the search is not a reasonable one within the meaning of the Constitution. *Richardson* v. *State*, 288 Ark.

407, 706 S.W.2d 363 (1986). Appellant argues that, had the officers desired to arrest him for terroristic threatening, they could have done so with a warrant, after Ms. Ralston's first call to Lieutenant Upton. He also argues that stopping him for a suspended driver's license was obviously pretextual as the officer did not immediately ask to see his driver's license. Appellant's contentions overlook the fact that a second complaint was made to the police immediately before the stop, and that officers had just been informed again, by Ms. Ralston's sister, that appellant was armed. Further, the officer making the stop stated that he had done so with the object of investigating the information of both violations of which he had knowledge, and denied that the object of the stop and arrest was to search. At the suppression hearing, the officer testified: "I *arrested* [appellant] for possession of methamphetamine. I *stopped* him for the suspended driver's license that Lieutenant Upton said . . . during roll call. . . . I stopped him to check him . . . and from what information I had been given [he] was threatening to do bodily harm to this unknown female. . . . He was supposed to be heavily armed." (Emphasis added.)

Appellant also argues that the pat-down search by the officer was not confined to an intrusion reasonably designed to discover weapons and, therefore, all evidence obtained therefrom should be suppressed.We do not agree. The officer testified that that was the sole purpose for his search, and when he felt a hard object in the pocket he removed it and found it to be contraband. Although the rule limits the scope of the search, it does not limit what may be seized if discovered during the course of a permissible search. *Cf. Johnson* v. *State*, 21 Ark. App. 211, 730 S.W.2d 517 (1987); *Van Daley* v. *State*, 20 Ark. App. 127, 735 S.W.2d 574 (1987). From our review of the totality of the circumstances, we cannot conclude that the trial court's findings that the stop, frisk, and subsequent arrest of the appellant were valid are clearly against the preponderance of the evidence.

Second, appellant contends the trial court erred in not suppressing evidence seized during the inventory of his vehicle following his arrest. We find no error. We do agree with appellant that the intrusion into the tool box and containers found within it could hardly be justified as a search incident to the arrest, pursuant to Ark. R. Crim. P. 12.1. As the officers had no

reasonable cause to believe that the tool box contained contraband, a warrantless search of its contents or the suitcase found within it would have been constitutionally infirm. Appellant relies on *Scisney* v. *State*, 270 Ark. 610, 605 S.W.2d 451 (1980), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), which held that warrantless searches of trunks of vehicles, pursuant to a lawful arrest, are violative of one's fourth amendment rights, absent exigent circumstances. However, this case is clearly distinguishable from *Scisney* and *Sanders*. The courts now recognize the "inventory search" as a well-defined exception to the warrant requirement of the fourth amendment. *See Colorado* v. *Bertine*, 479 U.S. 367 (1987); *Illinois* v. *LaFayette*, 462 U.S. 640 (1983); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976); *Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986); *Reeves* v. *State*, 20 Ark App. 17, 722 S.W.2d 880 (1987); *Henderson* v. *State*, 16 Ark. App. 225, 699 S.W.2d 419 (1985); *Colyer* v. *State*, 9 Ark. App. 1, 652 S.W.2d 645 (1983). This exception has been codified in Ark. R. Crim. P. 12.6(b), which states:

> A vehicle impounded in consequence of an arrest, or retained in official custody for other good cause, may be searched at such times and to such extent as is reasonably necessary for safekeeping of the vehicle and its contents.

In *South Dakota* v. *Opperman*, the United States Supreme Court declared that the policies behind the warrant requirement are not implicated in the inventory search nor is the related concept of probable cause. Chief Justice Burger stated:

> The standard of the probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures . . . The probable cause approach is unhelpful when analysis centers upon reasonableness of routine administrative caretaking functions, particularly when one claim is made that the protective procedures are a subterfuge for criminal investigations.

Opperman, 428 U.S. at 370 n. 5.

In *Colorado* v. *Bertine*, police officers stopped the appellant for driving while under the influence of alcohol. After the appellant had been taken into custody, and before the arrival of a tow truck to take his vehicle to an impoundment lot, the officer

inventoried the vehicle in accordance with local police procedure requiring a detailed inventory of impounded vehicles. He found a backpack directly behind the front seat and inside the pack he observed a nylon bag containing metal canisters. He opened the canisters and discovered contraband. The court opined that the inventory search procedure serves to protect an owner's property while it is in the custody of the police and to ensure against claims of lost, stolen, or vandalized properties. These interests, in light of diminished expectation of privacy of an automobile, were held to outweigh the individual's fourth amendment interests.

In *Bertine, Opperman,* and *Illinois* v. *LaFayette*, the United States Supreme Court emphasized the fact that the police were following standard procedures and that there was no real evidence that they acted in bad faith or for the purpose of investigation. The execution of an inventory pursuant to a standard procedure tends to ensure that the intrusion is limited to that which is necessary to carry out the prescribed caretaking function. *Opperman, supra.*

In the present case, the trial court found that the officers were following standard procedure prescribed by the Springdale Police Department. The officers testified that it was standard procedure for all vehicles which were taken into custody pursuant to an arrest or impounded to be routinely inventoried in order to protect the property and avoid liability.[1] The court found that there was nothing to indicate that appellant's vehicle was treated differently than any other vehicle under similar circumstances. The tool box was not locked, and, unless the officers inventoried all property in the vehicle, there was a likelihood that items might be lost or stolen. The court concluded that the inventory was made in good faith and pursuant to regulations of standard procedure, and was valid.

Appellant argues that the police should have permitted him to make other arrangements for the protection of his property, and, therefore, the inventory was not necessary. This argument was clearly rejected by the United States Supreme Court in *Bertine*. There, the Court held that, while giving an

---

[1] There was some evidence in the record that the procedure was in writing.

opportunity to make alternative arrangements may have been possible, "the real question is not what could have been achieved, but whether the fourth amendment requires such steps." *Bertine*, 479 U.S. at 374 (quoting *LaFayette*, 462 U.S. 640, 647). The Court opined that the reasonableness of a governmental activity does not necessarily or invariably turn on the existence of alternate or less intrusive means. *See also Cady* v. *Dombrowski*, 413 U.S. 433 (1973).

In *Bertine*, the Court also rejected appellant's argument that the container in which the contraband was found should have been inventoried as a unit because it was in police custody and a search warrant could have been obtained. Reaffirming its holdings in *Opperman* and *LaFayette*, the Court stated:

> When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers in the case of home, or between glove compartments, upholstered seats, trunks, wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.

Bertine, 479 U.S. at 375.

Appellant also argues that the inventory was not justified because the vehicle was not abandoned in a place where it created a traffic hazard. He points out that the inventory allowed in *Henderson* v. *State*, 16 Ark. App. 225, 699 S.W.2d 419 (1985), followed the arrest of the intoxicated, sole occupant of a vehicle which was in such a position that it interfered with other persons' use of a state park facility. He also relies on *Colyer* v. *State*, 9 Ark. App. 1, 852 S.W.2d 645 (1983), where a similar situation occurred in which a car was stuck in the mud at a highway intersection and the intoxicated driver was taken from the vehicle. Appellant argues that, by contrast, the vehicle here was not creating a traffic hazard but was parked in a parking lot at a motel, and, therefore, a different result is warranted. We do not agree. The fact that a vehicle is legally parked does not necessarily negate the need to take the vehicle into protective custody. In *United States* v. *Staller*, 616 F.2d 1284 (5th Cir. 1980), where an arrest was made in the parking lot of a shopping mall, the court

held that the fact that the vehicle was parked and presented no apparent hazard to public safety was not decisive. In *Staller*, the court stated:

> Although [the] vehicle was lawfully parked and presented no apparent hazard to public safety, the officers were aware that a car parked overnight in a mall parking lot runs an appreciable risk of vandalism or theft. The likelihood of such harm would increase with every passing day. Under these circumstances taking custody of [the] car was a legitimate exercise of the arresting officer's community caretaking function. Once the officers took custody of the car, they were required by police department regulations to inventory its contents.

Staller, 616 F.2d at 1290 (footnote omitted).

Here, appellant's vehicle was to be left in a motel parking lot. The appellant was taken into custody on a serious charge, and the likelihood that the vehicle would be vandalized if not taken into protective custody certainly existed. In *Reeves* v. *State*, 20 Ark. App. 17, 722 S.W. 2d 800 (1987), this court upheld the inventory of a vehicle, parked in a motel parking lot, before it was towed to the police facility.

Nor do we find merit in appellant's final argument that the inventory was a mere pretext for a search for contraband. Where an inventory is otherwise permissible, its validity is not affected by a suspicion that contraband may be found. *United States* v. *Staller, supra; United States* v. *Prescott*, 599 F.2d 103 (5th Cir. 1979).

Rule 12.6(b) of the Arkansas Rules of Criminal Procedure provides that a vehicle retained in official custody for good cause may be searched at such times and to such extent as would be reasonably necessary for the safekeeping of the vehicle and its contents. The officers conducted this inventory in accordance with standard police practice. We cannot conclude that it was unreasonable for the police officers to take this vehicle into custody in the parking lot or that there was any requirement that it be searched only after being towed. In both *Bertine* and *Reeves*, the validity of the inventory was upheld where the vehicle was searched before it was towed from the point of arrest. The only

requirement is that the vehicle be taken into police custody before the inventory is conducted. We cannot conclude from the record here that the action of the police officers did not constitute the taking of the vehicle into custody prior to the inventory.

Affirmed.

COOPER and ROGERS, JJ., concur.

Jack DEES *v.* Sylvia Jane DEES

CA 88-345 771 S.W.2d 299

Court of Appeals of Arkansas
En Banc
Opinion delivered May 31, 1989

Honey & Honey, P.A., for appellant.

Charles A. Yeargan, for appellee.

JOHN E. JENNINGS, Judge. Jack Dees appeals from an order

of the Pike County Chancery Court dated September 13, 1988, which found him in contempt of court for nonpayment of child support and sentenced him to thirty days in jail. His sole argument here is that the court erred in finding him in contempt. We agree and reverse.

The parties were divorced on January 7, 1982. The decree incorporated by reference a property settlement agreement between the parties. The agreement provided that appellant would have custody of the two oldest children and appellee would have custody of the youngest. It contained three provisions dealing with child support.

> Defendant [Appellant] will pay to the Plaintiff through the registry of the Court the sum of $100.00 weekly child support.
>
> In the event that Plaintiff should remarry, then in that event, each party will support the minor children in their home.
>
> The parties agree that the provisions of this agreement relating to custody and support of the children are subject to the modification and approval of this Court and that the other terms relating to property are contractual.

On November 14, 1984, custody of all three children was placed in the appellee.

In September 1986, appellee filed a petition for citation for contempt alleging that appellant was behind in the payment of child support. Sometime later that month appellee remarried. The hearing on that petition was held on May 6, 1987. Appellant was represented by counsel but did not personally appear. The trial court granted appellee a judgment for $3,500.00, representing arrearages accrued to May 1, 1987. There is no indication that the appellant asked the court to relieve him of his duty to pay child support at this time, despite the provision in the decree. The court's order neither relieved the appellant from paying nor imposed a new obligation on him, and no appeal was taken from the order.

Another petition for citation was filed approximately one year later. It again contained an allegation that appellant was in

arrears in paying child support. At a hearing on July 20, 1988, the chancellor found that appellant was in arrears in the amount of $5,700.00 since May 6, 1987, and that he was in contempt "for the willful non-payment of child support as ordered by the court." The chancellor sentenced appellant to thirty days in jail and expressly continued child support at the rate of $100.00 per week. Only the propriety of the court's finding of contempt and consequent jail sentence are raised on this appeal.

Unquestionably the chancellor had authority to punish the appellant for willful disobedience of an order of the court. *See Hervey* v. *Hervey*, 186 Ark. 179, 52 S.W.2d 963 (1932). In the case at bar, although the decree clearly directs the appellant to pay child support, it also provides that should appellee remarry "each party will support the minor children in their home." It is conceded that at least since September, 1986, the appellee was remarried, and did have primary custody of all three children. The appellant cannot be found in willful contempt of an order of the court if he has not violated that order. The general principles stated in 17 Am. Jur. 2d *Contempt*, § 52 are applicable here:

> Before a person may be held in contempt for violating a court order, the order should inform him in definite terms as to the duties thereby imposed upon him, and the command must therefore be express rather than implied. Indefiniteness and uncertainty in a judgment, order, or decree may well constitute a good defense in proceedings for contempt based on violation of the judgment, order or decree. The very nature of the proceeding in either civil or criminal contempt for an alleged disobedience of a court order requires that the language in the commands be clear and certain. Whether the allegedly violated order contains such language depends upon the circumstances of the individual case.
>
> In determining, in contempt proceedings, whether an order has been violated, the order will not be expanded by implication beyond the meaning of its terms when considered in the light of the issues and the purpose for which the suit was brought. The order must be so specific and definite as to leave no reasonable basis for doubt as to its meaning.

We recognize that the appellant's unilateral termination of

child support, without obtaining prior approval by the court, may render him liable for arrearages accruing until approval is obtained. *See e.g., Thompson* v. *Thompson*, 254 Ark. 881, 496 S.W.2d 425 (1973); *Stracener* v. *Stracener*, 6 Ark. App. 1, 636 S.W.2d 877 (1982). But exposure to civil liability is not the question here — the question is whether the appellant can be said to be in willful contempt of an order issued by the chancery court.

Appellee contends that appellant's failure to ask the court, at the earlier hearing, to relieve him of his child support obligation and his making of several child support payments even after that hearing demonstrate a lack of reliance on the divorce decree. Appellant, however, need not demonstrate reliance to avoid a finding of contempt, if he is not in violation of the express provisions of the decree.

Reversed.

ROGERS, J., dissents.

JUDITH ROGERS, Judge, dissenting. I respectfully dissent. In order to fully explain my position, it is necessary to supplement the factual situation as described in the majority opinion.

In early September of 1986, appellee filed a petition for contempt, alleging among other things that the appellant was delinquent in his payment of child support. Sometime later that month, appellee remarried. Appellee filed an amended petition in February of 1987, which reflected that fact as the style of the case shows her married name, Stone. A hearing was held on appellee's petitions on May 6, 1987. The appellant did not appear, although he was represented by counsel at the hearing. The court reduced to judgment an arrearage in child support, which accrued up to May 1, 1987. From this order, it is apparent that the trial court treated his obligation to pay child support as continuing, despite the fact that the appellee had remarried and in spite of the language in the property settlement agreement that his duty to pay would terminate as of the appellee's remarriage. No relief was requested from the judgment, and no appeal was taken. After the entry of this order, appellant continued to make payments of child support.

At the hearing on the present matter the appellant offered by way of explanation that it was his understanding that the child

support ordered was exclusively for the benefit of the youngest child Gordon, and that his failure to pay should be excused for the period of time that Gordon had lived with him. Appellant testified that Gordon had been with him from July 1986 to January 1987. However, the record reveals that two of the only three payments made in 1986 were made during this time period. The appellant also argued, as he does on appeal, that he was under no duty to pay because the appellee had remarried. This issue was raised as an afterthought, as it was brought out on cross-examination of the appellant.

It is my view of the law that the appellant remained obligated for the payment of child support, and that it was incumbent on the appellant to seek enforcement of the agreement before his obligation terminated by placing the issue before the court.

In the context of the duty to pay child support beyond the age of a child's majority, it has long been held that the payor spouse cannot of his own volition cease or reduce the payment of child support without first obtaining a ruling from the court. *See Thompson* v. *Thompson*, 254 Ark. 881, 496 S.W.2d 425 (1973); *Jerry* v. *Jerry*, 235 Ark. 589, 361 S.W.2d 92 (1962).

In *Jerry* the Supreme Court stated that ordinarily there is no legal obligation on the part of a parent to contribute to the maintenance and support of his children after they become of age. Yet, the court also recognized that the trial court, and that court alone, had the right to change an award of support, and that the trial court, had the facts and circumstances justified, could have continued the payment of child support beyond the age of majority. It is also true that a contract between divorced parties with regard to their children's support, whether or not adopted by the court, is not binding upon the court and is subject to modification as the circumstances justify, without the parties' consent. *Hitt* v. *Maynard*, 265 Ark. 31, 576 S.W.2d 211 (1979). *See also, Thurston* v. *Pinkstaff*, 292 Ark. 385, 730 S.W.2d 239 (1987). This is especially significant in this case as the language in the property settlement agreement is subject to interpretation.

The case of *Stracener* v. *Stracener*, 6 Ark. App. 1, 636 S.W.2d 877 (1982), involved a provision with regard to alimony stating that "the defendant will pay to the plaintiff the sum of $400 per month as alimony as long as she remains single and

living as a single person." The appellee had been cited for contempt by his ex-wife for the failure to make alimony payments, to which he responded by asking that he be relieved from the obligation to pay, based upon his allegation that the appellant was no longer "living as a single person." In upholding the trial court's termination of the alimony payments, this court also agreed with the trial court that the appellee was responsible for the payments up to the time the issue was raised. The reasoning for so holding is more compelling in this case than in *Stracener* v. *Stracener, supra*, as this case concerns the payment of child support, as opposed to alimony. The appellant had the opportunity to raise the issue of appellee's remarriage at the May 1987 hearing, when the arrearage that was reduced to judgment included a period of time after appellees' remarriage, yet he failed to do so at that time or afterwards, and he did not assert this position until one year after the May 1987 judgment was entered.

The case of *Storey* v. *Ward*, 258 Ark. 24, 523 S.W.2d 387 (1975), while similar, is factually distinguishable from the case at bar. In *Storey* v. *Ward*, it was held that there is no principle of public policy against a contract provision which terminates the duty of support upon a spouse's remarriage. Moreover, it was stated that parents cannot permanently bargain away the duty to pay child support, and hence the trial court has the continuing power to modify the original decree, although the trial court could not retroactively render such a modification.

There the wife had foregone the payment of child support upon her remarriage in 1965 pursuant to agreement, and did not press her claim for an alleged arrearage until 1973. In the instant case, the appellee preserved her right to receive the payment of child support, whereas the appellant by his actions was not diligent in pursuing his claim.

The chancery court has the power to order imprisonment in contempt proceedings as punishment for the violation of its orders, to coerce obedience to its orders for the benefit of its litigants, or a merger of the two, subject to certain limitations. *Alexander* v. *Alexander*, 22 Ark. App. 273, 742 S.W.2d 115 (1987). In cases of civil contempt, the objective is the enforcement of the rights of the private parties to litigation. On the other hand, the primary reason for punishment for criminal contempt is

the necessity for maintaining the dignity, integrity and authority of, and respect toward, courts, and the deterrent effect on others is just as important as the punishment of the offender. *Warren* v. *Robinson*, 288 Ark. 249, 704 S.W.2d 614 (1986); *Dennison* v. *Mobley*, 257 Ark. 216, 515 S.W.2d 215 (1974).

In making a determination whether the contempt is civil or criminal in nature, the United States Supreme Court recently offered guidance as to this question in *Hicks* v. *Feiock*, 485 U.S. 624 (1988). The Court said:

> In *Gompers*; decided early in this century, three men were found guilty of contempt and were sentenced to serve 6, 9, and 12 months respectively. The Court found this relief to be criminal in nature because the sentence was determinate and unconditional. 'The distinction between refusing to do an act commanded, — remedied by imprisonment until the party performs the required act; and doing an act forbidden, — punished by imprisonment for a definite term; is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment.' . . .
>
> . . .
>
> The distinction between relief that is civil in nature and relief that is criminal in nature has been repeated and followed in many cases. An unconditional penalty is criminal in nature because it is 'solely and exclusively punitive in character.' *Penfield Co.* v. *SEC*, 330 U.S. 585, 593 (1947). A conditional penalty, by contrast, is civil because it is specifically designed to compel the doing of some act.

In the case at bar, the appellant was sentenced to thirty days in the county jail. The relief was definite, and unconditional, and was thus criminal in nature. A criminal contempt citation requires proof beyond a reasonable doubt. *Ward* v. *Ward*, 273 Ark. 198, 617 S.W.2d 364 (1981). Upon review of criminal contempt proceedings, the appellate court reviews the evidence as in ordinary criminal cases to determine whether the evidence, when given its full probative force, is sufficient to sustain the findings of the trial court, and such findings will not be disturbed unless there

is no substantial evidence to support them. *Dennison* v. *Mobley, supra.*

In finding that the appellant's failure to pay was willful, the chancellor could have concluded that the appellant placed no particular reliance on either of the contingencies offered by the appellant to explain his failure to pay. Furthermore, a review of the record reveals that the appellant had a history of failing to make his child support payments as ordered. Two body attachments had been issued previously, and it appears that at the hearing in May of 1987 the trial court did not hold him in contempt, but only reduced the arrearages to judgment. Giving due deference to the trial court's superior ability to assess the credibility of the witnesses, and based on the peculiar factual circumstances of this case, I simply cannot say that the finding of the court is not supported by substantial evidence. Nevertheless, the majority frames the issue in this case as to whether there was an extant order requiring the appellant to pay child support. Since they find no order, they conclude there was no contempt violation. In my opinion, the appellant continued to be under a duty to pay, and that this duty was reaffirmed by the court's order in May of 1987. Further, in my view his obligation and the order reciting this duty remained in effect until the appellant sought an interpretation of the provision in the agreement which would be a specific court order relieving him of the obligation to pay child support. It is, therefore, obvious to me that there was a support order in effect at the time of the present hearing, and that the scope of our review is whether there is substantial evidence to support the chancellor's finding that the appellant's failure to pay was willful — which I believe is amply supported by the record.

The majority places undue reliance on the appellant's belated excuse that the provision in the decree terminated his performance to justify his failure to pay. The record is clear that he never followed this provision, and never asked the trial court to construe the decree in this manner until he was cited for contempt. It is difficult to imagine given the history of this case, involving the appellant's repeated disregard of court orders, and based on the appellant's purported reliance on the decree only when it arguably inured to his benefit, that my fellow judges can excuse this egregious behavior.

I cannot follow the majority's logic in holding the appellant could be civilly responsible, for arrearages, even though they simultaneously hold that there is no order requiring him to pay child support, and yet not be subject to the contempt power of the court. As a result of the majority opinion, courts will be left with the often ineffective remedy of granting judgment when arrearages cannot be swiftly and effectively collected. It may also lead to the undesirable result of litigants interpreting their own decrees and orders, notwithstanding that this role is within the province of the trial court. It will result in litigants not affirmatively seeking the court's guidance when they choose not to make support payments, and will abrogate the court's role of enforcement of litigants' rights and responsibilities. We should not ask courts to enforce orders, and simultaneously strip them of their tools to accomplish this task.

Bertie NEEL *v.* CITIZENS FIRST STATE BANK OF ARKADELPHIA

CA 88-380 771 S.W.2d 303

Court of Appeals of Arkansas
Division II
Opinion delivered May 31, 1989

Daniel D. Becker, for appellant.

Baxter, Eisele, Duncan & Jensen, for appellee.

MELVIN MAYFIELD, Judge. Bertie Neel appeals a summary judgment granted to appellee, Citizens First Bank, in a lawsuit based upon the bank's alleged wrongful dishonor of three checks. Appellant argues that the circuit court erred in (1) granting summary judgment to the bank because there were genuine issues of material fact, and (2) in applying the law regarding right of set-off and repossession and sale of collateral. We disagree and affirm.

The facts in this case, established by affidavits and other matters of record, show that on August 1, 1986, appellant signed a note for $5,370.24 to the bank for the purchase of an automobile. The note gave the bank the right to set off any amount owed by appellant under the note against any right appellant had to receive money from the bank, including money held in a checking account. Appellant also gave appellee a security interest in the

automobile. The security agreement contained the following statement:

> [A]ll sums secured hereby shall become immediately due and payable at Secured Party's option without notice to Debtor, and Secured Party may proceed to enforce payment of the same and to exercise any or all of the rights and remedies provided by the Uniform Commercial Code, as well as all other rights and remedies possessed by Secured Party.

Appellant also maintained a checking account with the bank. The checking account agreement stated:

> By signing this form [appellant] agree[s] that we may at any time (and without prior notice, except as prohibited by law) set-off the funds in this account against any debt owed to us now or in the future, by any of you having the right of withdrawal, subject to any limit on the right of withdrawal from this account by such person or legal entity.

Appellant became delinquent on the loan payments, and after several attempts on the part of the bank to work with appellant to bring her loan payments up to date, the bank repossessed the automobile on July 15, 1987. Because the bank believed a sale of the automobile would not completely satisfy the balance due on the loan, the bank placed a hold on appellant's checking account on July 16, 1987, when a $3,900.00 deposit was made to that account. On July 17, 1987, a $3,285.00 check written by appellant to First Bank of Gurdon was returned to the appellee bank. Appellee consulted with its attorney and, at his instructions, released the hold on appellant's account while the attorney researched the propriety of proceeding against the collateral and employing a set-off against the account. Several checks were allowed to clear appellant's account at this time. On July 20, appellant made a $3,325.00 deposit to her checking account, and two checks were paid. On July 21, three more checks cleared appellant's account.

On July 22, attorney for the appellee bank instructed it that a hold order could be placed on appellant's checking account, and on that day, the bank placed a $3,590.00 hold on the account. Also on that day, a bank in Benton called the appellee bank and

indicated that it was returning a $3,200.00 check that had been deposited by appellant on July 20. On July 23, the $3,590.00 hold was released, and a $7,700.00 hold was put on appellant's checking account. This was to take care of the $3,200.00 check and about $4,600.00 due on appellant's loan from the appellee bank. After the $3,200.00 check was charged back to appellant's account, the appellee bank applied a $2,924.55 set-off from appellant's checking account to her loan.

This left a balance of over $1,600.00 due on appellant's debt, and after notice, the appellee purchased the automobile for $3,400.00. Only one other bid was received at the sale. That bid was $1,350.00, and the appellee considered it to be inadequate. After the payment of sale expenses and attorney's fees, appellee returned the excess of the sale proceeds in the amount of $1,597.33 to appellant.

In her response to appellee's motion for summary judgment, appellant argued that a factual dispute existed and that she was entitled to proceed to trial. However, she did not supply any affidavits to counter the affidavits offered by appellee. On June 13, 1988, counsel for the parties argued the propriety of the entry of summary judgment. At that time, appellant's attorney agreed to let the circuit court decide the matter on the pleadings and stated: "[y]our Honor, the reason we didn't file anything, we don't have any disagreement on the facts. I mean she can't swear to the law and the law is all we've got to argue about, so. . . . Well, we're not arguing any of the facts, so there's no point in swearing."

Summary judgment is an extreme remedy and should be granted only when it is clear that there is no issue of fact to be decided. *Johnson* v. *Stuckey & Speer, Inc.*, 11 Ark. App. 33, 665 S.W.2d 904 (1984). The object of summary judgment is not to determine any issue of fact, but to determine whether there is an issue of fact to be tried; if there is any doubt, the motion should be denied. *Rowland* v. *Gastroenterology Associates, P.A.*, 280 Ark. 278, 657 S.W.2d 536 (1983). On appeal, we must view the evidence in the light most favorable to the party opposing the motion for summary judgment. *Hughes Western World, Inc.* v. *Westmoor Manufacturing Co.*, 269 Ark. 300, 601 S.W.2d 826 (1980). Once the moving party makes a prima facie showing of entitlement to summary judgment, the party opposing summary

judgment must meet proof with proof by showing a genuine issue as to a material fact. *Hughes Western World*, 269 Ark. at 301, 601 S.W.2d at 826-27. Where the facts are not disputed and the law can be applied, a summary judgment is an appropriate means of avoiding the expense and time of a formal trial. *Childs* v. *Berry*, 268 Ark. 970, 973, 597 S.W.2d 134, 135 (Ark. App. 1980).

Appellant's argument that issues of fact remain to be tried is entirely inconsistent with her position below. First, appellant offered no proof in response to appellee's affidavits and exhibits. Second, appellant clearly waived this issue and agreed with appellee that no material issues of fact remained for trial. Accordingly, appellant may not assert this argument on appeal. *See Briscoe* v. *Shoppers News, Inc.*, 10 Ark. App. 395, 401, 664 S.W.2d 886 (1984) (one may not complain of action he has induced, consented to, or acquiesced in).

We also find no error in the circuit court's application of the law to the facts of the case. Appellant argues that appellee should have chosen its remedy and that it could not exercise its rights of repossession and sale and set-off simultaneously. Appellant further argues that, if these remedies could be exercised simultaneously, appellee should not have exercised its right of set-off without first subtracting the fair market value of the collateral from the amount owed. We do not think any of the cases cited by appellant supports her argument. Moreover, our review of the Uniform Commercial Code and the relevant case law reveals no reason why a bank cannot set off a depositor's account for an overdue debt and exercise its right to repossess collateral securing that debt simultaneously. Ark. Code Ann. Section 4-4-303 (1987) recognizes a bank's right to set off funds in a depositor's account against that depositor's overdue loan balance. In *Clay County Bank* v. *First National Bank*, 178 Ark. 989, 993, 13 S.W.2d 595, 596 (1929), the supreme court stated that "[a] bank has a right to set-off against an overdue note of a depositor so much of the deposit as is required to discharge the note."

Arkansas Code Annotated Section 4-9-501(1) (1987) provides as follows:

> When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and except as limited by subsection (3) those

> provided in the security agreement. He may reduce his claim to judgment, foreclose, or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies, and duties provided in Section 4-9-207. The rights and remedies referred to in this subsection are cumulative.

Here, neither the funds in the checking account nor the fair market value of the car were alone sufficient to pay the outstanding debt. That the sale of the automobile was commercially reasonable is not questioned; neither is it disputed that appellee gave appellant the excess proceeds received from its sale. Further, the note and checking account agreement authorized set-off in the event of appellant's default. We believe that the remedies available to appellee in the event of appellant's default were cumulative, and under the circumstances of this case at least, the appellee could pursue its rights of set-off and repossession and sale simultaneously. *See Merchants & Planters Bank* v. *Meyer*, 56 Ark. 499 (in some volumes this case is found at 473), 20 S.W. 406 (1892); B. Clark, *The Law of Bank Deposits, Collections and Credit Cards* Section 11.13 (rev. ed. 1981); T. Quinn, *Uniform Commercial Code Commentary and Law Digest* Section 9-501[A][7] (1978).

Affirmed.

JENNINGS and ROGERS, JJ., agree.

Curtis Lee GRAHAM *v.* John SLEDGE, Jewell Sledge, and James R. Sledge

CA 89-92 771 S.W.2d 296

Court of Appeals of Arkansas
Division I
Opinion delivered May 31, 1989

Don E. Glover; Wright, Lindsey & Jennings, for appellant.

Griffin, Rainwater & Draper, P.A., by: *Billy J. Hubbell*, for appellees.

JUDITH ROGERS, Judge. In this appeal, the question presented is whether the trial court erred in imposing against the appellant the sanctions of dismissing his complaint, striking his answer to appellees' counterclaim, and entering a default judgment in favor of appellees for the appellant's failure to timely provide answers to interrogatories. The appellant advances several overlapping points for reversal which can essentially be combined into two arguments. As the first argument, he generally contends that such sanctions were not justified under the facts and circumstances of this case as the appellees were not prejudiced by his delay in responding to the interrogatories. Secondly, it is argued that the trial court erred in granting a default judgment on appellees' counterclaim when none of the interrogatories related to appellees' counterclaim. We find no abuse of discretion and affirm.

On October 24, 1987, appellant filed suit against the appellees seeking damages arising out of an automobile accident in which the parties were involved. Appellees answered the complaint and asserted a counterclaim which was in turn answered by the appellant. On December 2, 1987, the appellees propounded certain interrogatories that were responded to by the appellant on January 14, 1988. Appellees filed a motion to compel on February 3rd, alleging that the responses given were incomplete, and that the answers did not meet the requirements of Ark. R. Civ. P. 33(a), in that each interrogatory was not repeated immediately preceding the answer. In addition, it was alleged that the answers were not submitted under oath.

After a hearing on appellees' motion, the trial court made findings consistent with appellees' allegations and entered an order dated March 2, 1988, whereby the appellant was directed to resubmit answers to the interrogatories, in proper form and signed under oath, on or before April 15, 1988. The appellant was further ordered to respond to seven interrogatories which the court found had been previously answered either evasively or incompletely. The order also stated that the "[f]ailure to comply with this order shall result in sanctions and expenses being established and awarded herein pursuant to the provisions of Rule 37 of the Arkansas Rules of Civil Procedure."

The answers to the interrogatories were not received until April 22nd, whereupon appellees filed a motion to dismiss. A hearing was scheduled on this motion on April 28th. Although he had received notice of the hearing, the appellant failed to appear, and the trial court ordered the imposition of the sanctions which are the subject of this appeal. The date that the case was regularly scheduled for trial, May 9, 1988, was kept for the purpose of taking evidence to establish the amount of the appellees' damages, and for determining attorney's fees and expenses to be awarded. The appellant filed a motion to set aside the court's order striking his complaint and answer to the counterclaim; the trial court denied the motion.

Rule 37(d) of the Arkansas Rules of Civil Procedure provides the following with respect to a party's failure to serve answers to interrogatories:

> [t]he court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

Subdivision (b)(2)(C) provides the following sanction:

> An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

The thrust of appellant's first argument is that the sanctions

imposed were not warranted under the facts of this case. Relying largely on federal law, the appellant argues that before such drastic sanctions can be meted out, the failure to make discovery must be accompanied by a showing of bad faith or willfulness, or resulting prejudice to the party seeking discovery. He argues that these elements were absent in the instant case as the answers were tendered only five working-days late, and that the initial responses, although admittedly not in proper form, contained answers to most of the questions asked. He adds that in his deposition, which was taken on March 7, 1988, answers were supplied to most of the questions that had initially been unanswered.

In response to the issues raised in this argument, we do not find that Rule 37 has been so narrowly construed as to mandate an affirmative showing of these elements before the sanctions of dismissal or the entry of a default judgment can be imposed. As pointed out in *Cagle* v. *Fennel*, 297 Ark. 353, 761 S.W.2d 926 (1988), the supreme court stated that "[o]ur rules do not require a finding of willful or deliberate disregard under the circumstances." Although these factors may be pertinent to the trial court's decision in either awarding sanctions or weighing which sanctions should be imposed, the lack of such findings does not prohibit the trial court from ordering sanctions authorized under the rule.

As the court did in *Cagle* v. *Fennel, supra*, we also recognize that the dismissal of a complaint or the granting of a default judgment is drastic and both are severe sanctions. *See also, Harper* v. *Wheatley Implement Co., Inc.*, 278 Ark. 27, 643 S.W.2d 537 (1982). The appellant offers his substantial compliance in responding to the interrogatories as a rationale for excusing his non-compliance with the order of the court setting a deadline for the completion of this discovery, and we agree that perhaps the better practice might be for a trial court to exercise some restraint when imposing the harshest of sanctions. Without elaborating on the merits of appellant's contention that the appellees suffered no prejudice by the delay, we cannot say that the trial court abused its discretion in ordering these sanctions when a previous order had been entered, which clearly stated that the failure to comply would result in the award of sanctions pursuant to Rule 37. Relying on *Mann* v. *Ray Lee Supply*, 259

Ark. 565, 535 S.W.2d 65 (1976), the court in *Cagle* placed particular significance on the fact that the sanctions were preceded by an order in which the appellant was "pointedly warned" of the consequences of his failure to provide the requested discovery. *Accord, Burton* v. *Sparler*, 272 Ark. 254, 613 S.W.2d 394 (1981); *Loosey* v. *Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988).

Additionally, we find no merit to the appellant's argument that the order compelling discovery in this case did not "pointedly warn" him that a dismissal or default might possibly be entered. Reference to Rule 37 is sufficient. We further note that the entry of a default judgment did not foreclose the possibility for relief due to excusable neglect, unavoidable casualty or other just cause as provided in Ark. R. Civ. P. 6(b). *Mann* v. *Lee Supply, supra; Belcher* v. *Bowling*, 22 Ark. App. 248, 738 S.W.2d 804 (1987). Appellant's arguments do not support the setting aside of the default on these grounds, and it does not appear that the appellant offered any explanation for the failure to respond on the set date.

As appellant's second point for reversal, he contends that the trial court erred in granting judgment on appellees' counterclaim for alleged inadequacies in discovery when none of the questions related to appellees' counterclaim. Appellant relies on the decision of *Harper* v. *Wheatley Implement Co., Inc., supra*, and argues in his brief that "[a]s shown in *Harper*, the court *must* consider the relationship of the information withheld in formulating a remedy for sanctions." (Emphasis ours.) As we stated in our earlier discussion, we do not read Rule 37 as placing such narrow restrictions on the trial court's ability to act, nor do we interpret this case so broadly as requiring that in order for pleadings to be stricken, they must bear a direct relationship to the requested discovery. The trial court is vested with the discretion to impose sanctions pursuant to the rule for failure to comply with discovery obligations. Inflicting such sanctions for the failure to make discovery in disregard of the court's order may, on its face, appear excessively punitive. However, we give due deference to the trial judge who is in a superior position to make this determination, and who must have the discretion to control the conduct of litigation. In this case, the sanctions that the court imposed were within the range of those authorized

under the rule, and accordingly, we affirm the decision of the trial court as we find no abuse of discretion.

AFFIRMED.

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

Mae Ireland BROWN *v.* Steve IMBODEN, Administrator of the Estate of Bill Brown, et al.

CA 88-274 771 S.W.2d 312

Court of Appeals of Arkansas
En Banc
Opinion delivered June 7, 1989

Charles R. Easterling, for appellant.

Howard & Howard; Collier & Jennings, for appellee.

JAMES R. COOPER, Judge. The only issue in this appeal from the Craighead County Probate Court is whether the court erred in finding that the appellant, Mae Ireland Brown, is not the legal surviving spouse of the decedent, Bill D. Brown. We reverse and remand.

The parties stipulated to the facts involved in this case. Bill Brown married Roberta Barksdale in 1963, and they were divorced in 1974. They had two children, Wayne and Rickey Brown. Roberta, as guardian of Rickey Brown, is an appellee in this appeal.

After his divorce from Roberta, Bill married Brenda Brown. They later separated and Brenda filed for divorce in March 1978. There were no children born of this union. On April 14, 1980, the Craighead Chancery Court dismissed the divorce action for lack of prosecution.

The appellant, Mae Ireland Brown, believing Bill was divorced, married Bill on March 30, 1979. Mae Brown testified that in January or February of 1981, she was contacted by Brenda who informed her that there had been no dissolution of the marriage between Brenda and Bill. Mae stated that she immedi-

ately left Bill and did not live with him again until they were remarried on June 27, 1981.

On February 18, 1981, the chancellor set aside the April 14, 1980, order dismissing Brenda's 1978 petition for divorce and on February 27, 1981, Bill filed an answer and a counterclaim seeking a divorce from Brenda. A hearing was held on June 8, 1981, on the divorce complaint. Bill Brown, Mae Ireland Brown, Brenda Brown, and Mae Brown's daughter were present. Mae testified that she attended the hearing at Bill's insistence, and that at the conclusion of the hearing the trial judge stated that they were "as single people." However, the divorce decree was not filed with the chancery clerk until July 1, 1981, four days after the appellant and Bill had remarried. Therefore, the decree did not become effective until July 1, 1981, and the June 27, 1981, marriage between Bill and Mae was invalid. *See Standridge* v. *Standridge*, 298 Ark. 494, 769 S.W.2d 12 (1989).

Bill died intestate on December 17, 1987. After a hearing to determine heirship, the probate court found that Mae was not the legal surviving spouse of Bill Brown and that their purported marriage on June 27, 1981, was void *ab initio*. On appeal, the appellant contends that the appellees should have been estopped from questioning the validity of her marriage to Bill. We agree.

Initially we note that, although the appellant never specifically pled estoppel, the record clearly shows that the case was tried on an estoppel theory by implication. The relevant dates of the marriages and divorces involved were stipulated to by both parties, and the appellant testified at length regarding her reliance on Bill Brown's assertions that he was in fact divorced. Moreover, the appellees, in their brief, do not assert or rely upon any failure on the part of the appellant to raise estoppel as an affirmative defense. Under these circumstances, we think that the issue was tried by the implied consent of the parties, and we treat the pleadings as amended to conform to the proof. Ark. R. Civ. P. 15(b).

As stated in *Fox* v. *Fox*, 247 Ark. 188, 444 S.W.2d 865 (1969):

> The theory [of estoppel] is that the marriage is not made valid by reason of the estoppel but that the estopped person

> may not take a position that the divorce or latter marriage was invalid.
>
> . . .
>
> [T]he defendant by reason of his conduct will not be permitted to question its validity or the divorce; so far as he is concerned, he and the plaintiff are husband and wife.

247 Ark. at 199. In the present case, it was the decedent who initiated the remarriage of himself and the appellant, and it was at his insistence that she attend the divorce hearing. The evidence shows that the appellant relied, in good faith, on the validity of Bill's divorce from Brenda and relied in good faith on the validity of her marriage to Bill for almost seven years. On our de novo review, *Taylor* v. *Hill*, 10 Ark. App. 45, 661 S.W.2d 412 (1983), we find that Bill was at least culpably negligent in not determining that his divorce decree was final before initiating his remarriage with the appellant and that he would have been estopped to deny that the decree was final. *See J.F. Hasty & Sons* v. *Hampton Stave Co.*, 80 Ark. 405, 97 S.W. 675 (1906).

By this holding, we do not declare the validity of common-law marriage in Arkansas. A legal common-law marriage cannot be entered into in Arkansas, nor can one be created by estoppel, but equity can, and we hold that it does, under the facts in this case, require that the parties be estopped from denying the validity of a marriage. *Fox, supra.* Although a probate court is without jurisdiction to grant equitable relief, it may apply equity doctrines in cases properly before it. *Hilburn* v. *First State Bank*, 259 Ark. 569, 535 S.W.2d 810 (1976); *McDermott* v. *McAdams*, 268 Ark. 1031, 598 S.W.2d 427 (Ark. App. 1980). The Supreme Court's opinion in *Standridge, supra*, is not controlling in the case at bar because, in *Standridge*, no issue of estoppel was present: both parties in that case were aware that their marital status was questionable, to the extent that they made several visits to Oklahoma in a futile attempt to create a valid common-law marriage. In contrast, the appellant in the case at bar was unaware of any possible invalidity and, as we have noted, Bill Brown obtained her presence at the divorce hearing with the specific purpose of inducing her to marry him.

We hold that the estate and the heirs of Bill Brown are

estopped from challenging the validity of Bill's marriage to the appellant because they stand in privity to the decedent. Because Bill himself would be barred from challenging the validity of the marriage, his heirs and his estate are in no better legal position to challenge the validity of Bill's marriage to the appellant. *See Simmons* v. *Simmons*, 203 Ark. 566, 158 S.W.2d 42 (1942) and *Ripley* v. *Kinard*, 155 Ark. 172, 244 S.W. 3 (1922).

We reverse and remand to the Craighead Probate Court to enter orders not inconsistent with this opinion.

Reversed and remanded.

MAYFIELD and JENNINGS, JJ., concur.

CORBIN, C.J., and CRACRAFT, J., dissent.

JOHN E. JENNINGS, Judge, concurring. I concur but would not reach the issue of estoppel. In my view the marriage between Bill and Mae Ireland Brown was valid. Two rules of civil procedure are involved here. Ark. R. Civ. P. 58 provides:

> Every judgment or decree shall be set forth on a separate document. A judgment or decree is effective only when so set forth and entered as provided in Rule 79(a). Entry of judgment or decree shall not be delayed for the taxing of costs.

Ark. R. Civ. P. 79(a) (now Arkansas Supreme Court Administrative Order 2) provides, in part:

> All papers filed with the clerk, all process issued and returns thereon, all appearances, orders, verdicts and judgments shall be noted chronologically in the dockets and filed in the folio assigned to the action and shall be marked with its file number. These entries shall be brief, but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made.

In the case at bar the decree of divorce is dated June 8, 1981. It was filed marked on July 1, 1981, and the docket entry made in connection with the decree was made on that date. It reads

"Decree filed and recorded." We have no reason to assume that the decree was reduced to writing on any date other than June 8, 1981. There is no indication in this record it was entered nunc pro tunc.

In *Standridge* v. *Standridge*, 298 Ark. 494, 769 S.W.2d 12 (1989), the issue was the validity of a divorce, and consequent validity of a subsequent marriage. In *Standridge*, the chancellor heard divorce proceedings between Terry and Annie Thacker on October 5, 1984. He made a docket entry on that date, "Decree—A little unusual but it may work." The decree was filed on October 24, 1984. In the meantime, on October 7, 1984, Annie Thacker had participated in a marriage ceremony with Harold Standridge. From a reading of the opinion in *Standridge* it is not clear when the decree of divorce was reduced to writing, i.e., in the language of Rule 58, when it was "set forth on a separate document." In *Standridge*, the supreme court said, "Since the adoption of the rules, this court has made it clear that a judgment or decree may not be effective until it has been 'entered' as provided in Rules 58 and 79." The court used essentially the same language in *Childress* v. *McManus*, 282 Ark. 255, 668 S.W.2d 9 (1984) ("ARCP Rule 58 plainly states a decree is effective only when entered as provided by Rule 79(a)").

In my judgment, however, this was not the holding in *Standridge*. In that case the supreme court said:

> Annie argues the *Childress* case and cases similarly decided by our court of appeals are distinguishable because they involve the death of a party, which is not involved here, and because they involve situations where there were or may have been issues left unresolved after announcement of the decree which, she contends, is not the case here. We see no significant difference between the case where a death occurs before entry of a decree and one where remarriage occurs before entry of a decree. *In each case, the question is the same. Was the announcement of the divorce from the bench sufficient to effect the divorce? We again say no.* (Emphasis added.)

In my view this was the issue decided in *Childress* and in *Standridge*. As the majority in *Standridge* noted, these holdings effectively overruled *Parker* v. *Parker*, 227 Ark. 898, 302 S.W.2d

533 (1957).

After stating the issue and deciding it, the majority in *Standridge* went on to explain the rationale for its holding.

> Nor are we persuaded by the idea that in those cases there may have been issues remaining to be resolved. Although in the case before us now the support and property issues seemed to have been settled through Annie's testimony at the divorce hearing as to the parties' agreement, there is no telling what sort of objections one or the other of them might have upon seeing the decree in writing and being asked to approve it before entry. Our experience tells us there may always be outstanding issues until a written document is made the final instrument of the divorce and the divorce is made final at some definite point.

The manner in which the court posed the issue in *Standridge* leads me to the conclusion that the "definite point" is the point at which the divorce decree is reduced to writing in a "separate document", signed by the trial court. An announcement from the bench or an entry on the docket, or both, would be insufficient.

Other language in *Standridge* leads me to this conclusion. The court expressly noted that Administrative Order 2 provides merely for the ministerial act of filing. Although the holding in *Parker* v. *Parker, supra*, has been overruled by the court's decisions in *Childress* and *Standridge*, the distinction drawn in *Parker* between judicial and ministerial acts remains a valid one. I am not yet persuaded that the supreme court intends that the validity of a divorce, and the consequent validity of a subsequent marriage, should turn on the date of the performance of a ministerial act. This is particularly so in view of the long-standing presumption against deliberate bigamy, *Bruno* v. *Bruno*, 221 Ark. 759, 256 S.W.2d 341 (1953), and the common law presumption of the validity of the second marriage, *Cole* v. *Cole*, 249 Ark. 824, 462 S.W.2d 213 (1971).

Our supreme court has stated that, because our procedural rules are patterned after the federal rules, we should look with persuasion upon how the federal courts have interpreted their corresponding rules. *Robinson* v. *Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987). Although *Banker's Trust Co.* v. *Mallis*, 435

U.S. 381 (1978), is clearly not directly in point here, some of the language used by the United States Supreme Court is relevant. In discussing Rule 58 the Court said:

> It must be remembered that the rule is designed to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced. . . . The rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss.
>
> The Federal Rules of Civil Procedure are to be "construed to secure the just, speedy, and inexpensive determination of every action."
>
> * * *
>
> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. (Citations omitted.)

If, in the case at bar, the chancellor signed a written decree of divorce on June 8, 1981, the subsequent remarriage of Bill Brown to Mae Ireland Brown was valid, notwithstanding the delay in the performance of any ministerial act by a clerk.

MELVIN MAYFIELD, Judge, concurring. I concur in the opinion written by Judge Cooper. On our de novo review, I think the evidence is clear that the decedent, Bill Brown, induced the appellant, Mae Ireland Brown, to marry him again after he insisted that she attend the court hearing at which the judge stated that Bill and Brenda Brown were divorced.

While Bill may not have actually known that his divorce was not final at the time he married Mae the second time, I think he was guilty of willful disregard of her interest by not making sure that the decree was final before he married her again. It was his divorce and he knew she did not want to live with him until he had divorced Brenda and he and Mae were married again. By remarrying Mae after insisting that she come to court and see the judge grant him a divorce from Brenda, I think Bill would have been estopped to deny that his divorce from Brenda was not final at that time.

In *Bethell* v. *Bethell*, 268 Ark. 409, 597 S.W.2d 576 (1980), the court said:

> A party who by his acts, declarations or admissions, or by his failure to act or speak under circumstances where he should do so, either with design or willful disregard of others, induces or misleads another to conduct or dealings which he would not have entered upon, but for such misleading influence, will not be allowed, because of estoppel, afterward to assert his right to the detriment of the person so misled.

268 Ark. 424 (citations omitted).

Because Bill Brown would have been estopped to deny that his divorce was final at the time he remarried Mae, under the cases cited by Judge Cooper, Bill's heirs and estate are also estopped to make such denial.

Not only is the doctrine of estoppel a sufficient basis for upholding the validity of Mae's marriage to Bill, I think it is the only basis. It seems to me that the case of *Standridge* v. *Standridge*, 298 Ark. 494, 769 S.W.2d 12 (1989), makes it abundantly clear that a decree is not effective until properly entered. As the majority opinion in that case states, "since the adoption of the rules" the Supreme Court has made it clear that a judgment or decree is not effective until it has been entered as provided by the rules of civil procedure. It is hard for me to believe that any lawyer admitted to practice when the rules were made effective on July 1, 1979, has not known ever since then that decrees and judgments have to be entered before they are effective. And lawyers admitted since then should have known this. At least the rules, the appellate courts, and countless seminars have made it clear. Not only does the concept affect the time to appeal, it affects liens, divorces, interest rates, property interests, and many other things. It is time to accept the idea that decrees and judgments in civil cases are no longer effective—even for selected purposes—when "rendered."

GEORGE K. CRACRAFT, Judge, dissenting. I respectfully dissent. The law of this State has been for many years that a marriage entered into by one not divorced from a living spouse is void, even though one of the parties to the marriage enters into it

in good faith. *See Cooper* v. *McCoy*, 116 Ark. 501, 173 S.W. 412 (1915); *Evatt* v. *Miller*, 114 Ark. 84, 169 S.W. 817 (1914). This rule was reaffirmed by the Arkansas Supreme Court as recently as May 1, 1989, in *Standridge* v. *Standridge*, 298 Ark. 494, 769 S.W.2d 12 (1989). That case held that the *rendition* of divorce is not enough; it is not effective until reduced to writing and entered as required by Ark. R. Civ. P. 58 and Administrative Order 2.[1] In these two respects, *Standridge* stands on all fours with the case at bar.

The majority opinion would evade the application of this established rule by applying the novel principle announced in *Fox* v. *Fox*, 247 Ark. 188, 444 S.W.2d 865 (1969). I think this approach is wrong for at least two reasons.

In the first place, estoppel is an affirmative defense which must be specifically pled. Ark. R. Civ. P. 8(c). The abstract fails to disclose that this issue was ever pled, raised, or argued in the trial court, and it cannot be raised for the first time on appeal. *Beeson* v. *Beeson*, 11 Ark. App. 79, 667 S.W.2d 368 (1984); *Sheffield* v. *Strickland*, 268 Ark. 1148, 599 S.W.2d 422 (Ark. App. 1980).

Secondly, any similarity between the material facts in *Fox* and those in this case simply escapes me. In *Fox*, a divorced husband induced his former wife to resume the marital state without remarriage by willfully misrepresenting to her that he had seen their attorney and had their divorce decree set aside. Although he knew that the divorce had not been set aside, the wife did not. Relying on his misrepresentation, she believed in good faith that she was legally married to him and resumed the marital relationship. He made no mention of this deceit until he pled the divorce decree as a bar to a second action for divorce and property settlement twenty years later. In denying the husband's plea that he was not in fact married to her, the court said:

> The evidence of record in the case at bar sustains

---

[1] Administrative Order 2, which superseded Ark. R. Civ. P. 79, was adopted by per curiam opinion of the Arkansas Supreme Court on December 21, 1987, and became effective March 14, 1988, subsequent to the "divorce" and marriage involved herein. In all ways pertinent to the issues of this case, however, the order and former rule are identical.

> Dorothy's contention that she lived with Walter as his wife for more than twenty years under the mistaken belief, *brought about by Walter's deceit*, that the divorce had not become final or that the decree had been set aside and that she and Walter were still legally married during the entire period they lived together. There is no evidence in the record inconsistent with Dorothy's belief that she was legally married to Walter, and Walter has offered no proof tending to show that Dorothy did not believe they were still legally married, except her long toleration of his own philandering activities.
>
> A legal common-law marriage cannot be entered into in Arkansas, nor can one be created by estoppel, but equity should, and we hold that it does, *under the facts in this case*, require that Walter be estopped to deny that the divorce decree was set aside or "thrown out" before it became final, and he is estopped to deny such rights as Dorothy would be entitled to had a divorce decree never been entered. In other words, we simply hold that as between Walter and Dorothy, Walter is estopped from setting up the prior divorce as a defense to Dorothy's petition, and that Dorothy is entitled to exactly the same property rights, alimony and attorney's fees as she would be entitled to had there never been a divorce.

Fox, 247 Ark. at 199-200, 444 S.W.2d at 871 (emphasis added).

Estoppels rest on the principle that a party may not assert a right he has obtained by knowingly inducing another to in good faith change his position to his detriment. To establish estoppel, one must show that the party sought to be estopped knew the facts and intended that his conduct be acted upon, and that the party seeking estoppel was ignorant of the true facts and relied upon the other's conduct to his injury. *Askew Trust* v. *Hopkins*, 15 Ark. App. 19, 688 S.W.2d 316 (1985); *First State Bank* v. *Phillips*, 13 Ark. App. 157, 681 S.W.2d 408 (1984).

In *Fox*, the court found that the husband had willfully deceived the wife by misrepresenting the facts to her and that she had acted in the good faith belief that he had told her the truth. Here, there is no evidence to support a finding that either party did not act in the good faith belief that they were free to marry or

that either knew the divorce was invalid. There is nothing in the record I reviewed to suggest that either party relied on any statements other than the one made by the chancellor from the bench that Bill Brown and his former wife were "single people." The majority does not seem to base its application of the doctrine of estoppel on any knowledge of the true facts by Mr. Brown but on its *de novo* finding that he "was at least culpably negligent in not determining that his divorce decree was final before initiating his remarriage." The basis for finding him more negligent than appellant in their reliance on the judge's pronouncement or the lawyers' duty to effect a final decree also escapes me. There is simply nothing in the record I reviewed to sustain such a finding or conclusion. . .

I would follow the decision in *Standridge, supra*, and affirm.

Corbin, C.J., joins in this dissent.

John Paul COX *v.* NASHVILLE LIVESTOCK COMMISSION

CA 88-179 771 S.W.2d 786

Court of Appeals of Arkansas
En Banc
Opinion delivered June 7, 1989
[Rehearing denied July 5, 1989.*]

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

Wright, Chaney & Berry, P.A., by: *William G. Wright*, for appellant.

Barber, McCaskill, Amsler, Jones & Hale, P.A., for appellee.

JOHN E. JENNINGS, Judge. This is an appeal from a decision of the Workers' Compensation Commission denying benefits to the claimant, John Paul Cox. At the time of the hearing, Cox was fifty years of age and employed as manager of the Nashville Livestock Commission. His duties included responsibility for supervising twenty employees, soliciting business, and selling cattle at auction. He also helped load the cattle.

On Wednesday, November 19, 1986, the Nashville Livestock Auction had two cattle sales, one at 1:00 p.m. and another at 7:00 p.m. There were approximately 1,000 head of cattle to be sold that day. Cox testified that during the three days before the auction he had worked from five or six in the morning until midnight or 2:00 a.m., hauling cattle and getting them ready for sale. He testified that he had had no more than three or four hours sleep a night during that time.

Cox began having chest pains Wednesday night and was admitted to the hospital in Nashville early Thursday morning. He was transferred to a hospital in Little Rock the following Monday. He missed a total of two weeks work.

Cox was diagnosed by Dr. Steve Hutchins as having "single vessel coronary artery stenosis." A myocardial infarction (heart attack) was ruled out and the doctor described his chest pain as "unstable angina." Dr. Hutchins wrote:

> [I]t is my opinion that Mr. Cox's heavy workload during this two days certainly aggravated his condition and resulted in unstable symptomology. With proper hospitalization and medical treatment it was then possible for Mr. Cox to return to work once his symptoms had stabilized.

The doctor thought Mr. Cox's prognosis was "excellent."

In his claim, Cox sought neither temporary nor permanent disability benefits, but rather only the payment of his medical expenses. The ALJ awarded benefits and the full Commission reversed relying on our decisions in *Kempner's & Dodson Ins. Co.*

v. *Hall*, 7 Ark. App. 181, 646 S.W.2d 31 (1983), and *Black* v. *Riverside Furniture Co.*, 6 Ark. App. 370, 642 S.W.2d 338 (1982).

On appeal, Cox asks us to overrule our decisions in *Kempner's* and *Black*. We decline to do so because we are convinced that the holding in each case was proper on the facts presented. We are also persuaded, however, that the Commission's decision in the case at bar must be reversed, even though it is supported by a literal reading of some of our language in *Kempner's* and *Black*.

In *Black* v. *Riverside Furniture Co.*, 6 Ark. App. 370, 642 S.W.2d 338 (1982), the appellant was the widow of Lemuel Black. Black was a custodian for Riverside Furniture. He had an angina attack at work and sought medical treatment. He was diagnosed as having two pre-existing heart conditions, arteriosclerosis and atrial septal defect.[1] Surgery was performed to correct both conditions (a double by-pass for the arteriosclerosis) and Black died from complications of the surgery.

The Commission in *Black* denied benefits on the basis that the claimant had failed to prove by a preponderance of the evidence that Black's death was substantially caused by an injury arising out of and in the course of his employment at Riverside Furniture. One doctor testified that Mr. Black's working conditions produced the symptoms of angina, which he described as the "pain message" to the heart, but that no damage is done by the angina in the sense of death of cells. It was his opinion that "Mr. Black's working conditions neither aggravated nor accelerated his two pre-existing heart conditions, but would rather aggravate the symptomology." *Black, supra*, at p. 373. However, another doctor testified that Black's work aggravated both of his pre-existing conditions and was responsible for precipitating his "syncopal episodes." He said that Black's activity at work aggravated both his symptoms and his disease. No doctor testified that Black's surgery was made necessary by the angina.

The issue we were called upon to decide in *Black* was whether there was substantial evidence to support the Commis-

---

[1] "Atrial septal defect" is apparently a hole in an interior wall of the heart. This problem seems to have been congenital.

sion's decision. Although we held that the decision was so supported, we expressed our opinion that there was "ample evidence in the record to sustain the appellant's claim." The claim in *Black* failed because the Commission was not persuaded there was a causal relationship between Mr. Black's angina attack and his subsequent death.

We continued on in *Black*, however, to pose the question "whether or not aggravation of the symptoms of a pre-existing condition is compensable." Clearly it was not necessary to our decision in *Black* to answer that question or establish such a sweeping rule. We cited two cases involving angina attacks, *Duffy* v. *State Accident Insurance Fund*, 43 Or. App. 505, 603 P.2d 1191 (1979), and *Kostamo* v. *Marquette Iron Mining Co.*, 405 Mich. 105, 274 N.W.2d 411 (1977). *Kostamo* was like *Black* in that the issue was whether there was substantial evidence to support the Commission's denial of benefits. The court in *Duffy* merely held that, under the medical evidence presented, the claimant could not obtain a permanent disability award as a result of a work-related angina attack. In *Duffy*, in fact, the claim for treatment of the angina was accepted by the carrier.

In *Kempner's* v. *Hall*, 7 Ark. App. 181, 646 S.W.2d 31 (1983), we said:

> "Angina" is defined not as a disease but as a *symptom* of the underlying disease. The angina is the pain resulting from the underlying disease. In appellee's case it was a symptom of his arteriosclerosis or hardening of the arteries. We have recently held that aggravations of the *symptoms* of a preexisting condition are not compensable. In *Black* v. *Riverside Furniture Co.*, 6 Ark. App. 370, 642 S.W.2d 338 (1982) we held that where working conditions merely aggravated the angina, the symptoms of the preexisting, underlying arteriosclerosis, the employer was not liable for medical expenses or other consequences. (Emphasis in original.)

In the case at bar, the Commission quoted and relied upon this language. *Kempner's*, like *Black*, was a case in which the sole issue was whether there was substantial evidence to support the Commission's decision on a question of fact. In *Kempner's*, the claimant had had an angina attack at home. Subsequently, at

work, he developed chest pains, drove to the hospital, and by-pass surgery was performed. There was testimony that the claimant in *Kempner's* had suffered a heart attack. Our *holding* in *Kempner's* was merely that there was substantial evidence to support the Commission's award of benefits. Our descriptions of "angina" in *Kempner's* and in *Black* were merely recitations of the medical testimony in each case. We have not held that "angina" is a "symptom" as a matter of law.[2] Furthermore, there are substantial difficulties in having the issue of compensability turn on whether something is characterized as a "symptom" or not.

> [I]t becomes a matter of semantics whether the disability is described as a symptom of the disease or a disability to which the exertion was a contributing precipitating factor. It may well be both. The fact finding body must in this event remain the final arbiter of the compensability of the attack, and of whether the disability arose out of the employment as well as in the course of it.

Cox v. *Employers Mut. Liab. Ins. Co.*, 122 Ga. App. 659, 660, 178 S.E.2d 287, 288 (1970). We think that our language in *Black* was overbroad. We have not yet held that if an injury may be characterized as an aggravation of the symptoms of a pre-existing disease, it may not be compensable under any circumstances. To the contrary, in *Boyd* v. *General Industries*, 22 Ark. App. 103, 733 S.W.2d 750 (1987), we expressly held that where an on-the-job injury rendered an underlying disease symptomatic, the disability resulting from those symptoms may be compensable. Furthermore, we have not yet *held* that the disability resulting from a work-related angina attack can never be compensable. There is respectable authority to the contrary. *See Jones* v. *Alaska Workmen's Compensation Bd.*, 600 P.2d 738 (Alaska 1979); *H.V. & T.G. Thompson Lumber Co.* v. *Bates*, 148 Ga. App. 810, 253 S.E.2d 213 (1979); *Bertrand* v. *Coal Operators Casualty Co.*, 253 La. 1115, 221 So.2d 816 (1968); *Seals* v. *Potlatch Forest, Inc.*, 151 So.2d 587 (La. Ct. App. 1963); *Canning* v. *State Department of Transportation*, 347 A.2d 605

---

[2] We are not in a position to take judicial notice of what "angina" is. *Stedman's Medical Dictionary* lists twenty-four different types of angina, one of which is angina pectoris, and gives eight definitions for angina pectoris.

(Me. 1975).

In *Dougan* v. *Booker*, 241 Ark. 224, 407 S.W.2d 369 (1966), the court, quoting from *Triebsch* v. *Athletic Mining & Smelting Co.*, 218 Ark. 379, 237 S.W.2d 26 (1951), said:

> Therefore, to summarize: we have in the case at bar undisputed facts which are similar in essential respects to those which existed in the six cases hereinbefore discussed, in each of which compensation was awarded. These facts are: *a pre-existing ailment, an increased and overtaxing effort to accomplish the workload under the conditions existing, and a collapsed worker resulting therefrom.* These make a case of accidental injury within the purview of the workers' compensation law. (Emphasis added in *Dougan.*)

In *Dougan* the claimant had a heart attack, but in *Triebsch* the claimant, who was suffering from a pre-existing respiratory ailment, merely collapsed from overwork.

Our workers' compensation law is essentially statutory. It does not provide that compensability is to turn on the characterization of a problem as a symptom nor on whether there is a finding that heart cells have died. In *Owens* v. *National Health Laboratories, Inc.*, 8 Ark. App. 92, 648 S.W.2d 829 (1983), we said we could conceive of no reason why harm to the body of a worker should be limited to visible physical injury to the bones and muscles. In each case the question is whether the claimant is disabled from an injury arising out of and in the course of employment. *See* Ark. Code Ann. § 11-9-401 (1987).

In the case at bar we hold only that the Commission erred in concluding that appellant's claim for medical expenses was foreclosed by our decisions in *Black* and *Kempner's*. We reverse and remand this case to the Commission for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MAYFIELD and ROGERS, JJ., concur.

CRACRAFT, J., and CORBIN, C.J., dissent.

MELVIN MAYFIELD, Judge, concurring. I concur in the

result of the majority opinion. I think the distinction between this case and *Black* v. *Riverside Furniture Company*, 6 Ark. App. 370, 642 S.W.2d 338 (1982), is that the widow of the deceased worker in *Black* was denied benefits because the Commission found, as the last sentence in the opinion states, that the worker's "death was caused by arterial by-pass surgery to correct the previous heart condition of arteriosclerosis, and there is substantial evidence to support the Commission's finding that [his] death did not arise out of and in the course of his employment." The opinion in *Black* makes it clear that working conditions that "merely" accelerate symptoms of a disease are not compensable.

Here, however, we have symptoms that may have been disabling in and of themselves. When such symptoms are caused by work which aggravates a preexisting condition, the medical expense and disability resulting therefrom should be compensable. Therefore, I concur in the remand of this case to the Commission.

ROGERS, J., joins in this concurrence.

GEORGE K. CRACRAFT, Judge, dissenting. I disagree that the language in *Black* v. *Riverside Furniture Co.*, 6 Ark. App. 370, 642 S.W.2d 338 (1982), was overbroad and unnecessary to our decision in that case, or that we have in some way misled the Commission. In my opinion, the Commission fully comprehends what that case holds and properly applied it here.

The issue of whether symptoms of a disease were compensable, where the work caused no aggravation of the underlying disease, was not only necessary to our decision in *Black*, it was, in my thinking, the basic issue decided. To me, at least, nothing could more clearly state the issue than the following language employed by Judge Cloninger, speaking for a unanimous court:

> We have a situation in this case which has not been specifically addressed before in this jurisdiction; namely, whether or not aggravation of the symptoms of a preexisting condition is compensable.
>
> * * *
>
> In the case before the court, although Dr. Gilliland testified that Mr. Black's working conditions accelerated

> and aggravated his pre-existing heart conditions, both Dr. Patrick and Dr. Pruitt testified *that it merely accelerated his symptoms in the form of angina pectoris.*

Black, 6 Ark. App. at 374-75, 642 S.W.2d at 341 (emphasis added).

Here, the majority states that the only issue we had to decide in *Black* was whether the Commission's finding that appellant had failed to prove that her husband's death was the result of his employment was supported by substantial evidence, and that it was not necessary for us to discuss compensability of "symptoms." However, only by facing up to the issue referred to by Judge Cloninger could that standard of review be properly applied. Had we decided that an aggravation of the symptoms of an underlying disease was a compensable "injury" *per se*, an entirely different result would have been mandated, as all three doctors would have been in accord that the deceased's surgery and consequential death resulted from a compensable injury. If the majority thinks it proper to overrule *Black* and those cases following it, so be it; but to hold that this declaration in *Black* was overbroad, unintentional, or unnecessary to this opinion is wrong.

Secondly, I think the rule announced in *Black* is sound and in keeping with the basic concepts of our Workers' Compensation Act. Our Act affords relief for loss of ability to earn because of *accidental injury* arising out of and in the course of an employment. It includes compensation for disease only if it is an occupational one as defined by our law, or is aggravated by the work. The symptomatology suffered by the appellant in this case was that of heart disease, not an occupational one. There was no evidence that the underlying heart disease was aggravated or enlarged by appellant's employment. Our Act was not intended to afford general health insurance or to provide coverage for an illness or symptoms of an illness contracted elsewhere, which is brought into the workplace by the worker and which continues in the same degree after he leaves it. This was the rationale of our decision in *Black*, and I think it is the correct one to apply in cases of this nature.

Nor can I agree that *Boyd* v. *General Industries*, 22 Ark. App. 103, 733 S.W.2d 750 (1989), has any application to this case. *Boyd* and those cases it relies on hold nothing more than

that:

> [W]hen there has been a *physical accident or trauma*, and claimant's *disability* is *increased or prolonged by* traumatic neurosis, conversion hysteria, or hysterical paralysis [or effects of another latent prior condition that are precipitated by the compensable, on-the-job injury], it is now uniformly held that the full disability including the effects of the neurosis is compensable.

Id. at 108, 733 S.W.2d at 752 (emphasis added) (quoting *Wilson & Co.* v. *Christman*, 244 Ark. 132, 141, 424 S.W.2d 863, 869 (1968)). Here, there was no physical, on-the-job injury and, therefore, no compensable disability resulting therefrom *to be* "increased or prolonged" by the effects of appellant's latent prior condition.

CORBIN, C.J., joins in this dissent.

Robert Lee TAYLOR *v.* STATE of Arkansas

CA CR 88-247 771 S.W.2d 318

Court of Appeals of Arkansas
En Banc
Opinion delivered June 7, 1989

G.B. "Bing" Colvin III, for appellant.

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

JOHN E. JENNINGS, Judge. Robert Lee Taylor was charged in Chicot County Circuit Court with the first degree murder of Floyd Tumey, Sr. He was found guilty by a jury of the lesser included offense of negligent homicide and sentenced to one year in the county jail. The only argument on appeal is that the trial court erred in refusing to grant his motion for a directed verdict, based upon appellant's contention that self-defense was established as a matter of law. The court denied the motion and submitted the issue of self-defense to the jury. We find no error and affirm.

Barley Tumey of Lake Village, the deceased's brother, testified that the deceased lived in a trailer house on his mother's place. There were pecan trees located on nearby land owned by the government. The property had been previously owned by the deceased's family.

Barley Tumey testified that he was present when the shooting occurred. He saw his brother with a gun and testified that Floyd Tumey said, "I'm going to shoot me a couple of niggers." He said that his brother "could have been drinking some." He testified that he heard the shooting:

> Just guns went off. You know, I heard all the shots hit my truck. Then I just kept, we just kept laying there. And it was just like a few seconds, you know, my brother shot. Just a few more. There was a hesitation there. And one shot maybe from up at the top of the hill. And my brother said, "Huh-oh, he caught me with buckshot."

Barley Tumey took his brother to the hospital where he

subsequently died. He had been struck in the abdomen with buckshot.

Willie Jones testified that he and appellant were good friends. On the day of the shooting they had driven to the pumping station where the pecan trees were located. He testified that Floyd Tumey had driven by in a truck and told them they couldn't pick up his pecans. Later on, Tumey walked by and told them he was going home to get his shotgun. Jones testified that the appellant said that Tumey wasn't the only one that had a gun.

Jones testified that the appellant went to the car and got a shotgun out of the trunk. He also got three shells and stuck them in his pocket, and the two of them went back to picking pecans. Then he heard Barley Tumey drive up in a truck and Jones looked up and saw Floyd Tumey walking towards them along the road with a shotgun. He heard the deceased tell his brother that he "was going to kill two niggers." He testified that Tumey set his beer down on the highway and shot, after appellant had stepped out from behind a tree. He said the appellant was hit and then shot back. Then the deceased fired again and the appellant fired again. The appellant's second shot was apparently the fatal one. Jones testified that the first time they knew they were in trouble was when they saw the deceased with a gun, and that they didn't run because they didn't have anyplace to go. He said "there was a fence there, and just broad open space. We couldn't get across there without getting shot." He said that they "barely had any gasoline" in their car. He also testified that he thought Floyd Tumey was drunk.

Floyd White, a sergeant with the Chicot County Sheriff's Department, testified that there would have been approximately sixty-six yards between the appellant and the deceased when the shots were fired.

The appellant, Robert Lee Taylor, testified in his own behalf and his testimony was consistent with that of Willie Jones. He said that they were picking up pecans on government land and that when the deceased came up to them and told them to get out from under his pecan trees he said, "Old man, we ain't bothering you, you ought to chill out." When Floyd Tumey said, "I'll get my shotgun," appellant told him "Old man, you ain't the onliest one that's got a shotgun." He testified that he thought the deceased

was just bluffing. He said that he knew he was going to get shot at when he saw Floyd Tumey walk up the road with a gun, but that it was too late to leave. He testified that Tumey would have shot them in the back or in the car, that there was a briar thicket behind them, and that they had no place to go. Like Jones, appellant testified that Tumey shot first and that the first shot hit appellant. Taylor testified that he did not know that he had loaded his gun with buckshot.

The appellant made no objection to the giving of instructions on the lesser included offenses of manslaughter and negligent homicide and there is no contention on appeal that the jury was not correctly instructed on the law. Arkansas Code Annotated § 5-2-607 (1987) provides:

> Use of deadly physical force in defense of a person.
>
> (a) A person is justified in using deadly physical force upon another person if he reasonably believes that the other person is:
>
> (1) Committing or about to commit a felony involving force or violence; or
>
> (2) Using or about to use unlawful deadly physical force.
>
> (b) A person may not use deadly physical force in self defense if he knows that he can avoid the necessity of using that force with complete safety:
>
> (1) By retreating, except that a person is not required to retreat if he is in his dwelling and was not the original aggressor, or if he is a law enforcement officer or a person assisting at the direction of a law enforcement officer; or
>
> (2) By surrendering possession of property to a person claiming a lawful right thereto.

Justification, by way of self-defense or otherwise, is a defense. Ark. Code Ann. § 5-2-602 (1987). Where there is evidence of self-defense it is error for the court not to give an appropriate instruction, *Doles* v. *State*, 275 Ark. 448, 631 S.W.2d 281 (1982), but the question is one of fact for the jury. We are cited to no case, and can find none, which holds that if the

evidence that the defendant acted in self-defense is strong, the court should take the case from the jury and decide the issue as a matter of law.

Although decided under prior law, *Ringer* v. *State*, 74 Ark. 262, 85 S.W. 410 (1905), is not obsolete. There the supreme court made it clear that the question of justification is largely a matter of the defendant's intent. A defendant's intention, being a subjective matter, is ordinarily not subject to proof by direct evidence, but must rather be established by circumstantial evidence. *See Lewis* v. *State*, 7 Ark. App. 38, 644 S.W.2d 303 (1982). It is essentially a question of fact to be decided by the trier of fact, in this case the jury. Furthermore, the jury in the case at bar was not required to believe the testimony of the appellant, nor for that matter, that of his friend Willie Jones. *See Gilliam* v. *State*, 294 Ark. 115, 741 S.W.2d 631 (1987).

Unquestionably appellant shot Floyd Tumey and caused his death. The appellant's intent and "reasonable belief" were questions of fact for the jury. It was also for the jury to decide whether the appellant knew that he could avoid the necessity of using deadly force by retreating or by surrendering possession of the property. Ark. Code Ann. § 5-2-607(b) (1987).

We hold that the trial court did not err in submitting the issue of self-defense to the jury.

Affirmed.

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

MELVIN MAYFIELD, Judge, dissenting. I cannot agree to the affirmance of the judgment of conviction for negligent homicide. At the conclusion of the state's testimony, the appellant moved for a directed verdict on the filed charge of first degree murder "or any lesser included offense," and at the conclusion of all the evidence in the case, the appellant again made the same motion. The evidence by the eyewitnesses to the shooting, including the deceased's own brother, established that the deceased told the appellant he was going to get his gun; that the deceased did get his gun and walked toward the appellant announcing, so all the witnesses including the appellant could hear, that he was going to shoot a couple of niggers; that he raised his gun and shot appellant; and that appellant also raised his gun and shot the

deceased.

Although the brother of the deceased did not say, as did the appellant and his friend, that the deceased shot first, the brother did not deny that the deceased shot first. Considered in the light most favorable to the state, the deceased's own brother testified that the first shots were fired simultaneously. However, I do not think it important to this appeal to know which man fired first. The law is clear. A person commits negligent homicide "if he negligently causes the death of another person." *See* Ark. Stat. Ann. § 41-1505 (Repl. 1977), as amended by Act 538 of 1987. (The appellant was charged with an act committed on November 11, 1987. Ark. Code Ann. (1987) did not go into effect until December 31, 1987. *See* section 2 of Act 267 of 1987.) The Commentary to Ark. Stat. Ann. § 41-1505 states that it "is designed to cover conduct producing liability because the actor negligently fails to perceive that his conduct creates a substantial and unjustifiable risk of death to another." This court has pointed out that one charged with negligent conduct as defined in Ark. Stat. Ann. § 41-203(4) (Repl. 1977) is assumed to have been unaware of the risk of his conduct. *Smith* v. *State*, 3 Ark. App. 224, 623 S.W.2d 862 (1981). It is obvious that when the appellant in this case shot at the deceased he was aware of the risk involved; neither the state nor the appellant contends that the appellant was unaware of the risk of his conduct. Under the evidence in this case, there is simply no way the appellant could be guilty of negligent homicide, and the court should have granted his motion for directed verdict as to the lesser included offense of negligent homicide.

Not only is the appellant not guilty of negligent homicide, I think his motions for directed verdict should have been granted because of his defense of justification. The evidence is clear that the appellant knew the deceased was approaching him with a gun while making threats to shoot him and that there was no place for appellant to go except across clear land—exposed to the deceased's stated objective of shooting appellant. It has always been the law in Arkansas that "one is not required to retreat unless he can do so with safety to himself." *See LaRue* v. *State*, 64 Ark. 144, 41 S.W. 53 (1897); *Bieard* v. *State*, 189 Ark. 217, 72 S.W.2d 530 (1934); *Sanders* v. *State*, 256 Ark. 605, 509 S.W.2d 295 (1974); *Martin* v. *State*, 290 Ark. 293, 718 S.W.2d 938 (1986).

But the state does not contend that the appellant should have attempted to retreat at the time the deceased appeared with his gun. What the state argues is that the appellant should have retreated when the deceased told the appellant *he was going* to get his gun. The state's brief says that instead of going to his car and getting his own gun the appellant "could have driven off and the incident with the victim would have been avoided."

The law as to justification in effect at the time of the incident in this case, Ark. Stat. Ann. § 41-507 (Repl. 1977), provided:

> (1) A person is justified in using deadly physical force upon another person if he reasonably believes that the other person is:
>
> (a) committing or about to commit a felony involving force or violence, or
>
> (b) using or about to use deadly physical force.
>
> (2) A person may not use deadly physical force in self defense if he knows that he can avoid the necessity of using that force with complete safety:
>
> (a) by retreating, except that a person is not required to retreat if he is in his dwelling and was not the original aggressor, or if he is a law enforcement officer or a person assisting at the direction of a law enforcement officer; or
>
> (b) by surrendering possession of property to a person claiming a lawful right thereto.

The Commentary to Ark. Stat. Ann. § 41-507 states that one who claims self defense must use all "reasonable means" to avoid the killing and "under most circumstances" this means retreat where it can be effected with safety. *See Martin* v. *State, supra,* (quoting the Commentary). Now it is true that when the deceased yelled at the appellant "don't pick up my pecans," the appellant could have got in his car and left the area (even the whole state, I assume). And it is also true that the law does not allow one to use deadly physical force upon another if it can be avoided by "surrendering possession of property to a person claiming a lawful right thereto." But the trouble with the state's argument is that it requires the appellant to get off the property *before* he could have *reasonably* known that he needed to retreat. Before

the deceased returned with his gun, the appellant could not *reasonably* know that the deceased would return with a gun to run appellant off land owned by the government. I submit that it was neither reasonable nor required that the appellant run away when the deceased yelled at him. To require retreat at that time is not really retreat—it is surrender.

Therefore, I dissent. The appellant simply could not, in my opinion, be guilty of negligent homicide under the evidence in this case. Moreover, I think it is clear that under the evidence in this case, the appellant's action was justified as a matter of law.

CORBIN, C.J., and COOPER, J., join in this dissent.

CALDWELL TRUCKING SERVICE, INC. and James Caldwell *v.* NATIONAL INDEMNITY CO.

CA 88-177 771 S.W.2d 784

Court of Appeals of Arkansas
En Banc
Opinion delivered June 7, 1989

Larry J. Steele, for appellants.

Wright, Lindsey & Jennings, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a summary judgment holding the appellants, Caldwell Trucking Service, Inc. and James H. Caldwell, jointly and severally liable for additional insurance premiums for coverage of "truckmen-hired automobiles" liability insurance. Appellants claim there are genuine issues of fact as to (1) coverage, (2) amount of premium due, and (3) which appellant is liable. We agree.

Appellee's complaint alleges that "Defendant is a domestic corporation" and that on June 22, 1980, the appellee issued to "James H. Caldwell d/b/a Caldwell Trucking Service, Inc., at defendant's request" an automobile liability and physical dam-

age insurance policy No. BA 30 57 53. The complaint also alleges that pursuant to the terms of the policy the appellee conducted an audit on July 16, 1981, which reflected an "earned premium of $29,960.00 during the term" of the above policy. It is alleged that this amount has not been paid. Also, that on June 22, 1981, another policy, No. BA 33 74 04 was issued with "defendant's consent and agreement" and under that policy an additional premium was due but the exact amount "is unknown pending discovery." The judgment, however, was only for $29,960.00, plus interest and attorney's fees.

The pleadings, exhibits, discovery, and other matters in the record disclose the following information.

The policy issued by the appellee on June 22, 1980, was a basic automobile liability and physical damage insurance policy which covered a "1979 Ford 1/2 Ton." Mr. Caldwell requested that "hired auto coverage" be added to this policy, for which he paid an additional premium of $1,790.00, but he informed appellee that no vehicles were being hired at the time. The company added endorsements to the policy which provided (1) for revisions in the premiums for the "1979 Ford 1/2 Ton" and hired autos; (2) that the radius of operations was "over 200 miles;" and (3) that the named insured was amended to read "Caldwell Trucking Service, Inc."

Subsequently, the insurance company conducted an audit and concluded that additional premiums of $26,235.00 were due for "hired autos." When appellants refused to pay the additional premiums, appellee filed this suit contending that certain truck drivers were "hired employees." Appellants contended the truck drivers were independent contractors who owned their own trucks and carried their own insurance. The policy endorsement involved provides that the meaning of the term "hired automobile" is "an automobile not owned by the named insured which is used under contract in behalf of, or loaned to, the named insured . . . ."

In response to interrogatories, the appellants said "No trucks were leased or rented. Individuals who owned trucks were hired for various jobs." During the period of time involved "no employees drove trucks." The individuals hired were "independent truckers; they were not employees." It is the appellants'

contention that the vehicles for which the appellee is trying to charge a premium were owned by independent contractors and were not "hired automobiles" as defined in the policy because they were not used "under contract" with the appellants. It is claimed that the meaning of the term "under contract" should be construed against the insurance company; that the term is ambiguous; and that its meaning should be decided by the fact finder, not by the court on a motion for summary judgment.

Appellants argue that the meaning of the term "cost of hire" is also ambiguous and presents a question of fact which should not have been decided by summary judgment. According to a section of the insurance policy entitled "Truckmen-Hired Automobiles," "when used as a premium basis: 'cost of hire' means the amount incurred for hired automobiles, including the entire remuneration of each employee of the named insured engaged in the operation of such automobiles subject to an average weekly maximum remuneration of $100." Appellant's position is that there was no "employee of the named insured engaged in the operation of such vehicles" since the truck drivers were independent contractors, not employees of the named insured.

Finally, it is claimed that judgment should not have been entered against the appellant, James H. Caldwell, individually, because the endorsement providing for hired automobile coverage was issued to a corporation, Caldwell Trucking Service, Inc., and not James H. Caldwell individually.

Summary judgment is an extreme remedy which 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). Motions for summary judgment are governed by some well-established principles of law. In *Walker* v. *Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981), we summarized:

> On such motions the moving party has the burden of demonstrating that there is no genuine issue of fact for trial and any evidence submitted in support of the motion must be viewed most favorably to the party against whom the relief is sought. 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. *Hendricks* [*Henricks*] v. *Burton*, 1 Ark. App. 159, 613 S.W.2d 609 (1981); *Dodrill* v. *Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979); *Braswell* v. *Gehl*, 263 Ark. 706, 567 S.W.2d 113 (1978). The object of summary judgment proceedings is not to try the issues, but to determine if there are any issues to be tried, and if there is any doubt whatsoever the motion should be denied. *Trace X Chemical, Inc.* v. *Highland Resources, Inc.*, 265 Ark. 468, 579 S.W.2d 89 (1979); *Ashley* v. *Eisele*, 247 Ark. 281, 445 S.W.2d 76 (1969). A motion for summary judgment cannot be used to submit a disputed question of fact to a trial judge. *Griffin* v. *Monsanto Co.*, 240 Ark. 420, 400 S.W.2d 492 (1966).

3 Ark. App. at 210.

The appellee contends that appellants' answers to discovery interrogatories admitted that Caldwell Trucking "operated pursuant to lease agreements with the drivers" and "regardless of the relationship between appellants and the individuals driving the trucks, a cost of hire was incurred, coverage was provided, and a premium was contracted for and owed." We think appellee's statement overlooks certain provisions of the policy it issued and the fact that this is an appeal from a summary judgment. The appellants in response to discovery interrogatories also stated that "No trucks were leased or rented. Individuals who owned trucks were hired for various jobs." Operating pursuant to lease agreements with the *drivers* may not be the same as a *vehicle* "under contract . . . or loaned to the named insured," which is the policy's definition of a "hired auto" and the basis upon which the policy allows the additional premiums to be collected. So, we think an issue of fact was presented in this regard.

The same analysis applies to the term "cost of hire" used in the policy. That term is defined as "the amount incurred for hired automobiles" and whether the appellants hired *automobiles* or *drivers* is an issue of fact in this case.

And, surely, under the state of the record described above, it was a question of fact as to whether the corporation or James H. Caldwell the individual—either or both—owed any

additional premiums due.

We reverse the summary judgment and remand for further proceedings consistent with this opinion.

JENNINGS and ROGERS, JJ., dissent.

JOHN E. JENNINGS, Judge, dissenting. I do not agree that the trial court erred in granting summary judgment in regard to either coverage or the amount of the premium due. Furthermore, I cannot agree that a question as to which appellant is liable has been raised, either in the trial court or on this appeal. I would affirm.

ROGERS, J., joins in this dissent.

Tony NOEL *v.* STATE of Arkansas

CA CR 88-282 771 S.W.2d 325

Court of Appeals of Arkansas
En Banc
Opinion delivered June 14, 1989

Green & Henry, by: *J.W. Green, Jr.*, for appellant.

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

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Arkansas County Circuit Court. Appellant, Tony Noel, appeals from his convictions of aggravated robbery, a violation of Arkansas Code Annotated Section 5-12-103 (1987) and theft of property, a violation of Arkansas Code Annotated Section 5-36-103 (Supp. 1987). Appellant was tried before a jury and sentenced to twenty years in the Department of Correction on the aggravated robbery count as an habitual offender and one year in the county jail on the theft of property count. The sentences were to run consecutively. We affirm.

In his only point for reversal, appellant argues that the court erred in not excusing for cause Ms. Melanie Raines, daughter of the Stuttgart mayor, thereby requiring appellant to exercise a peremptory challenge which resulted in his having to accept a juror over objection after he used all of his allowed peremptory challenges. In order to preserve his point for appeal it

must appear from the record that the trial court should have excused the juror for cause. The record must also show that appellant exhausted his peremptory challenges and showed prejudice in that he was forced to accept a juror against his wishes. *Gardner* v. *State*, 296 Ark. 41, 754 S.W.2d 518 (1988).

Appellant argues that because of Ms. Raines' father's position as city mayor and city police involvement in the case, she was biased and should have been excused for cause. Implied bias is a particular cause of challenge and those relationships that would give rise to such excuse for cause are described by statute; however, Ms. Raines is not a party to any of the relationships listed therein. *See* Arkansas Code Annotated § 16-33-304 (1987). When actual bias is in question, the qualification of a juror is within the sound discretion of the trial judge because he is in a better position to weigh the demeanor of the prospective juror's response to the questions on *voir dire*. Jurors are assumed to be unbiased and the burden of demonstrating actual bias is on the appellant. *Linell* v. *State*, 283 Ark. 162, 671 S.W.2d 741 (1984), *cert. denied*, 470 U.S. 1062 (1985). Upon this record, appellant has not demonstrated such bias. Therefore, we cannot say that the trial judge abused his discretion by not excusing Ms. Raines for cause.

Even had appellant been able to show that Ms. Raines should have been excused for cause, appellant's abstract does not reveal that he exhausted his peremptory challenges and that he was forced to take a juror he otherwise would have excused. Appellant's entire abstract of *voir dire* is as follows:

> I live with my parents. My father is the Mayor of Stuttgart. He is the chief official of the police department here in Stuttgart. He is over the police department, over the Chief of Police. It might bother me if questions here today were asked that were unfavorable to the police department or did not make them look good with my father being the chief officer for the police department. I don't think it would bother me to the extent to influence my decision, but I cannot say for sure that it would not. I am almost positive but I am not totally for sure that I could put it aside. I would not feel obligated to cover up or do anything in the event the police were made to look bad. It

> would not change my mind on the case one way or the other. I would base my decision on what I hear from the bench not on any consideration of the fact that my father is the Mayor.

On appeal, the record is confined to that which is abstracted. *Sutherland* v. *State*, 292 Ark. 103, 728 S.W.2d 496 (1987). Furthermore, when an error is alleged, prejudice must be shown, since we do not reverse for harmless error. *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984), *cert. denied*, 470 U.S. 1085 (1985). Because appellant has not shown that he exhausted his peremptory challenges and was thereby forced to take a juror he otherwise would have excused, he has not shown that he was prejudiced by the court's denial of his motion to exclude the juror for cause.

Affirmed.

MAYFIELD, J., dissents.

COOPER, J., joins in this dissent.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the majority opinion for three reasons.

(1). The state did not argue the merits of the primary point upon which the majority opinion bases its decision. The opinion holds the trial court did not abuse its discretion in failing to excuse a juror for cause. The state's brief does not even mention the trial court's discretion or attempt in any manner to justify the failure of the trial court to excuse this juror. The state simply stands on its assertion that this point "has not been properly preserved for appellate review." The juror the appellant sought to excuse for cause was the daughter of the mayor of the city in which the case was being tried. She had admitted on voir dire examination that her father was the chief official of the city police department and that she could not say for sure that this would not influence her decision in the case. Because the state's brief does not discuss the merits of that issue, I do not agree to base my decision on a point not even relied upon by the state.

(2). However, I do not agree that the point relied upon by the appellant was not properly preserved, and I particularly do not agree with the majority opinion's statement that the appellant

"has not shown that he exhausted his peremptory challenges and was thereby forced to take a juror he otherwise would have excused." In *Scherrer* v. *State*, 294 Ark. 227, 742 S.W.2d 877 (1988), the Arkansas Supreme Court said:

> Scherrer argues that because he had to use three of his peremptory challenges to strike jurors who should have been excluded for cause, he was forced to allow an objectionable juror to be seated. In order to preserve this point for appeal, an appellant must have exhausted his peremptory challenges and must show that he was later forced to accept a juror who should have been excused for cause. *Watson* v. *State*, 289 Ark. 138, 709 S.W.2d 817 (1986); *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 284 (1982).

294 Ark. at 233. In *Watson* and *Hill* cases cited in the above quote, the court relied upon *Conley* v. *State*, 270 Ark. 886, 607 S.W.2d 328 (1980), where it said:

> Despite the judge's failure to excuse, Conley's counsel accepted the twelve jurors who were ultimately seated; he had exhausted his peremptory challenges but he made no showing at all that he was forced to accept any juror against his wishes. In two cases exactly on point we found no reversible error when a peremptory challenge was used and the record failed to disclose that an undesirable juror was forced on the objecting party. *Arkansas State Highway Comm.* v. *Dalrymple*, 252 Ark. 771, 480 S.W.2d 955 (1972); *Green* v. *State*, 223 Ark. 761, 270 S.W.2d 895 (1954). In *Glover* v. *State*, 248 Ark. 1260, 455 S.W.2d 670 (1970) the defense used some of its peremptory challenges to remove unacceptable veniremen, but the defense made a record that had it not been required to use all of its peremptory challenges, a particular juror who was seated would have been challenged. In *Glover* we found that the error had been preserved and reversed the judgment.

270 Ark. at 888-89.

Now this is exactly the procedure followed by appellant's counsel in the present case. The majority opinion, however, suggests that the appellant's abstract *does not show* that this procedure was followed. Here is a reproduction of a portion of

page 10 of appellant's "Abstract and Brief."

> Melanie Raines, daughter of the Mayor of the City of Stuttgart was called as a prospective juror. Challenge for cause was made by the Defendant, but overruled. (TR58-59) The Defendant excused Melanie Raines by exercising one (1) of his eight (8) peremptory challenges. After all peremptory challenges were exercised by the Defendant an attempt to exercise a peremptory challenge for a ninth juror was made. The trial court then attempted to correct the matter of denying the requested excuse for cause for Melanie Raines by allowing the Defendant an additional peremptory challenge. (TR74) The Defendant exercised the additional peremptory challenge by excusing Mr. Church. (TR75) Another juror, Mr. Martin, was called and the Defendant attempted to exercise a peremptory challenge which was denied. (TR75)

From the above, it is plain to see what occurred. The state contends that this is not a proper abstract because it appears on the first page of the argument section of appellant's brief. The majority opinion does not state that the majority does not understand what occurred or that the pages of the transcript referred to do not show what the appellant says they show. I do not know what more is needed, and I do not agree that the above abstract is not sufficient.

(3). The question remains as to whether any prejudice in the trial court's failure to excuse the mayor's daughter for cause was eliminated when the court granted appellant an additional peremptory challenge which was used to excuse the juror. It may be that this question is answered by the old case of *Brewer* v. *State*, 72 Ark. 145, 78 S.W. 773 (1904). In that case the appellant argued that a prospective juror should have been excused for cause; however, as in the instant case, the judge gave the appellant an extra peremptory challenge which was used to excuse the prospective juror. On appeal, the court found no error based upon the following rationale:

> [T]he record shows that before the jury was complete the presiding judge offered to allow the defendant one more peremptory challenge than the statute allows in order, as he said, "to cure any possible error in passing on qualifica-

> tions of jurors." This offer was made after the defendant had exhausted all his peremptory challenges, and was accepted by the defendant, who thereupon challenged another juror. So far as the record shows, this action of the court placed the defendant in the same position he would have been had talesman Troxell been excused for cause, and cured any possible error made by the court in holding that he was competent. It was just the same as if the court had said: "I have changed my opinion, and now hold that the challenge for cause made by the defendant should be sustained, and will for that reason allow an extra challenge."

72 Ark. at 152.

But the above reasoning is clouded by the recent case of *Gardner* v. *State*, 296 Ark. 41, 754 S.W.2d 518 (1988), where the court discussed the appellant's tenth and eleventh points together. The tenth point was "that Arkansas Law allows additional peremptory challenges at the discretion of the Trial Court" and that it was an abuse of discretion to deny appellant's request for five additional peremptory challenges. The court said:

> However, Gardner has failed to cite any authority for either broad proposition and has failed entirely to provide convincing argument on these points. If, without further research, it appeared at all that the arguments were well taken, we could ignore the failure to cite authority. Under the circumstances, because the arguments are so obviously lacking in merit and are unsupported by any citation of authority, we decline to research the issues on appellant's behalf and will not consider either point. *Ricarte* v. *State*, 290 Ark. 100, 717 S.W.2d 488 (1986); *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977).

296 Ark. at 62-63. Thus, it does not appear to be clear that the trial court has the discretion to allow additional peremptory challenges. Arguments can certainly be made against the exercise of such discretion. At best it would inject into the trial process an element of uncertainty which would probably not be welcomed by trial lawyers or judges.

To conclude, I do not agree to affirm this case on the basis

that the appellant's abstract is insufficient. I am also unwilling to affirm on the merits without the benefit of a brief from the state on the issues mentioned in this dissent.

COOPER, J., joins in this dissent.

Donna Sue SUTTON *v.* Bob Lynn SUTTON

CA 88-386 771 S.W.2d 791

Court of Appeals of Arkansas
En Banc
Opinion delivered June 14, 1989

Buford Gardner, for appellant.

Elcan & Sprott, by: *James D. Sprott*, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Boone County Chancery Court. Appellant, Donna Sue Sutton, appeals from an order finding in favor of appellee, Bob Lynn Sutton. We reverse and remand.

The parties were divorced pursuant to a decree of divorce entered by the court on October 20, 1980. A property settlement agreement between the parties, filed the same day, was approved by the court but was not incorporated into the decree. This action was initiated by appellant on August 20, 1987. Appellant alleged that appellee had failed to comply with the property settlement agreement and asked that he be held in contempt or in the alternative that he be required to specifically perform the requirements of the agreement. After hearings on the matter, the chancellor entered an order finding that the property settlement agreement could not be enforced by contempt because it had not been incorporated into the decree, and that the provision of the agreement at issue was not enforceable because of indefiniteness. From that order comes this appeal.

For reversal, appellant argues: (1) The court erred in ruling the contract was vague; and (2) the court erred in ruling the contract was severable.

The provision at issue provides in pertinent part:

4. HUSBAND agrees to pay WIFE the sum of $500.00

> per month as part of her interest in the property of the marriage, such payments to begin on November 1, 1980 . . . . These payments will be the responsibility of the HUSBAND during his lifetime and of his estate if the said WIFE should survive him. These payments are to cease upon the re-marriage of WIFE.

With regard to the provision, the chancellor stated:

> It does not say what the amount of the total of the payments was to be. More importantly it does not say how long the payments are to continue. There is a provision that they stop if the wife should remarry. There is a provision that they do not stop if the husband should die. There is an indefinate [sic] period of duration otherwise . . . . The Court holds that the [provision] is not enforcable [sic] . . . .

Questions relating to the construction, operation, and effect of separation agreements between husband and wife are governed, in general, by the rules and provisions applicable in the case of other contracts generally. 24 Am. Jur. 2d, *Divorce and Separation* § 838 (2d ed. 1983). It has long been established that the first rule of interpretation is to give to the language employed by the parties to a contract the meaning they intended. *Lee Wilson & Company* v. *Fleming*, 203 Ark. 417, 156 S.W.2d 893 (1941). Where there is an ambiguity in any part, word, or words, it is the court's duty to place itself in the situation of the parties and ascertain if possible, from the language used, what the parties meant. *Bauer* v. *Dotterer*, 202 Ark. 1055, 155 S.W.2d 54 (1941). In construing a contract, if there are two constructions, each of which is reasonable, one of which will make the contract enforceable, and the other which will make it unenforceable, the court will prefer the construction which will make it enforceable. *Hastings Indus. Co.* v. *Copeland*, 114 Ark. 415, 169 S.W. 1185 (1914).

We believe the trial court erred in choosing a construction which makes the provision unenforceable. The provision in pertinent part states "These payments will be the responsibility of the HUSBAND during his lifetime and of his estate *if the said WIFE should survive him.*" (Emphasis ours). Conversely, the phrase may be reasonably construed to mean that if the wife does

not survive him, the responsibility of appellee or his estate is terminated. Words which fix an ascertainable fact or event, by which the term of a contract's duration can be determined, make the contract definite and certain in that particular. 17 Am. Jur. 2d *Contracts* § 80 (2d ed. 1964).

The omission of the total of the payments to be made also does not make the contract vague. Although appellee argues that annuity contracts are not analogous, we cannot agree. In exchange for her interest in certain property, appellant was to receive a fixed sum of money terminable upon her death or remarriage. Appellee has cited no authority that the omission of the total payments to be made would alone make the contract unenforceably vague.

Because we find that the contract may be reasonably construed so as to make it enforceable, we need not address appellant's second point for reversal. We have reviewed the chancellor's findings with regard to misrepresentation and unconscionability and cannot say he was clearly erroneous. The case is reversed and remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. I dissent because the trial court's ruling that the contract is vague and unenforceable is correct. The contract provides for monthly payments of $500.00, beginning November 1, 1980. The contract provides that payments are to cease only upon the remarriage of the appellant. There is no definite total sum appellee is to pay the appellant nor is there any conclusion to the payments if the appellant remains unmarried.

The agreement states that the "payments will be the responsibility of the HUSBAND [appellee] during his lifetime and of his estate if the said WIFE [appellant] should survive him." Thus if the appellant remains unmarried and the appellee dies the appellee's estate remains liable for the payments. If the appellant then dies after the appellee, the appellee's estate could conceivably remain liable for payments to the appellant after her death.

These payments were to be made as part of the appellant's interest in marital property; however, the contract does not list the value of the property she is receiving payment for. Without being able to define the time limits on the payments or the value of the property, the trial court had no alternative than to find that the contract was vague and unenforceable. *See Ashley, Drew & Northern Ry. Co.* v. *Baggott*, 125 Ark. 1, 187 S.W. 649 (1916); *Welch* v. *Cooper*, 11 Ark. App. 263, 670 S.W.2d 454 (1984).

Kenneth Milburn TERRY *v.* Janice Jean TERRY

CA 88-225 771 S.W.2d 321

Court of Appeals of Arkansas
En Banc
Opinion delivered June 14, 1989

Isaacs & Isaacs, by: *William B. Isaacs*, for appellant.

Dale Varner, for appellee.

MELVIN MAYFIELD, Judge. Kenneth Milburn Terry appeals a decision of the Washington County Chancery Court denying

him a reduction in child support payments.

Kenneth and Janice Terry were divorced March 3, 1982. They entered into an agreement which provided for the custody, visitation and support of their three minor children, ages 6, 10 and 13. The divorce decree states the agreement had been made and that it is "specifically approved by the Court and adopted and incorporated herein as a part and parcel of this decree." The agreement provided that custody and control of the children would be vested in the appellee and support was set out as follows:

> (2) SUPPORT OF MINOR CHILDREN: It is agreed that the HUSBAND shall pay support unto the WIFE into the Registry of the Court. Such support payments shall begin on the date of this Agreement and shall be due and payable on the first of each successive month thereafter. Said support payments shall be in the amount of One Hundred Sixty-Six ($166.00) Dollars per child per month through September of 1988. At that time said support payments shall be reduced to the amount of One Hundred Forty-Two ($142.00) Dollars per child per month, and shall continue at that amount through September of 1998, at which time support payments shall cease.
>
> IT IS FURTHER AGREED that should the WIFE remarry prior to September of 1998, the HUSBAND'S child support payments shall be reduced in the following manner: Each time any child reaches the age of majority, marries, or otherwise becomes self-supporting, that portion of child support for such child shall cease unless such child elects to continue his or her formal education. In that event each child's support shall continue as long as he or she continues to pursue his or her education.

On August 25, 1987, appellant filed a motion for modification of child support contending that the parties' oldest child, Kenneth M.Terry, Jr. had married, was working full time, was no longer a dependent and therefore appellant's child support obligation should be modified. A hearing was held in which evidence was presented to show that Kenneth M. Terry, Jr. was indeed married and had a child and a full time job. However, it was also revealed that Kenneth, his wife, and his son were living

with appellee, Janice Terry, along with her two other children. Also, there was testimony showing that appellee had not remarried.

The chancellor held that the property settlement and support agreement, incorporated into the divorce decree, specifically provided that the appellant would continue to pay child support until 1998, long after the children reached the age of majority and had also specified a certain condition under which that agreement would be modified, i.e., appellee's remarriage. The chancellor stated that in the light of that provision and the fact that Janice Terry had not remarried, he was powerless to change the contract. He reasoned:

> If the parties had intended to say that this child support agreement will be in effect until September 1988 [sic] or at such time before then as any child attains majority, that would make it perfectly clear. But they didn't say that and the only assumption to be made is that they didn't say it because, for whatever reason, they didn't intend to say it. . . . This is the agreement the parties made and there is nothing unlawful about it and the Court is not free to change that contract.

Appellant contends on appeal that the chancellor erred in finding that the parties' agreement was a contract and that he was not free to modify the child support payments. Appellant argues that the court can always modify child support upon a proper showing of changed circumstances, citing *Biddle* v. *Biddle*, 208 Ark. 777, 187 S.W.2d 720 (1945). He also cites *Thurston* v. *Pinkstaff*, 292 Ark. 385, 730 S.W.2d 239 (1987), where the court stated that "separate agreements, even if incorporated into the decree, cannot diminish the power of the court to modify support upon a determination of a change of circumstances." 292 Ark. 389. Appellant also relies upon *Nooner* v. *Nooner*, 278 Ark. 360, 645 S.W.2d 671 (1983), in which the court said:

> The Court always retains jurisdiction over child support, as public policy. No matter what an independent contract states, either party has a right to ask for a change in child support. In this case where alimony and child support were not separately stated, the appellant can ask the Chancery Court to make a determination as to how

> much of the $100 is child support and how much is alimony.

278 Ark. at 364. Thus, it appears that the chancellor's statement that he was "not free" to modify the child support could be regarded as incorrect.

However, we do not believe this statement is necessarily wrong or that reversal of the chancellor's decision is required. The agreement contains fourteen numbered provisions. This case is concerned with the provision numbered (2). It consists of the two paragraphs which we quoted at the beginning of this opinion. Looking carefully at these paragraphs, we see that the first one is headed, or entitled, "SUPPORT OF MINOR CHILDREN." It states that the "HUSBAND shall pay support unto the WIFE" and describes how, when and in what amount those "support payments" shall be made. And after September of 1998 those "support payments" shall cease. But the second paragraph states that "IT IS FURTHER AGREED" that should the wife remarry prior to September of 1998, the husband's "child support" payments shall be reduced in the following manner — the paragraph then describes conditions under which "child support" will or will not cease, but in each instance it states "child support." Thus we see that the first paragraph speaks of "support payments" to the wife and the second paragraph speaks of "child support" payments.

We think the distinctions made by the parties in the two paragraphs must be considered deliberate and significant. It certainly is understandable that the parties might reach an agreement whereby the husband would pay support to the wife for a certain period of time. So, the first paragraph provides for support payments through September of 1998. That would be sixteen years from the date of the agreement and date of the divorce. At that time, the youngest child, who was six when the agreement was made, would be twenty-two years old, and the oldest, who was thirteen when the agreement was made, would be twenty-nine years old. This sounds like alimony and neither the agreement nor decree made any other provision for alimony.

In keeping with this concept, the second paragraph provides that should the wife remarry prior to September of 1998, the husband's "child support" shall cease for each child when it

reaches the age of majority, marries, or otherwise becomes self-supporting, unless that child continues to pursue its education. This sounds like the "alimony" feature stops at remarriage and leaves only child support.

Viewed as described above, we think the chancellor was correct in refusing to modify the payments called for in the agreement and incorporated into the divorce decree. Under that agreement the payments under the "alimony" feature of the agreement were still due — the wife had not remarried and September of 1998 had not arrived. And even if the chancellor gave the wrong reason for his ruling, we do not reverse if he reached the right decision. *Ratliff* v. *Moss*, 284 Ark. 16, 678 S.W.2d 369 (1984).

We would point out that our decision does not affect the jurisdiction or right of the court to modify its decree as to the payment of child support upon the determination of a change in circumstances. See *Thurston* v. *Pinkstaff*, *supra*. In *Nooner* v. *Nooner, supra*, the court held that a modification of an independent agreement for alimony without the consent of both parties was not permissible. We hold that the "alimony feature" of the agreement in this case was an independent contract which could not be modified without the consent of the parties. But *Nooner* also held that no matter what an independent contract states, either party has the right to ask for a change in child support as the court retains jurisdiction over that matter because of public policy. And in *Nooner*, where alimony and child support were not separately stated, the court held that the chancery court could make a determination as to how much of the support payments, provided for by the agreement, is child support and how much is alimony. That authority obviously exists in this case; however, because of the provisions of the agreement in this case "support payments" to the wife may not be reduced, under some factual situations, even if a change in circumstances justified a change in child support payments.

Affirmed

CRACRAFT, J., concurs.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. I dissent because I

disagree with the conclusion, stated in the majority opinion, that the support payments provided for in the first paragraph of provision number two were intended to be alimony payments, rather than child support payments. This paragraph is captioned with the words "support of minor children" in capital letters. The payments consist of a sum of money to be paid "per child, per month." As the majority opinion notes, neither the agreement nor the decree made any specific provision for alimony.

The sense and meaning of words used by the parties to a contract must be considered as they are taken in their plain and ordinary meaning, *Farm Bureau Mutual Ins. Co. of Arkansas, Inc.* v. *Milburn*, 269 Ark. 384, 601 S.W.2d 841 (1980), and courts are duty bound to construe a contract according to its unambiguous language without enlarging or expanding its terms. *Christmas* v. *Raley*, 260 Ark. 150, 539 S.W.2d 405 (1976). Moreover, where the language of the instrument is imprecise or obscure, the construction to be adopted is that which is most reasonable. *See Love* v. *Couch,* 181 Ark. 994, 28 S.W.2d 1067 (1930); *Singer Sewing Machine Co.* v. *Brewer*, 78 Ark. 202, 93 S.W. 755 (1906). I submit that provision number two of the parties' agreement is unambiguous if the words "support of minor children" are given their plain and ordinary meaning, and that the majority has overturned the plain and unambiguous terms of the contract by construing this provision as an agreement to pay alimony. I think that the challenged sections of the agreement clearly provided for child support, and that the chancellor erred in concluding that he was without authority to modify the contractual child-support agreement. *Crow* v. *Crow*, 26 Ark. App. 37, 759 S.W.2d 570 (1988). I would reverse.

Marion ALDRIDGE *v.* Betty ALDRIDGE

CA 89-2 773 S.W.2d 103

Court of Appeals of Arkansas
Division I
Opinion delivered June 14, 1989

Dan Dane, for appellant.

Butler, Hicky & Long, by: *Fletcher Long, Jr.*, for appellee.

JUDITH ROGERS, Judge. The parties to this litigation were divorced by decree of October 25, 1988, after seventeen years of marriage. The chancellor found that certain bank accounts were marital property, and thus equally divided the proceeds therefrom between the parties. The chancellor also awarded appellee a portion, based on a percentage formula, of appellant's retirement fund, as well as alimony in the amount of $350 per month. At a subsequent hearing on appellee's motion for contempt alleging the non-payment of alimony, the chancellor found that the award of alimony had not been superseded by a previously entered order of supersedeas staying other provisions of the decree during the pendency of this appeal. In addition, the chancellor held, in any event, that an award of alimony could not be stayed pending appeal. From the decree of divorce with regard to the above-mentioned dispositions, and the ruling of the chancellor as to his lack of authority to stay the award of alimony comes this appeal. We affirm with modification.

As his first issue on appeal, the appellant contends that the chancellor erred in failing to consider the bank account of the appellant as premarital property. The appellant testified that the bank account in question was held in his name only, existed prior to the marriage, and that as of the time of the marriage the balance of the account was $18,317.20. The appellant maintains that these facts in conjunction with the appellee's not having made any contributions to the account, required the chancellor to trace the funds and declare the account to be his separate, premarital property. We disagree.

The chancellor found that over the seventeen year marriage that the accounts had been commingled. It is undisputed that at the time of divorce, the account contained $12,086.79, and there was evidence that the balance could have at

times dipped as low as $8,000. Presumably, the funds were used by the parties over the course of the marriage, and marital funds were utilized to replace any amounts that had been withdrawn. The appellant argues that no facts were developed to support the chancellor's finding that the funds withdrawn were intermingled with marital property. However, the converse of this argument is of equal import in that the appellant had failed to show that the funds maintained their separate character, perhaps because of the difficulty of tracing such funds over the course of a seventeen year marriage. In *Canady* v. *Canady*, 290 Ark. 551, 721 S.W.2d 650 (1986), the supreme court recognized:

> Unquestionably the tracing of money or other property into different forms may be an important matter, but tracing is a tool, a means to an end, not an end in itself. . . . We have no doubt that the tracing of funds and even the acquisition of property before the marriage or by gift during the marriage might be inconsequential when considered at the dissolution of a marriage that had lasted for many years and had left the parties with decidedly unequal means for supporting themselves in the future.

See also, *Jackson* v. *Jackson*, 298 Ark. 60, 765 S.W.2d 561 (1989). It has also been stated "that where transactions result in great difficulty in tracing the manner in which nonmarital and marital property have been commingled, the property acquired in the final transaction may be declared marital property." *Boggs* v. *Boggs*, 26 Ark. App. 188, 761 S.W.2d 956 (1988).

The burden is on the party who asserts an interest in property to establish that it is in fact separate property not subject to division. *Gorchik* v. *Gorchik*, 10 Ark. App. 331, 663 S.W.2d 941 (1984). Chancery cases are tried *de novo* on appeal, but the trial court's findings of fact will not be disturbed unless they are clearly against the preponderance of the evidence. *Bone* v. *Bone*, 12 Ark. App. 163, 671 S.W.2d 217 (1984); Ark. R. Civ. P. 52(a). We cannot say that the chancellor's finding that the balance of the account at the time of divorce was marital property, and thus subject to equal division, was clearly against the preponderance of the evidence.

The second issue raised by the appellant is his contention that the trial court erred in awarding appellee alimony. In the

decree, the chancellor ordered the appellant to pay alimony in the amount of $350 per month until the appellee either reaches the age of 62 at which time she would be entitled to draw social security, or until she applies for and receives social security disability benefits. The evidence showed that appellee was 58 years of age and in ill-health, that she had not worked since the time of their marriage, and that she would have no means of providing for her own support since her poor health rendered her unable to seek employment. While on the other hand, the appellant, who was retired, and receiving disability benefits had a combined income of $1,162.55 per month.

An award of alimony lies within the sound discretion of the chancellor, whose decision will not be reversed absent a clear abuse in the exercise of that discretion. *Boggs* v. *Boggs*, *supra*. There are numerous factors that have a bearing on the determination of whether to award alimony. *See*, *Boyles* v. *Boyles*, 268 Ark. 120, 594 S.W.2d 17 (1980); *Weathers* v. *Weathers*, 9 Ark. App. 300, 658 S.W.2d 427 (1983). The primary factors to be considered are the need of one spouse and the ability of the other spouse to pay. *Harvey* v. *Harvey*, 295 Ark. 102, 747 S.W.2d 89 (1988). When all the evidence in this case is considered, we cannot say that the chancellor abused his discretion in awarding alimony, particularly in light of the contingencies placed on the award, which will cause it to terminate when the appellee begins to receive income from these independent sources.

Although it is undisputed that the appellant's interest in his retirement fund was vested and was currently distributable at the time of the divorce, and thus properly subject to division upon divorce, the appellant argues that the trial court made an error in calculating the monthly amount that the appellee was entitled to receive. We agree.

The evidence was that appellant was receiving in monthly installments the sum of $453.55 in retirement from AP&L, based upon twenty-seven years of employment. The parties were married for thirteen of the twenty-seven years that his benefits were accruing. The chancellor sought to divide the monthly retirement income based on a percentage formula which was approved of by the supreme court in *Addis* v. *Addis*, 288 Ark.

205, 703 S.W.2d 852 (1986). In doing so, he awarded appellee the sum of $271 per month, which is 13/27 of the total monthly amount. However, the chancellor failed to consider that the appellee should share in the distribution of this fractional amount if this asset were to be divided equally. Thus the chancellor misapplied the percentage formula in failing to further divide the 13/27 fractional amount by multiplying the fraction by one-half.

Since we agree that the chancellor miscalculated the appellee's interest in the retirement fund, we may enter here the order that should have been entered by the chancellor, since the record has been fully developed, making remand on this issue unnecessary. *See Ferguson* v. *Green*, 266 Ark. 556, 587 S.W.2d 18 (1979). Therefore, we modify the amount that appellee is entitled to receive monthly from appellant's retirement fund to one-half of $271, or $135.50.

As his final argument on appeal, the appellant challenges the chancellor's conclusion that the award of alimony could not be stayed by an order of supersedeas during the pendency of the appeal. Inasmuch as we have affirmed the chancellor's decision to award alimony to the appellee, the question raised by appellant is now moot. Therefore, we need not and decline to address this issue. *See Arkansas Dep't of Human Servs.* v. *M.D.M. Corp.*, 295 Ark. 549, 750 S.W.2d 57 (1988).

AFFIRMED AS MODIFIED.

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

EUREKA LOG HOMES and United States Fidelity & Guaranty Co. *v.* Corbit MANTONYA

CA 88-430 772 S.W.2d 365

Court of Appeals of Arkansas
Division I
Opinion delivered June 21, 1989

Davis, Cox & Wright, by: *Kelly Carithers*, for appellant.

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

DONALD L. CORBIN, Chief Judge. Stated explicitly, the issue in this case is whether the Arkansas Workers' Compensation Commission was correct in awarding appellee, Corbit Mantonya, interest on medical bills which accrued pending a final determination by this court as to which of three employers was liable for injuries sustained by appellee in October of 1983. We affirm the Commission's finding that the appellee is entitled to 10% interest on his medical benefits from August 17, 1984, until paid by appellants, Eureka Log Homes and United States Fidelity & Guaranty Company.

Appellee's chronological survey of the lengthy history of this case is helpful:

> 10/29/83: Appellee suffered a compensable work-related injury while in the employ of Don Cox Lumber Company, an uninsured subcontractor of appellant Eureka Log Homes. Thereafter, appellee filed a claim for workers' compensation benefits against both Don Cox Lumber Company and appellant Eureka Log Homes (designated respectively as Respondent No. 1 and Respondent No. 2 below).
>
> 4/25/84: The original hearing was conducted in this matter before Administrative Law Judge Tolley in order to determine appellee's entitlement to workers' compensation benefits. At this hearing, both Don Cox Lumber Company and appellant Eureka Log Homes took the position that Don Cox Lumber Company was an independent contractor for purposes of appellee's workers' compensation claim.
>
> 8/17/84: The original opinion was filed in this case, wherein the administrative law judge ruled that Don Cox Lumber Company was the subcontractor of appellant Eureka Log Homes, so that both were liable to appellee for the work-related injury he sustained. In particular, appellant Eureka Log Homes was directed to pay permanent partial disability benefits, reasonable and necessary medi-

cal expenses, attorney's fees, and costs of the proceedings. The administrative law judge specifically ruled that the award would "bear interest at the rate of ten (10%) percent from date until paid." The issue of claimant's entitlement to permanent partial disability benefits, having been reserved, was not ruled upon by the administrative law judge.

9/4/84: Appellant Eureka Log Homes filed its notice of appeal from the 8/17/84 administrative law judge's decision, stating as the grounds for said appeal that appellant Eureka Log Homes was not liable to appellee on his workers' compensation claim.

10/2/85: The full Commission rendered its initial decision in this case, wherein the Commission found that Don Cox Lumber Company was an "independent contractor," so that appellant Eureka Log Homes was not liable to appellee for payment of the workers' compensation benefits in question.

10/23/85: Appellee filed his notice of appeal with the Arkansas Court of Appeals appealing from the above-referenced Commission ruling, stating as the grounds for said appeal the Commission's error in not finding appellant Eureka Log Homes to be a statutory prime contractor under Arkansas Statutes Annotated Section 81-1306 (1976) now codified at Arkansas Code Annotated Section 11-9-402 (Supp. 1987).

7/2/86: The Arkansas Court of Appeals in an unpublished opinion found appellant Eureka Log Homes to be a prime contractor within the meaning of Arkansas Statutes Annotated Section 81-1306, thereby reversing the full Commission's decision of 10/2/85. No mention was made of the prior interest award.

11/7/87: A hearing was held in this case before Administrative Law Judge Emerson to take up the issue of appellee's entitlement to permanent partial disability benefits (which issue had been preserved at the original 8/17/84 hearing), and to determine the end date of appellee's "healing period." At this hearing, appellee also requested

that the administrative law judge enforce the original ten (10%) percent interest award granted herein.

12/4/87: The administrative law judge's opinion was filed, wherein it was determined that claimant's "healing period," ended on January 17, 1985, and that claimant was entitled to permanent partial disability benefits in the amount of five (5%) percent to the body as a whole. The administrative law judge, however, refused to enforce the ten (10%) percent interest award for his stated reason that the 7/2/86 Court of Appeals decision had not specifically ordered the same.

1/8/88: Appellee filed his notice of appeal to the full Commission from the 12/4/87 administrative law judge's decision, on the grounds that he erred in finding that appellee was not entitled to interest on medical benefits as initially awarded by the original administrative law judge.

10/12/88: The full Commission filed its opinion in this case, wherein the 12/4/87 administrative law judge's opinion was reversed and appellee was determined entitled to receive ten (10%) percent interest on the stipulated $27,789.31 of medical expenses.

11/7/88: Appellants filed their notice of appeal from the 10/12/88 full Commission opinion with the Arkansas Court of Appeals alleging that the Commission erred in finding that appellee is entitled to the ten (10%) percent interest award. It is this appeal which is now pending before the Court of Appeals.

The Commission noted that the appellate history of this case has always dealt with the status of the employment relationship (independent contractor/uninsured subcontractor/prime contractor as statutory employer). The finding of compensability, with its resulting expenses (benefits/fee/interest), was never challenged. The Commission further observed that the controversy has always revolved around *who* has to pay, not *what* they will pay.

The majority of the Commission in its decision of October 10, 1988, opined that since the appellants did not challenge the award of interest in the first appeal to this court, the doctrine of

res judicata applied; thus, barring the appellants from now contesting the 10% interest award.

This court in its unpublished opinion in this matter dated July 2, 1986, finally determined who had to pay. We placed the liability on the appellants herein. Although we did not say specifically that appellants would be liable for the original award of interest on the medical bills granted by Administrative Law Judge Tolley, it was at least implicit that appellants would be totally liable for any benefits accruing and due appellee/claimant. We did state that appellant herein was "also liable for the [claimant's] claims for compensation benefits and medical expenses." We believe this language is broad enough to include an award of interest within the meaning of "compensation benefits." In effect, we reinstated Administrative Law Judge Tolley's decision of August 17, 1984. As we have noted earlier, there never has been a direct challenge as to what was to be paid until the appeal now before us.

Once we reversed the Commission as to the designation of who was liable, the case had to go back to the Commission for it to determine the appropriate dollar amount due the claimant. This would necessarily require a recalculation of interest because there would have to be a calculation of benefits in order to arrive at a total award. Every decision we make in workers' compensation cases necessarily requires that the case go back to the Commission for the entry of an order that is in keeping with our decision. On remand, the Commission referred the case to an administrative law judge for a hearing on issues that had been reserved at the original August 17, 1984, hearing to determine the end of appellee's healing period and his entitlement to permanent partial disability benefits.

In *Clemons* v. *Bearden Lumber Company*, 240 Ark. 571, 401 S.W.2d 16 (1966) our supreme court in construing Arkansas Statutes Annotated Section 81-1319(g) (1976) noted the task of filling certain omissions in the statute such as "When, for example, would interest begin to run if the claim were allowed by the referee, denied by the Commission, and allowed by the courts?" The supreme court held that interest upon accrued and unpaid installments of compensation is to be computed from the dates when they should have been paid, beginning, however, not

earlier than the date on which a referee or full Commission first enters an award allowing or denying a claim. The court explained:

> This rule has the merit of simplicity, fixing the rights of all concerned with certainty. It has the far more important merit of fairness, providing the claimant with some measure of redress for the fact that the payment of his just claim has been delayed, through no fault of his, for months or even, as in the case at bar, for years. Morever, [sic] this construction of the statute treats delinquent payments with the same justice that applies to advance payments, which must be discounted to their present value. § 81-1319(k).

Id. at 576, 401 S.W.2d at 19. *See also*, *Reynolds Metal Co.* v. *Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956).

Arkansas Code Annotated Section 11-9-809 (1987) provides that "compensation shall bear interest at the legal rate from the day an award is made by either an administrative law judge or the full Workers' Compensation Commission on all accrued and unpaid compensation." In turn, Arkansas Code Annotated Section 11-9-102(9) (1987) expressly states that " 'compensation' means the money allowance payable to the employee or to his dependents and includes the allowances provided for in § 11-9-509 . . . ."

Arkansas Code Annotated Section 11-9-509 (1987) is titled "Medical services and supplies — Amounts and time periods" and specifically addresses itself to the amounts payable and time periods allowable "for authorized medical, hospital, and other services and treatment furnished under §§ 11-9-508—11-9-516," which code provisions deal exclusively with medical services and supplies of the type involved in the case at bar.

■ Because Section 11-9-102(9) expressly and unequivocally includes those types of "allowances provided for in § 11-9-509," we agree with appellee that it cannot be seriously maintained that the interest award granted earlier by the administrative law judge did not encompass and directly apply to the stipulated $27,789.31 medical expense amount involved here.

■ Appellants' second issue involves the allegation that the Commission erred in finding that appellee is entitled to interest on

medical expenses paid directly to medical care providers by appellants. We fail to see any merit in appellants' argument that since the providers were paid directly, an award of interest to the appellee on this sum would allow claimant to recover a "windfall." We addressed this issue, at least obliquely, in our discussion of the *Clemmons* case. Appellants' argument in this regard is not persuasive. We have to agree with appellee's assessment that most medical benefits are paid directly to the medical providers. A review of many cases while not specifically stating that medicals were paid directly, brings us to the conclusion that interest is due on direct medical payments. In *Ragon* v. *Great American Indemnity Company*, 224 Ark. 387, 273 S.W.2d 524 (1954) an attorney sought to base his fee on the amount expended on medical services after successfully reversing the Commission's denial of benefits to his client. The court in referring to the complaint noted that the insurance company has paid out great sums for medical and hospital services and supplies which were within the peculiar knowledge and information of the carrier and unknown to plaintiff. *Ragon* turned on the legal ground that the attorney had not exhausted his administrative remedies by first applying to the Commission for redress. Very few seriously injured employees have the resources to pay for expensive medical care. We see the allowance of interest as being part and parcel of the benefits due an injured employee. It also should serve as a deterrent to frivolous appeals.

We find substantial evidence to support the Commission's determination that appellants owe appellee interest on the stipulated medical expenses of $27,789.31 beginning August 17, 1984, the date it should have been paid and the earliest date that an administrative law judge first entered the award.

Affirmed.

MAYFIELD and ROGERS, JJ., agree

Eddie JOHNSON *v.* Austin HUX d/b/a Fireball Electronic
CA 88-342 772 S.W.2d 362

Court of Appeals of Arkansas
En Banc
Opinion delivered June 21, 1989
[Supplemental Opinion on Denial of Rehearing
December 13, 1989.*]

*Cooper, J., concurs.

Landers & Shepherd, by: *Bobby E. Shepherd*, for appellant.

Ronald L. Griggs, for appellee.

GEORGE K. CRACRAFT, Judge. Eddie Johnson appeals from an order of the Arkansas Workers' Compensation Commission finding that he had failed in his burden of proving a compensable injury and denying him temporary total disability benefits. We find no error and affirm.

Appellant went to work for appellee as a satellite television system installer during the summer of 1984. Appellant testified that, while installing a satellite antenna in February of 1985, he sustained a work-related injury when he fell and injured his hip. He stated that he continued to work for several weeks thereafter until the pain became so intense that he finally consulted Dr. John Giller. After a short period of treatment, appellant returned to work for a few weeks but continued to have pain and was again forced to cease his employment. He was later seen by Dr. Ernest Hartmann and diagnosed as having a herniated lumbar disc, for which surgery was performed in 1986.

The administrative law judge (ALJ) found the hip injury to be work-related and awarded temporary total disability benefits. On appeal, the Commission reversed that decision on a finding that the claimant had failed to prove by a preponderance of the credible evidence that he had suffered a work-related injury.

Appellant first contends that this finding is not supported by substantial evidence. We do not agree. In its opinion, the Commission stated that appellant offered only his own testimony

that the injury occurred while on the job. The Commission noted that none of the reports of appellant's treating physicians contained a history of the slip-and-fall incident referred to in appellant's testimony. To the contrary, Dr. Giller's report stated that appellant attributed his pain to a 1983 "tussle with a cow" during which the cow stepped on appellant's hip. Dr. Hartmann's report of October 29, 1985, stated that appellant had a "three-month history of *non-traumatic* low back and right leg pain aggravated by riding in a car, coughing and sneezing" (emphasis added), and that appellant had that day consulted him complaining that he developed a "catch" in his back when he had to suddenly and forcefully apply the brakes of his car. The Commission also noted that appellant admitted in his testimony that, during the same week in which he alleged the job-related fall to have occurred, he wrecked a three-wheeled vehicle two or three times, turning it over and hurting his hip.

On appellate review of workers' compensation cases, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission, and will affirm if there is any substantial evidence to support the findings made. *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 597 S.W.2d 360 (1979); *Oller* v. *Champion Parts Rebuilders, Inc.*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). In making our review, we recognize that it is the function of the Commission to determine the credibility of the witnesses and the weight to be given to their testimony. *Wade* v. *Mr. C. Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989). We give the ALJ's findings no weight whatsoever. *Clark* v. *Peabody Testing Service, supra; Oller* v. *Champion Parts Rebuilders, Inc., supra.* It is the duty of the Commission to make findings in accordance with the preponderance of the evidence; its function is not to determine whether there is substantial evidence to support the findings of the ALJ. *Jones* v. *Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. From our review of the record, we cannot conclude that the Commission's finding that appellant failed to prove a compensable, work-related injury is not supported by substantial evidence.

Alternatively, appellant argues for the first time on this appeal that the application of these well-established rules governing the Commission's function and our standard of review deny him due process of law because they permit findings of credibility to be made by a fact finder which had no opportunity to observe the manner and demeanor of the witnesses while giving their testimony. We do not address this issue because it was not raised before the Commission. In *Hamilton* v. *Jeffrey Stone Co.*, 6 Ark. App. 333, 641 S.W.2d 723 (1982), we held that the rule which prohibits presentation of constitutional issues for the first time on appeal applies with equal force to appeals from the Workers' Compensation Commission.

We find no merit in appellant's argument that the rule should not apply in this case because he had no opportunity to object to the unconstitutional nature of the act and had no occasion to complain until after the decision of the ALJ had been reversed by the full Commission. First, it is clear under current law that the weight and credibility of witnesses' testimony are matters within the exclusive province of the Commission, and that the Commission is not in any was bound by the findings of the ALJ. Indeed, the Commission is not only authorized but required to make its own findings, unless, after a *de novo* review, it expressly adopts as its own those of the ALJ. *Jones* v. *Tyson Foods, Inc.*, 26 Ark. App. 51, 759 S.W.2d 578 (1988). Therefore, appellant knew as of the time the decision was appealed to the full Commission that the Commission was free to completely disregard the ALJ's findings. If he questioned the constitutionality of this long-standing procedure, he could have raised that issue at the Commission level.

Furthermore, the Commission's decision would not be beyond the reach of that body until the expiration of thirty days from the date appellant received a copy of the order. During that period of time, the constitutional issue could have been brought forward by a motion to reconsider and a proffer of any proof deemed essential to preservation of the issue. *Morrison* v. *Tyson Foods, Inc.*, 11 Ark. App. 161, 668 S.W.2d 47 (1984); *Walker* v. *J & J Pest Control,* 270 Ark. 941, 606 S.W.2d 597 (Ark. App. 1980).

Several other reasons why the rule requiring constitutional

issues to be raised before the Commission should not be applied in this particular case have been advanced in our conference. However, we conclude that within a given class of cases, e.g., appeals from the Workers' Compensation Commission, rules governing appellate review and procedure are, and ought to be, intended for universal application. Only chaos could result from a determination of the applicability of a clearly stated procedural rule on a case-by-case basis.

Affirmed.

ROGERS, J., concurs.

COOPER, J., dissents.

JUDITH ROGERS, Judge, concurring. Although I agree that Judge Cooper's dissent may be the more humane approach, the well reasoned historical approach stated in the majority opinion more accurately reflects our standard and scope of review. Therefore we are again reminding counsel that all issues should be raised and to some degree anticipated, at the earliest possible moment, so that these questions can be preserved for appellate review.

JAMES R. COOPER, Judge, dissenting. The majority has affirmed this case on the ground that the question raised by the appellant has not been preserved for appellate review. I dissent because I believe that the appellant was presented no meaningful opportunity to raise the issue. It is noteworthy that the present appellant was the appellee before the Commission, having prevailed before the administrative law judge. The majority holds that the appellant should have presented his due process question to the Commission because he knew that current law required the Commission to make credibility determinations in the absence of an opportunity to observe the demeanor of the witnesses. I maintain that the majority demands an uncommon degree of precognitive ability on the part of appellees who come before the Workers' Compensation Commission. The appellee, who did not bring the appeal, is thus required in his answer both to anticipate that the Commission will reverse the administrative law judge's decision, and that the basis for the reversal will be that the Commission, which did not see the witnesses, will disagree with the specific finding of credibility made by the administrative law

judge who had the witnesses before him.

Nor do I agree that it is necessary to petition for rehearing before the Workers' Compensation Commission in cases such as this in order to preserve an issue for appeal. First, *Hamilton* v. *Jeffrey Stone Co.*, 6 Ark. App. 333, 641 S.W.2d 723 (1982), is distinguished by the fact that, in *Jeffrey*, the statute of limitation question that was the subject of the appeal was plainly in issue at the administrative law judge level and throughout the proceedings. In the case at bar, no question of the constitutionality of the Commission's review procedure arose until the Commission's decision was rendered. Second, although we have held that the Commission has the authority to grant petitions for reconsideration, no explicit statutory authority exists for this procedure, *Morrison* v. *Tyson Foods, Inc.*, 11 Ark. App. 161, 668 S.W.2d 47 (1984), and I have found no case holding that an issue was not preserved for appeal due to the appellant's failure to petition the Commission for reconsideration.

Finally, the Commission issued its opinion in this case prior to the Supreme Court's decision in *Wade* v. *Mr. C. Cavenaugh's* 298 Ark. 363, 768 S.W.2d 521 (1989), which held, for the first time, that the Commission may rely on the administrative law judge's observations and comments concerning the claimant's demeanor, conduct, appearance, or reactions at the hearing. The appellant's due process issue is therefore particularly apropos now, when the effect of the *Wade* decision is unclear in light of the long line of cases holding that the Commission is the sole judge of a witness's credibility. Because of the manner in which this case has come before this Court, and because of the significant question presented by the appellant's argument, I would remand to the Commission for a determination of the due process question advanced by the appellant.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING DELIVERED DECEMBER 13, 1989

781 S.W.2d 751

PER CURIAM. Petition for rehearing is denied.

COOPER, J., concurring.

JAMES R. COOPER, Judge, concurring. I agree with the denial of the appellant's petition for rehearing but I write

separately because, under the circumstances of this case, I have concluded the appellant's due process argument should have been addressed rather than dismissed on the ground that he failed to preserve it. *Johnson* v. *Hux*, 28 Ark. App. 187, 191, 772 S.W.2d 362, 364 (1989) (Cooper, J., dissenting).

After a hearing before the administrative law judge, the appellant's injury was found to be compensable. However, the full Commission reversed the administrative law judge's finding and based its opinion solely on the credibility of the appellant's testimony.

The appellant contends that our statutory system which allows the Workers' Compensation Commission to make its own findings concerning the credibility of witnesses and to disregard the credibility findings of the administrative law judge denies him due process. Citing *St. Louis-San Francisco Ry. Co.* v. *Mangum*, 199 Ark. 767, 136 S.W.2d 158 (1940), the appellant asserts that, because the administrative law judge has the opportunity to observe the witnesses and the Commission only reviews a cold record, unreasonable and arbitary state action results and operates as a denial of due process.

In his brief the appellant cites a Wisconsin case which held that there may be a due process violation where the Commission's findings on credibility of witnesses is contrary to the credibility findings of the hearing examiner. *Braun* v. *Industrial Comm.*, 36 Wis.2d 48, 153 N.W.2d 81 (1967). In *Braun*, the issue of whether or not the claimant's injury arose in the course of employment depended on the testimony and credibility of the claimant. The hearing officer found the claimant not to be credible and denied benefits. However, the Commission, without benefit of live testimony, reversed and found the injury to be compensable. In finding that the Commission's actions violated due process, the Supreme Court of Wisconsin noted that the ultimate responsibility for fact finding is upon the Commission and not the examiner, and that the reviewing court's duty is to scrutinize the Commission's finding. The Court stated further, that when the Commission's findings as to credibility of the witnesses is contrary to those of the examiner, it is a denial of due process if the Commission does not have the benefit of the findings, conclusions, and impressions of the hearing officer who conducted the hearing.

However the majority of States are in accord with the

Arkansas rule that the Commission, and not the administrative law judge, is the fact-finder on matters of credibility. 3 A. Larson, *The Law of Workmen's Compensation*, § 80.12(b) (1989). Larson classifies the Wisconsin method as a "modified majority rule" because credibility is the only finding by an administrative law judge that is binding on the Commission. All other factfindings are left to the Commission under this modified rule. 3 A. Larson, *The Law of Workmen's Compensation*, § 80.12(c) (1989). Furthermore, in Arkansas, the Commission has the benefit of the Administrative Law Judge's conclusions and findings because his opinion is part of the record reviewed by the Commission. The Commission may also rely on the administrative law judge's observations and comments concerning the claimant's demeanor, conduct, appearance, or reactions at the hearing. *Wade* v. *Mr. C Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989).

The procedure used by the Commission must be fundamentally fair and due process requires a hearing before one's rights are adjudged, *Duggan* v. *Potlatch Forests, Inc.*, 92 Idaho 262, 441 P.2d 172 (1968), and the hearing and review by the Commission must be conducted according to the prescribed statutory law and in a reasonable manner. *Pollard* v. *Krispy Waffle #1*, 63 N.C. App. 354, 304 S.W.2d 762 (1983). Where a claimant is given appropriate notice and opportunity to be heard, it does not constitute a denial of due process for the Commission to make finding of credibility without the benefit of live testimony. *Id; see also Eastham* v. *Whirlpool Corp.*, 524 N.E.2d 23 (Ind. App. 3rd Dist., 1988). In *Bowman Transportation* v. *Arkansas-Best Freight*, 419 U.S. 281 (1974), the United States Supreme Court held that, in matters of credibility, an agency is not bound by the findings of its hearing examiners.

In Arkansas, it is the Commission's duty to make findings of fact and to assess the credibility of witnesses. In exercising this duty, the Commission may hear the parties, their representatives and witnesses, Ark. Code Ann. § 11-9-704(b)(6) (1987), permit the introduction of additional evidence, Ark. Code Ann. § 11-9-705(c); study briefs in pending cases; Rules of the Commission, Rule 18; or hear oral arguments if requested by either the parties or the Commission; Rules of the Commission, Rule 17. Clearly the legislature and the Commission have provided statutes and

Rules which provide a claimant with several opportunities to be heard without harming the purpose of speedy recovery. I believe that the procedure used in Arkansas does not violate due process.

MAYFIELD, J., joins in this opinion.

Grady H. STILLMAN *v.* MULTI-STATES ELECTRIC

CA 88-248 771 S.W.2d 807

Court of Appeals of Arkansas
Division I
Opinion delivered June 21, 1989

Thorp Thomas, for appellant.

Friday, Eldredge & Clark, by: *Kevin A. Crass*, for appellee.

GEORGE K. CRACRAFT, Judge. Grady H. Stillman appeals from an order of the Arkansas Workers' Compensation Commission denying him benefits for an injury to his back under the so-called *Shippers Transport* doctrine. He contends that the evidence in this case does not support the application of that doctrine. We agree.

In *Shippers Transport of Georgia* v. *Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979), it was held that a denial of benefits by the Commission is proper where:

> (1) the employee knowingly and willfully makes a false representation as to his physical condition;
>
> (2) the employer relies upon the false representation, and this reliance is a substantial factor in the hiring; and
>
> (3) there is a causal connection between the false representation and the injury.

In this case, the only pre-employment question asked concerning appellant's condition was: "Do you have any physical limitations that preclude you from performing any work for which you are being considered?" Appellant answered the question, "No." While in the employ of appellee, appellant sustained an injury to his back. There was evidence that, on several occasions prior to his employment with appellee, appellant had suffered injuries to the same area of his back for which permanent partial disability to the body as a whole had been awarded. The Commission found that appellant had falsely represented his physical condition in his job application and that the employer relied on the false representation. It also found that

these facts were substantial factors in the hiring and that there was a causal connection between the representation and the injury. As there is no dispute as to the applicable law, the only issue for us to determine is whether these findings are supported by substantial evidence, which is defined as that which a reasonable mind might accept as adequate to support a conclusion. *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979).

While we find that there was substantial evidence to support a finding that the answer contained in the application was a substantial factor in the hiring and that there was a causal connection between appellant's present condition and a preexisting one, we cannot conclude that the evidence is sufficient to sustain findings that the employee knowingly and willingly made false statements as to his physical condition or that a false statement was causally connected with the injury.

In *College Club Dairy* v. *Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988), where a claimant had been asked whether he had any "physical defects," we quoted with approval the following statement from the Commission's opinion:

> The employer knows which physical conditions or maladies would be relevant to fitness for the particular tasks he expects the applicant to perform. Therefore, employers relying upon the *Shippers Transport* affirmative defense must show that the employee was questioned in some degree regarding health history and present condition in such a way as to elicit responses likely to be worthwhile in assessing the employee's health history, condition, and capacity for performing the employment. The question posed in this case is so general and broad that it conveys no message about any aspect of one's health that it [sic] may be germane to employability.

Id. at 218, 756 S.W.2d 129.

Here, appellant was not asked specifically about prior injuries or whether he made previous workers' compensation claims. He was simply asked whether he had any physical limitation that would preclude him from performing the work for which he was being considered. There was no evidence that appellant knowingly made a misrepresentation in his response to

that question or that he, in fact, had a physical limitation that would preclude his performance. To the contrary, the evidence shows that he was able to fully perform the duties for which he had been employed for over four months, and until he injured his back in a freak accident caused by soapy water and oil on the floor. From our review of the facts and circumstances of this case, we must conclude that the Commission's finding that appellant willfully misrepresented his physical condition is not supported by substantial evidence. The case is therefore reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

JENNINGS, J., agrees.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. I concur in the result reached by the majority opinion. The decision is based on the proposition that the evidence will not support the causal connection requirement of the *Shippers Transport* doctrine. The case could have been decided on the basis that the question asked concerning appellant's physical condition was too broad and general to support the *Shippers Transport* defense. *See Knight* v. *Industrial Electric Co.*, 28 Ark. App. 224, 771 S.W.2d 797 (1989), handed down today. At any event, the appellant's physical condition had nothing to do with the freak accident he had in this case.

Porter TUBERVILLE *v.* INTERNATIONAL PAPER CO.

CA 88-447 771 S.W.2d 805

Court of Appeals of Arkansas
Division I
Opinion delivered June 21, 1989
[Rehearing denied July 26, 1989.]

Denver L. Thornton, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this workers' compensation case sustained compensable back injuries while employed by the appellee in 1969 and 1970. The appellant requested a hearing in November 1972, contending that he was permanently and totally disabled. The administrative law judge (ALJ) awarded the appellant a permanent partial disability rating of fifty-five percent to the body as a whole. The Commission affirmed the ALJ's decision in July 1983. No appeal was taken from the Commission's decision. However, in May 1982 the appellant filed a claim for additional benefits pursuant to Ark. Stat. Ann. § 81-1326 (Repl. 1976) (now codified at Ark. Code

Ann. § 11-9-713 (1987)). The ALJ awarded the appellant benefits for permanent total disability. The Commission reversed the ALJ. We reversed the Commission's decision because the Commission had improperly relied on the appellant's original contention of permanent total disability to find that he was no more disabled than at the time of his original hearing. *Tuberville* v. *International Paper Co.*, 18 Ark. App. 210, 711 S.W.2d 840 (1986). We remanded this case to the Commission for a redetermination of the appellant's entitlement to a modification of his award under Ark. Stat. Ann. § 81-1326. On remand, however, the Commission did not reach the merits of the appellant's claim, but instead denied the claim for additional benefits on the ground that it was barred by the statute of limitations. Noting that the Commission had reached this result by ignoring the parties' stipulation that medical payments had been made within the past year and continuously, thereafter, we again reversed the Commission's decision and remanded for a determination of the merits of the appellant's claim. *Tuberville* v. *International Paper Co.*, No. CA 87-134 (op. del. November 4, 1987) (not designated for publication). In an opinion filed October 12, 1988, the Commission found that the appellant's physical condition had changed since the original award, but also found that this change was due entirely to the natural process of aging. On the basis of these findings, the Commission concluded that the change in appellant's condition was not causally related to his compensable injury, and denied the appellant's claim for permanent total disability benefits. From that decision, comes this appeal.

The appellant contends that the Commission's decision is not supported by substantial evidence. We agree.

In determining the sufficiency of the evidence to sustain the findings of the Workers' Compensation Commission, we review the evidence in the light most favorable to the Commission's findings, and we must affirm if there is any substantial evidence to support them. *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984). We may reverse the Commission's decision only when we are convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Snow* v. *Alcoa*, 15 Ark. App. 205, 691 S.W.2d 194 (1985).

The record shows that the appellant's condition worsened subsequent to the original award, and that surgery was therefore performed. The Commission relied on the following testimony of the appellant's treating physician, Dr. Chakales, to find that the change in his condition was due entirely to the natural process of aging:

> Q. Tell us, then, what you did.
>
> A. Well, I sent him home and told him to think about it, whether or not he wanted to have any surgery. If he was hurting a lot and he wished to, we would schedule him for a decompression laminectomy because of the spinal stenosis. What happened is, that over a period of time as he got older, *the fact that he had had the previous surgery with the normal progression of aging process, there is actually a shrinking of the spinal cord, causing more pressure on the spinal cord and the nerve. This will cause a spinal stenosis.*
>
> * * *
>
> Q. Did he give you any history of a particular incident that would cause the condition you found him in when you did this recent surgery?
>
> A. No.
>
> Q. What would be your opinion as to what would put him in that situation?
>
> A. General, gradual process of aging, I would say.
>
> Q. Someone in Mr. Tuberville's condition, *having had the injury he had back in 1970 and having had the removal of the disc back in '71 would be a real candidate to wake up in the shape he was in in '82?*
>
> A. *Correct.*
>
> Q. And that would be because, as you say, the aging process?
>
> A. Correct.
>
> * * *

> A. I assume what happened in '77 until '82, that he was stabilized and he had probably learned to cope with his problem, but then something triggered off and started getting more acute.
>
> Q. Do you have any idea what would trigger it?
>
> A. Mother nature — you know, aging.

(Emphasis supplied.) The rule applicable to this case was stated as follows in *Home Insurance Co.* v. *Logan*, 255 Ark. 1036, 505 S.W.2d 25 (1974):

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

Logan, 255 Ark. at 1037. Dr. Chakales's testimony clearly expresses his opinion that appellant's worsened condition resulted from the natural process of aging *acting upon the appellant's prior, compensable injury.* Unless this testimony is read wholly out of context, no other conclusion is possible. We hold that fair-minded persons with these facts before them could not conclude that the appellant's worsened condition was attributable entirely to the natural process of aging, and that the Commission's finding to that effect is not supported by substantial evidence. *Snow* v. *Alcoa, supra.* Instead, the evidence relied upon by the Commission clearly demonstrates that the appellant's worsened condition was a natural consequence of his primary, compensable injury. *See Home Insurance Co.* v. *Logan, supra.* We hold that the appellant has proved that his change in physical condition is causally related to his employment and to his original compensable injury. Thus, we reverse and remand to the Commission for it to determine the degree of appellant's increase in his disability.

Reversed.

CRACRAFT and ROGERS, JJ., agree.

SAN ANTONIO SHOES and Kemper Insurance Company
v. Kerry W. BEATY

CA 88-356 771 S.W.2d 802

Court of Appeals of Arkansas
Division II
Opinion delivered June 21, 1989

Wright, Lindsey & Jennings, for appellant.

Jesse W. Thompson, for appellee.

JOHN E. JENNINGS, Judge. This is a workers' compensation case. On March 20, 1987, the claimant, Kerry Beaty, sustained a broken ankle when Steve Jackson, the ex-husband of claimant's co-worker, Janet Jackson, slammed a car door on the claimant's leg in the parking lot of the claimant's place of work for San Antonio Shoes. The issue on appeal is whether the Commission's finding that the injury arose out of and in course of employment is supported by substantial evidence. We think it was and affirm.

Beaty had been employed at San Antonio Shoes for about three and one-half years. He and Keith Blocker were "latchers." Beaty's wife also worked at the plant. Janet Jackson and a number of other ladies were "cementers." In constructing a pair of shoes, cementers first cement the leather, and it then goes to the latchers to be stitched together.

Around January 1, 1987, the process used in "latching" shoes changed, which resulted in a pay raise for the latchers.

There was no corresponding increase for the cementers. Sometime in mid-February 1987, the cementers began complaining about how much Beaty and Blocker were making. Beaty testified that "ever since then" the cementers had been hostile toward them. He said that if they talked to him at all it would be only to say something "hateful," and that they began to pick on his wife. Beaty testified that before the pay dispute, the relationship between the cementers and latchers had been good, and that he had never had any problem with Janet Jackson, whom he had known for three and one-half years, or with Steve Jackson, whom he had known for two years.

On March 19, 1987, the day before the incident, Beaty and his wife were getting ready to clock out and as they walked by the cementers they all started "barking at [Mrs. Beaty] like a dog." The next day as Beaty and his wife were going into work, Ms. Jackson said, "There's the dog f——r," referring to Mrs. Beaty. According to Beaty, he just went on to work. Later that day when Ms. Jackson said, "Your wife's a bitch, and you are a son-of-a-bitch," Beaty said, "Y'all just go to hell," and walked away.

When Beaty left work that afternoon he was met in the parking lot by Steve Jackson and, in the ensuing altercation, Jackson slammed a car door on Beaty's foot, breaking his ankle. Beaty testified that Jackson said, "You don't cuss at my wife." Beaty also testified that the cementers were mad at him because he made more than they did and that they said they were going to do something about it.

The general rule applicable here has been restated several times. Injuries resulting from an assault are compensable where the assault is causally related to the employment, but such injuries are not compensable where the assault arises out of purely personal reasons. *See e.g.*, *Daggs* v. *Garrison Furniture Co.*, 250 Ark. 197, 464 S.W.2d 593 (1971); *Townsend Paneling* v. *Butler*, 247 Ark. 818, 448 S.W.2d 347 (1969); *Bagwell* v. *Falcon Jet Corporation*, 8 Ark. App. 192, 649 S.W.2d 841 (1983).

In *Westark Specialties et al.* v. *Lindsey*, 259 Ark. 351, 353, 532 S.W.2d 757, 759 (1976), the supreme court quoted Larson with approval:

> Assaults arise out of the employment either if the risk of assault is increased by the nature or setting of the work, *or if the reason for the assault was a quarrel having its origin in* [the] *work.* (Emphasis in *Lindsey.*)

1 A. Larson, *The Law of Workmen's Compensation* § 11 (1972).

The court also said that a "causal connection with the employment may be shown by connecting with the employment the subject matter of the dispute leading to the assault." 259 Ark. at 353, 532 S.W.2d at 759.

Clearly the question whether there was a causal connection between the assault and the claimant's employment is one of fact for the Commission. *Bagwell, supra.* When we review findings of fact made by the Commission, we must view the evidence in the light most favorable to those findings and give the testimony its strongest probative force in favor of the Commission's action. *See McCollum* v. *Rogers,* 238 Ark. 499, 382 S.W.2d 892 (1964). The question is not whether the evidence would have supported findings contrary to the ones made by the Commission, but whether the evidence supports the findings actually made. *Massey Ferguson, Inc.* v. *Flenoy*, 270 Ark. 126, 603 S.W.2d 463 (1980). We will reverse the Commission's decision on an issue of fact only if it is not supported by substantial evidence. *Linthicum* v. *Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *College Club Dairy* v. *Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988). In the case at bar, we hold that the Commission's finding of a causal relation between the injury and the employment is supported by substantial evidence.

Appellant directs us to our language in *Bagwell:*

> *Foster* holds no more than the mere fact that an assault that occurs on an employer's parking lot or in close proximity to his place of employment does not, standing alone, establish a causal connection which cannot be supplied by speculation. There must be affirmative proof of a distinct employment risk as the cause of the injury.

Bagwell v. *Falcon Jet Corporation*, 8 Ark. App. at 197, 649 S.W.2d at 843. It is true that, in this kind of case, there must be a

showing that the risk of assault is increased by the nature or the setting of the work, *unless* there is proof that the reason for the assault was a quarrel having its origin in the work. *See Westark Specialties et al.* v. *Lindsey*, 259 Ark. 351, 532 S.W.2d 757 (1976). In the case at bar, because there is such evidence, the issue of "employment risk" is not involved. We note too that the doctrine of "positional risk," discussed in *Pigg* v. *Auto Shack*, 27 Ark. App. 42, 766 S.W.2d 42 (1989), is inapplicable to the case at bar. That doctrine is analogous to the doctrine of *res ipsa loquitur* and is applicable only when the injury is unexplained.

Appellant relies on *Chase* v. *White Elephant Restaurant*, 418 A.2d 175 (Me. 1980). The facts in *Chase* bear a marked similarity to those in the case at bar. Chase was a short order cook at the White Elephant Restaurant in Bangor, Maine. Chase and a waitress, Mrs. Blanchard, got into an argument over whether Mrs. Blanchard should use a pen or pencil in writing down her orders. In the course of the argument Chase used abusive language toward Mrs. Blanchard who left the restaurant and went home. A few minutes later Mr. Blanchard appeared, walked into the kitchen and said, "don't ever say what you said to my wife." Chase injured his back in the ensuing scuffle.

The Maine Workers' Compensation Commission found that the injury did not arise out of or in the course of Chase's employment. The Maine Supreme Court merely held that the Commission's decision on this question of fact was not "clearly erroneous." 418 A.2d at 177.

In the course of the opinion, the Maine Supreme Court said:

> At the very least then, for the injury to have arisen out of the employment, the conditions of the worker's employment must contribute to the creation of an environment in which the potential of an assault is reasonably foreseeable.

418 A.2d at 176.

It is doubtful that this statement remains law in Maine, because in *Comeau* v. *Maine Coastal Services*, 449 A.2d 362 (Me. 1982), the court noted that the tort concept of foreseeability is not an aspect of the compensation law requirement of "arising out of" because culpability is not an issue. *See Comeau*, 449 A.2d at 366, citing 1 A.E. Larson, *Workmen's*

Compensation Law, § 6.60. More to the point, the concept of foreseeability is not a part of the causal connection requirement in workers' compensation cases in this state. In *Simmons National Bank* v. *Brown*, 210 Ark. 311, 195 S.W.2d 539 (1946), the court said, "While there must be some causal relation between the employment and the injury, it is not necessary that the injury be one which ought to have been foreseen or expected." 210 Ark. at 317, 195 S.W.2d at 542. In the case at bar, neither fault on the employer's part, nor the foreseeability of this injury, are at issue — both are immaterial.

Appellant suggests that the injury should not be compensable because the assault was by a non-employee. While we agree that this is a factor to be considered in determining whether there is a causal relation between the employment and the injury, we see no reason to hold that it bars a finding of the existence of that relation.

Our conclusion is that the Commission's finding that the claimant's injury arose out of and in the course of his employment is supported by substantial evidence.

Affirmed.

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

F.R. VESTAL *v.* Martha R. VESTAL

CA 88-389 771 S.W.2d 800

Court of Appeals of Arkansas
Division II
Opinion delivered June 21, 1989

Hopkins & Erwin, P.A., for appellant.

Rose Law Firm, A Professional Association, by: *Jess Askew III*, for appellee.

JOHN E. JENNINGS, Judge. Appellant, Frank Vestal, and appellee, Martha Vestal, were married in 1963. During the marriage appellant acquired one hundred percent of the stock in PRO Files, Inc., and Ryan Leasing Company, and seventy-five percent of the stock in Cinesport, Inc. On November 17, 1987, appellant signed an agreement to sell all of his stock in those three corporations to World Bass Association, Inc., for $80,000.00. On that same date he entered into an agreement entitled "Consulting Contract and Covenant Not to Compete" with WBA, in which WBA agreed to pay appellant $1,600,000.00 in twenty annual installments of $80,000.00.

The appellee was granted a divorce by the Pulaski County Chancery Court on June 14, 1988, and was awarded a one-half interest in the proceeds of both contracts. The chancellor specifically found that the amount payable under the "consulting contract" was really additional compensation for the sale of the

businesses. The argument on appeal is that the chancellor was wrong in awarding Mrs. Vestal any interest in the proceeds of the consulting contract. We disagree and affirm.

Appellant concedes that his stock in the three corporations, and therefore the proceeds from its sale, were marital property subject to division by the court. He contends, however, that "compensation for future services as an employee is not a generally accepted form of marital property." While we do not disagree with this proposition, the answer is that the chancellor made a specific finding that the payments due appellant under the consulting contract were not "compensation for future services" but were, in fact, additional compensation for the sale of the businesses. The real issue in the case at bar is whether that finding of fact is clearly erroneous.

Appellant contends that the agreement provided that he would be employed by WBA to "consult, sell, advertise and generally help obtain sponsorship and named personalities for the business." The second paragraph of the contract, however, does not support these contentions:

> 2. *Duties of Vestal.* For a period of three years, Vestal will render to WBA such services of an advisory or consultive nature as WBA may reasonably request, so that WBA may continue to have the benefit of Vestal's experience and knowledge of the affairs of the business WBA is involved in and of his reputation and contacts in the industry, and he will be available for advice and counsel to the officers of WBA at all reasonable times by telephone, letter or in person, provided, however, that his failure to render such services or to give such advice and counsel by reason of illness or other incapacity shall not affect his right to receive his compensation during such period.

The chancellor also noted that if appellant died, the payments were to be made to his estate. Appellant also argues that the "Consulting Contract and Covenant Not to Compete" was a separate and distinct contract from the contract for sale of stock. The latter contract, however, provides in part:

> As further consideration, *which all parties agree to be an integral portion of the compensation being paid for the*

> *purchase of the stock,* WBA agrees to enter into a consulting contract and covenant not to compete with Vestal. . . . (Emphasis added.)

There was, as appellant notes, evidence from which the court could find that the three businesses had little net worth at the time of sale. There was also, however, evidence that the businesses had net assets in excess of $3,000,000.00 within two years of the date of sale. In any event, while the value of the stock in the corporations may have been an appropriate factor for the chancellor to consider in deciding the issue here, it certainly is not determinative.

While we review chancery cases *de novo*, we defer to the chancellor's superior position to find the facts, and reverse his findings only if they are clearly erroneous. *City National Bank of Fort Smith* v. *First National Bank & Trust Co. of Rogers*, 22 Ark. App. 5, 732 S.W.2d 489 (1987).

Courts of equity have traditionally not hesitated to see through the form of a transaction in order to ascertain its true nature. In *Williams* v. *Cotten*, 9 Ark. App. 304, 313-314, 658 S.W.2d 421, 426 (1983), we said:

> Equity looks beyond the mere form in which the transaction is clothed and shapes its relief in such way as to carry out the true intent of the parties to the agreement, and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their relations to one another and to the subject-matter, are subjects for consideration. (Citing *Maners v. Walsh*, 180 Ark. 355, 22 S.W.2d 12 (1929)).

Under the facts of the case at bar, we are unable to say that the chancellor's finding that the payments due appellant under the terms of the "consulting contract" were, in reality, additional compensation for the sale of stock, was clearly erroneous.

Affirmed.

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

Dave COX, d/b/a Dave Cox & Company *v.* Jimmy BISHOP and Brenda Bishop

CA 88-293 772 S.W.2d 358

Court of Appeals of Arkansas
Division I
Opinion delivered June 21, 1989

[redacted]

Stuart Vess and *Omar Greene*, for appellant.

Ralph M. Patterson, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal by Dave Cox from the chancellor's order which rescinded appellees' contract for the purchase and installation of a fiberglass swimming pool and refunded to appellees their consideration of $13,500.00.

In 1986, appellees contracted with defendants, All American Fiberglass Pools, Inc.; appellant, Dave Cox, doing business as Dave Cox & Company; and The Tipton Company, Inc., for the purchase and installation of a fiberglass swimming pool in appellees' yard. The defendants were paid $13,500.00 for the pool and its installation. On July 23, 1986, appellee Jimmy Bishop signed a completion certificate, stating that the pool had been installed and was in good condition. In January 1987, appellees discovered that their pool had risen from the hole in which it had been installed, and thereafter, it developed a series of problems and defects, which appellees alleged rendered it unsafe for use.

Ultimately, appellees filed suit for rescission of the contract, and appellant, Dave Cox, defended on the grounds that the other defendants were the contractors and suppliers of the pool; that he had not guaranteed the job but merely the loan from the financial institution; and that any damages suffered by appellees resulted from their own negligence and misuse. Defendant Tipton Company failed to answer and service upon defendant Fiberglass Pools was never perfected. After a trial upon the merits, the chancellor found that appellant Dave Cox undertook to see that the pool was properly installed; that the pool was improperly installed, which was a material breach of the contract, and therefore, the contract should be rescinded. Judgment was entered, jointly and severally, against The Tipton Company and Cox for the contract price of $13,500.00

Appellant first argues that the chancellor erred in rescinding the contract as it had been substantially performed; therefore, appellant contends the appellees' proper measure of damages should be the cost of repairing the pool, because it could be repaired without economic waste.

In D. Dobbs, *Handbook on the Law of Remedies,* § 12.24 at 919 (1973), in discussing the contractor's remedies where the contractor is in default, having partially breached the contract by failing to complete it or by delivering defective work, the author states that "the doctrine of substantial performance permits [the contractor] to recover, in spite of his breach, if his performance is sufficiently 'substantial.' " In *Mitchell* v. *Caplinger*, 97 Ark. 278, 133 S.W. 1032 (1911), the court said:

> "Substantial performance," as defined by the cases, permits any such omission or deviations from the contract as are inadvertent or unintentional, are not due to bad faith, do not impair the structure as a whole, are remediable without doing material damage to other parts of the building in tearing down and reconstructing, and may without injustice be compensated for by deductions from the contract price.

97 Ark. at 282. This court has said that substantial performance cannot be determined by a mathematical rule relating to the percentage of the cost of completion, and the issue of substantial performance is a question of fact. *Roberts and Co.* v. *Sergio*, 22

Ark. App. 58, 733 S.W.2d 420 (1987). And in *Prudential Insurance Co. of America* v. *Stratton*, 14 Ark. App. 145, 685 S.W.2d 818 (1985), we listed the following considerations as significant in determining whether performance is substantial:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

14 Ark. App. at 151-52.

Dobbs also says that a contractor, though in substantial breach, may recover on a restitutionary theory or on quantum meruit. Recovery is allowed, not on the basis of fault or innocence, but on the basis that one person has retained benefits provided by another. Dobbs, *supra*, at 920-21. The quantum meruit theory was used to allow recovery in *Pickens* v. *Stroud*, 9 Ark. App. 96, 653 S.W.2d 146 (1983), where this court determined that even though there was no substantial performance, that did not prevent the appellees from recovering on a quantum meruit basis for the benefit of the work they did perform.

In the instant case, Jimmy Bishop testified that the pool leaks about four inches of water a week, and introduced into evidence a number of photographs substantiating problems with the pool. The pictures showed a bulge in the side of the pool underneath the ladder, a crack that goes all around the pool, and that the pool had floated out of the hole about six inches. He testified that "they" (it is unclear from the record whom appellant meant) came out and sawed the lip off the side of the pool and patched it, but it didn't hold the cracks down; and that

"they" came back again and redug up his yard to try to fix the leaks in the pool. Mr. Bishop testified that the crack is now six to seven inches wide; the appearance of the pool is terrible; and it prevents him from selling his house. He also said that because of its sharp edges, the pool is useable by children only when an adult is constantly watching, and several children have been hurt on it.

Bob Callahan testified that he had been in the business of repairing pools for fifteen years and the problems with appellees' pool were caused by improper installation. He said relief valves are standard in most pools to relieve the water drainage from underneath the pool and that he saw no such device in this pool. Moreover, he saw no sand backfill around the pool that would help to prevent a fiberglass pool from being damaged. He testified in detail regarding the problems with appellees' pool and stated the pool would have to be removed to repair the damage and that the cost would be approximately $20,000.00

Johnny Burnett, who does not sell fiberglass pools, testified he thought the pool could be saved and estimated the cost of repair to be between $2,500.00 and $5,000.00. He admitted it was possible that his company had told Mr. Bishop over the telephone that the pool would have to be replaced and that he had only looked at the pool from over a six-foot fence the morning of trial.

Charles Wood, who estimated the pool could be repaired at a cost of approximately $2,500.00, had not been active in the pool business since 1982 and admitted that he had never satisfactorily repaired a pool in a condition similar to the one in this case. He also stated that the man who installed appellees' pool did not know what he was doing, and if the pool had been built properly there would not be any problems.

We do not reverse the factual determinations of the trial judge unless they are clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a). Under the evidence here, we cannot find that the chancellor erred in refusing to allow appellant to recover on the basis of substantial performance. Nor can we find that the appellees have received and retained any benefits provided by the appellant which would entitle appellant to recover on a quantum meruit basis for work performed.

Appellant also argues the chancellor incorrectly relied upon

Economy Swimming Pool Co. v. *Freeling*, 236 Ark. 888, 370 S.W.2d 438 (1963), where the Arkansas Supreme Court stated:

> It seems to be basic contract law — apparently so basic that there is little case law on the point — that where there is a material breach of contract, substantial nonperformance and entire or substantial failure of consideration, the injured party is entitled to rescission of the contract and restitution and recovery back of money paid.

236 Ark. at 891 (citations omitted).

In discussing the owner's remedies for a contractor's breach of a building or repair contract in *Handbook on the Law of Remedies*, *supra,* Dobbs says there is a restitution measure of recovery that will restore to the owner any amounts he has paid on the contract price and it is usually thought of in terms of rescission of the contract plus restitution of the parties to the "status quo ante."

> Whatever theory is used, it is clear that restitution is not to be granted in every case for breach of contract, but only where the breach is a "vital" one, or if it represents a substantial "failure of consideration." This requirement of a substantial breach is a summary expression of the policy of fairness between the parties. What constitutes a substantial breach is not, as judges sometimes have assumed, merely a quantitative matter. Rather it is a matter of making a fair adjustment between the parties,

Dobbs at 911. The *Freeling* case is one of the cases cited by Dobbs in support of the above statement. In the instant case, in his comments from the bench at the conclusion of the evidence, the chancellor stated:

> I just don't see anything other than, after looking at these pictures and hearing the testimony of the defense witnesses, that this was just a "botched" job. There is a material breach of contract. I don't think anybody would buy that house with that pool in that condition, and I think the contract should be rescinded.

From the testimony and the evidence presented, we cannot find the chancellor's decision that the contract was breached and that

appellees are entitled to rescission and restitution of their payment is clearly erroneous. Ark. R. Civ. P. 52(a).

Appellant further argues that the court erred in granting appellees rescission of the contract because appellees have not returned what they received under the contract, citing *Stanford* v. *Smith*, 163 Ark. 583, 260 S.W. 435 (1924), where the court said that "rescission will be granted upon the condition only that the party asking it restore to the other party substantially the consideration received, and, if he cannot do so, he is remitted to his action for damages." 163 Ark. at 588. *Stanford,* however, goes on to state:

> In 4 R.C.L., p. 511, at [Section] 23 of the chapter on Cancellation of Instruments, it is said: "In administering the remedy of cancellation, the fundamental theory on which equity acts is that of restoration. The injured party is the primary object of this purpose, and therefore it is not indispensable that the complainant be able to place the defendant *in statu quo* in those cases where it will not be inequitable to permit a rescission without so doing. If the requisite grounds for relief are clearly established, equity will not decline to grant its aid merely because circumstances intervening since the occurrence of the transaction complained of may render it difficult to restore the parties exactly to their original situations."

163 Ark. at 589. *Accord Strout Realty, Inc.* v. *Burghoff*, 19 Ark. App. 176, 718 S.W.2d 469 (1986).

In the instant case, the evidence shows that the appellees, in fact, sought to have the pool and equipment returned to the appellant by requesting the court to order it removed. After the chancellor's comments from the bench, appellees' attorney stated:

> Your Honor, in rescinding the contract and returning the $13,500.00 to Mr. Bishop, he hasn't been returned to the status quo in that he has a hole in his yard that has to be corrected. Would your order also include them to remove the pool and fill the hole?

The appellant did not agree to this request in the trial court, and the abstract does not show that the appellant objected when the

court denied the appellees' request. Issues raised for the first time on appeal will not be considered. *See Boatman* v. *Dawkins*, 294 Ark. 421, 425, 743 S.W.2d 800 (1988). *Belcher* v. *Bowling*, 22 Ark. App. 248, 252, 738 S.W.2d 804 (1987).

Affirmed.

COOPER and JENNINGS, JJ., agree.

John E. DILLARD *v.* Cecilia Ann DILLARD

CA 88-359 772 S.W.2d 355

Court of Appeals of Arkansas
En Banc
Opinion delivered June 21, 1989

Robert Batton, for appellant.

Howard, Price, Trice, Basham & Hope, P.A., by: *Dale Price and Carey E. Basham*, for appellee.

MELVIN MAYFIELD, Judge. The parties in this divorce case were married in 1963. The appellee, Cecilia Ann Dillard, filed for divorce on April 16, 1987. They have two sons: John Vincent, who was twenty-one at the time the divorce suit was filed, and Michael Edward, who was seventeen. The appellant, John E. Dillard, appeals the court's property division. He argues that the court erred in (1) failing to order appellee to return certain funds taken from two joint accounts; (2) awarding appellee one-half of his severance pay; and (3) finding that two racing cars were marital property.

In 1980 appellant opened two accounts in Savers Federal Savings and Loan, each of which listed the name of one of his sons, followed by appellant's name and his wife's name, all separated by an "or." The social security number listed on each account was that of the son and each of the young men testified that he was aware of the fund in his name. Each of them understood that the fund was for his college education. Each of them thought the fund in his name belonged to him; knew he could withdraw the money from the fund but had not been told by his father that the fund was a gift; and before the parents' separation, neither of the boys ever removed any of the money from his fund.

Appellee testified that she had not signed the signature card for either account and, until just prior to the separation from her husband, had never written a check on either account. However, prior to her separation, she withdrew $2,500.00 from Michael's account and, on the day she filed for divorce, she withdrew another $500.00 from that account. She testified that the accounts had originally been set up when the boys were small to provide for their college education but that her husband had used the accounts for some ordinary personal obligations.

Appellant testified that the accounts were marital property; that the money in them did not belong to the boys and that neither had any authority to remove any funds from either account. He said he placed the boys' names on the accounts to provide funds

for them and as a means of bypassing probate in case something happened to him and their mother.

After divorce proceedings had been instituted, appellee and her sons went to Savers and withdrew all the money from each account. Each check was made out to appellant and appellee, as well as to the son whose name was on the account. John Vincent's withdrawal totalled $34,434.05; Michael's withdrawal totalled $29,244.28. Appellee endorsed each check and the money was deposited in a bank in Texas. John Vincent deposited his money in an account in his and his wife's names; Michael deposited his money in an account in his and his mother's names.

Appellee argued at trial that the money in the two accounts was a gift to the boys and, therefore, not marital property. The chancellor held, however, that the money was marital property and ordered appellee to return to appellant one-half of the funds withdrawn by Michael. The appellee has not appealed from that decision. As to the funds withdrawn by John Vincent, the chancellor, during a discussion with counsel at the end of a hearing, stated:

> I think the funds, as between the parties, were marital property, and if they were still setting in the Savers account, I would order them split. I just need to know what to do, since they're not, and were withdrawn by persons that Mr. Dillard authorized to withdraw them and not her.

After further discussion about the account in John Vincent's name, the chancellor stated:

> I did not find that she caused her son, her older son, to make the withdrawal. That dispute is between him and his father. And possibly his mother; if she wants some portion of it back. As to the amount that is remaining in the account with the younger son, one-half of those funds should be returned to Mr. Dillard.

Appellant contends on appeal that the chancellor erred in failing to also order appellee to return to him one-half of the funds taken from John Vincent's account. Appellant argues that the court incorrectly stated he had authorized his sons to withdraw funds from the accounts; that appellee was a participant in the

improper withdrawal of the funds; and that appellee still has control over sufficient funds to make restitution to him.

The first argument is based upon the assumption that the chancellor relied upon Ark. Code Ann. § 23-32-1005 (1987) for her decision that appellant had authorized his sons to withdraw from the accounts. This statute provides that accounts may be opened in banking institutions and saving and loan associations in the names of two or more persons and unless a written designation to the contrary is made the account will be owned by those persons as joint tenants with right of survivorship. The statute also provides that unless a contrary written designation is made, the funds in the account may be paid to or on order of any joint tenant or any surviving joint tenant. The saving and loan associations were added to this statute by an amendment enacted in 1983. Thus, the appellant argues that the act does not apply to this case since these accounts were opened in 1980. However, we do not agree that the chancellor relied upon this statute, and we think the view she took makes the statutory problem moot.

There is in evidence a signature card executed November 12, 1980, to open one of the accounts in the Savers Federal Savings and Loan Association. This card was for the account in Michael's name. The card has a line designated for the names of the holders of the account and underneath this line is printed "as joint tenants with right of survivorship and not as tenants by the entirety." The first name on this card is Michael E. Dillard, followed by John E. Dillard, followed by Cecilia Dillard, with the word "or" at the end of the first two names. While the card for John Vincent's account is not in evidence, there is no contention that another type card was used for his account. Also, there is in evidence an account statement, dated May 7, 1987, for each account. The names on John Vincent's account are just like the ones on Michael's account except for the names of the boys. The appellant testified that he opened both accounts and he was responsible for the manner in which they were opened.

Based upon the names on the accounts and the other evidence in the case, the chancellor found that the money withdrawn by John Vincent from his account was authorized by his father and that any dispute about the ownership of that money was a matter between them. Although the appellant argues that

the appellee was responsible for the withdrawal of the funds, the trial court did not agree. The judge's decision as to the other fund is not at all inconsistent. Both funds were found to be marital property and the appellee was ordered to return one-half of the fund still in her name. However, the court found that the appellee did not cause John Vincent to withdraw the money from the fund in his name and the court simply held that the appellant had made it possible for John Vincent to get that money, the appellee did not cause him to get it, and the appellant would have to take up the matter with his son — not the appellee who did not have any of the money from that son's account. We do not think the chancellor's ruling was clearly against the preponderance of the evidence.

Next, appellant argues the trial court erred in awarding appellee one-half of appellant's severance pay. Appellant contends that while his severance pay was based upon the number of years he was employed, it was not a benefit which accrued as a result of his employment. Relying on *Potter* v. *Potter*, 280 Ark. 38, 655 S.W.2d 382 (1983), in which the Arkansas Supreme Court held that income an attorney earned before the divorce but received after the divorce, was not marital property, appellant argues that the award of one-half his severance pay to appellee was error.

Appellant worked for Arkansas Power & Light Company throughout the marriage and had been terminated on November 30, 1987, and began drawing severance pay before the divorce was granted on March 29, 1988. As explained by the AP&L payroll manager, the severance pay was "a benefit that the company decided upon for the outplaced employees, a reduction in force of the company." He subsequently stated that it was to be parceled out in increments over the future, but was a right or asset that the appellant acquired based upon his years of service. We do not believe appellant's reliance on *Potter* is justified in light of the language in *Meeks* v. *Meeks*, 290 Ark. 563, 721 S.W.2d 653 (1986), in which the Arkansas Supreme Court said:

> The chancellor found the appellee was entitled to one-half of the law firm assets. The appellee's right to the law firm assets is not contested, only decisions by the chancellor concerning specific assets. The appellant questions the chancellor's finding that the accounts receivable and

"work in progress" were marital property under Arkansas' new marital property law. Ark. Stat. Ann. § 34-1214(B) (Supp. 1985). He argues that under *Potter* v. *Potter*, 280 Ark. 38, 655 S.W.2d 382 (1983), the law firm's accounts receivable are not marital property. In *Potter* we did say that accounts receivable might not be marital property unless there was evidence of fraud or intent to delay receipt of the property in order to exclude it from consideration in a divorce proceeding. In *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984), we considered our prior decisions and stated:

> We now realize that we have inadvertently failed to recognize the new concept of 'marital property,' created by Act 705 of 1979, as amended. That statute defines marital property as *all* property acquired by either spouse subsequent to the marriage, . . .

We were wrong in *Potter* to qualify the treatment of accounts receivable as marital property. The general rule is that accounts receivable are marital property.

290 Ark. at 566.

We believe this reasoning is applicable to the appellant's severance pay. It was earned by the years of service he put in with AP&L during which time he was married to appellee and he began drawing it before they were divorced. We agree that it is marital property and appellee is entitled to one-half of it.

Finally, appellant argues that the court erred in finding that the two racing cars were marital property. The appellee testified that both cars were marital property. At one hearing, the appellant testified he owned both cars. At another hearing, the appellant testified his father owned one car and they owned the other car jointly. His father testified to the same thing. All of this boils down to a question of fact for the trial judge. Findings of fact shall not be set aside unless clearly erroneous (clearly against the preponderance of the evidence), giving due regard to the superior opportunity of the trial court to judge the credibility of the witnesses. Ark. R. Civ. P. Rule 52(a). We cannot say the chancellor's finding that the cars were marital property was

clearly erroneous.

Affirmed.

JENNINGS and ROGERS, JJ., dissent.

JUDITH ROGERS, Judge, dissenting. I respectfully dissent. The chancellor was correct in her findings as to the division of the severance pay and the division of the racing cars as marital property. The chancellor also correctly found that the funds in the interest bearing bank accounts were marital property due to the parties' dominion and control over them, despite the fact that the accounts were designated as being joint tenancies with the right of survivorship and bore the social security numbers of the respective sons. The court rejected the argument that these were gifts to the sons. The chancellor then stated that she did not "know what to do." Although she obviously knew the correct law to apply, she failed to carry out her decision by not giving the appellant credit for one-half the funds in the approximate amount of $34,000 placed in the name of the parties' son, John Vincent, and his wife. There were other assets in the hands of the appellee to satisfy this $17,000 set off, and this should have been done.

In affirming the chancellor on this issue, the majority seems to ignore the fact finding of the chancellor that this was marital property, which is, of course, subject to equal division upon divorce. Additionally, the majority appears not to recognize that the chancellor possesses the equitable authority to offset funds that have been removed from the jurisdiction of the court. I agree with the chancellor's fact finding, and prefer to show her the way the result could comport with the facts and applicable law. More importantly, I also do not wish to provide encouragement to future litigants that marital funds can be removed from the court's jurisdiction with impunity.

JENNINGS, J., joins in this dissent.

Larry KNIGHT *v.* INDUSTRIAL ELECTRIC CO. and
Aetna Life & Casualty Ins. Co.

CA 88-132 771 S.W.2d 797

Court of Appeals of Arkansas
Division I
Opinion delivered June 21, 1989

George D. Ellis, for appellant.

Friday, Eldredge & Clark, by: *William M. Griffin III*, for

appellee.

MELVIN MAYFIELD, Judge. Larry Knight appeals a decision of the Workers' Compensation Commission holding that he had knowingly and willfully made a false representation as to his physical condition on his employment application and, consequently, his claim was barred by the doctrine of *Shippers Transport of Georgia* v. *Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979).

The evidence showed that appellant applied for work with appellee on September 28, 1984. On the employment application was the question: "Do you have any physical condition which may limit your ability to perform the job applied for?" Appellant answered the question, "No," even though he had been blown off an oil drilling rig in January 1979 and sustained injuries to his neck and back. He explained at the hearing that he had not mentioned his prior injury on the application because he was not asked and at the time the application was made he was in good physical condition, having completely recovered and worked at heavy oil field labor for several years since the previous injury.

After working for the appellee employer for several months, appellant suffered injuries to his back on July 19 and August 14, 1985, and January 30, 1986. It is for those injuries that this claim was filed. The administrative law judge held that the appellant's claim was not barred by the *Shippers* defense because the question asked on the application was too broad; however, the Commission reversed stating:

> In this case, the Administrative Law Judge found that the employee did not knowingly and willfully make a false representation as to his physical condition.
>
> We disagree and find that claimant did knowingly and willfully make a false representation as to his physical condition. The employment application completed by claimant contains the following question: "Do you have any physical condition which may limit your ability to perform the job applied for?" The claimant answered "No" to that question even though he knew the job for which he was applying required a substantial amount of lifting and that he had a history of back problems for which

> he had been assigned an impairment rating of 21 % to his low back and 12 ½ % to his neck. The claimant alleges that the question on the employment application is only a general question equivalent to "How do you feel today?" We do not agree. For this Commission to hold that the claimant did not understand the relevancy of the question and its purpose on the application would be to assume that the claimant is illiterate and would contradict the purpose of the *Shippers* defense.

We do not agree with the Commission's decision and therefore reverse and remand.

In *Shippers Transport, supra*, the Arkansas Supreme Court said it was presented with a case of first impression. After discussing the statutory provisions of the Arkansas Workers' Compensation Law, the court concluded that since there was not "clear legislative intent to the contrary" public policy required truthful answers to questions on employment applications subject to the test stated by Larson. *See* 1B Larson, *The Law of Workmen's Compensation* § 47-53 (1987).

> The following factors must be present before a false statement in an employment application will bar benefits: (1) The employee must have knowingly and wilfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury.

265 Ark. at 369. The opinion in *Shippers Transport* then stated:

> The rationale of Larson's rule is demonstrated by the fact that Workmen's Compensation Law requires that the employer must take an employee as it finds him. Employment places on the employer the risks attendant upon hiring a known or unknown infirm employee. Consequently, it is only fair that the appellant employer here have a right to determine a health history before employment of the appellee as a mechanic to avoid the possible liability for an accidental injury, causally related to an infirmity.

Id. We think it is important to carefully consider the last sentence from the above opinion. It states: "Consequently, it is only fair that the appellant employer here have a right to determine *a health history* before employment of the appellee as a mechanic to avoid the possible liability for an accidental injury, causally related to an infirmity." (Emphasis added.) It is obvious that today's case has come a long way from the situation in *Shippers Transport* where the Arkansas Supreme Court adopted as "public policy" a rule giving an employer the right to determine a prospective employee's *health history*. In today's case the only "health history" question on the application signed by the appellant was, "Do you have any physical condition which may limit your ability to perform the job applied for?" We agree with the opinion of the Administrative Law Judge who said, "Such a general question requires an applicant to make a self-diagnosis of his physical condition at his own risk."

We were faced with a similar situation in *College Club Dairy* v. *Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988), where the Commission, in contrast to its holding in the instant case, held that the claimant was not barred from receiving benefits because of the *Shippers* defense. On appeal to this court from that decision the employer argued that the Commission had imposed an impermissibly strict new standard and burden of proof for employers. We disagreed and said:

> The Commission found that appellant failed to prove that appellee knowingly and willfully misrepresented his physical condition on his job application wherein he answered "No" to the question, "Do you have any physical defects?" With regard to the question, the Commission stated:
>
> > The employer knows which physical conditions or maladies would be relevant to fitness for the particular tasks he expects the applicant to perform. Therefore, employers relying upon the *Shippers Transport* affirmative defense must show that the employee was questioned in some degree regarding health history, and present condition in such a way as to elicit responses likely to be worthwhile in assessing the employee's health history, condition, and capacity for performing the employment. The question posed in

> this case is so general and broad that it conveys no message about any aspect of one's health that it [sic] may be germane to employability.

25 Ark. App. at 218.

After the *Shippers Transport* case was decided by our Supreme Court in 1979, the Court of Appeals was established and since then workers' compensation cases have been appealed directly to this court. In a number of cases we adhered to the *Shippers Transport* rule that an employer has a right to "determine a health history" of a prospective employee. *See Shock* v. *Wheeling Pipe Line*, 270 Ark. 57, 603 S.W.2d 446 (Ark. App. 1980) (application asked "were you injured on the job?"); *Baldwin* v. *Club Products Company*, 270 Ark. 155, 604 S.W.2d 568 (Ark. App. 1980) (form asked if applicant had ever been injured on the job or ever filed a workers' compensation claim); *Foust* v. *Ward School Bus Manufacturing Co.*, 271 Ark. 411, 609 S.W.2d 88 (1980) ("appellant, although asked, did not provide information about a back injury"); *Mosley* v. *Heim Brothers Packing Co.*, 271 Ark. 722, 610 S.W.2d 276 (1981) ("On the application form, appellant denied ever having a workers' compensation claim or having any back injuries").

However, we strayed from the *Shippers* standard in *DeFrancisco* v. *Arkansas Kraft Corp.*, 5 Ark. App. 195, 636 S.W.2d 291 (1982), when we affirmed the Commission's denial of benefits where the appellant had given an untruthful answer to a question which asked if he was "in good health to the best of his knowledge." Also, in *Sanders* v. *Alan White Co.*, 10 Ark. App. 322, 663 S.W.2d 939 (1984), we approved a Commission finding that the appellant had given an untruthful answer to the question: "Do you have any physical, mental or medical impairment or disability that would limit your job performance for the position for which you are applying?"

In the case of *College Club Dairy* v. *Carr, supra*, we got back on the course set in *Shippers Transport* by affirming a Commission's decision that said the question "Do you have any physical defects" was so general and broad it conveyed no message about any aspect of one's health that was germane to employability. Our affirmance of that holding by the Commission pointed both of us back to the "health history" concept of the *Shippers*

Transport case and our decision in the instant case is an attempt to keep both of us on that course.

In light of the fact that the *Shippers* defense relieves an employer of liability for an otherwise compensable injury, it does not seem unreasonable to require questions calling for factual information rather than opinion. Whether one has ever had a workers' compensation claim or lost work because of an on-the-job injury are questions not hard to understand or difficult to answer. But the question on the application in this case not only calls for an opinion, it almost guarantees litigation. In fact, the president of the appellee employer testified that the application was probably furnished by the insurance carrier. The appellant said he did not think his physical condition would limit his ability to do the job applied for, but the carrier said the appellant knowingly and willfully made a false representation. Thus, a lawsuit resulted. We think the public policy that gave birth to the *Shippers* defense should also seek to prevent, not promote, litigation.

We hold the question contained in the employment application is too broad and general to support the *Shippers Transport* defense. We reverse and remand for further proceedings.

COOPER and JENNINGS, JJ., agree.

Leslie Joe MACK *v.* TYSON FOODS, INC.

CA 89-20 771 S.W.2d 794

Court of Appeals of Arkansas
Division I
Opinion delivered June 21, 1989

Laura J. McKinnon, for appellant.

Bassett Law Firm, by: *Gary V. Weeks*, for appellee.

JUDITH ROGERS, Judge. The appellant, Leslie Joe Mack, suffered a back injury on October 11, 1986, while working for appellee, Tyson Foods, Inc. Although appellee initially accepted the claim as compensable, appellee later contended that it was

barred by the *Shippers* defense. The administrative law judge agreed and found that the claim was barred. On appeal, the Commission affirmed. Appellant raises two points on appeal which essentially challenge the sufficiency of the evidence to support the Commission's decision. We affirm.

The *Shippers* defense was established by the supreme court in *Shippers Transport of Ga.* v. *Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979). In that case the court adopted a three part test for determining when false statements by an employee prior to employment will preclude recovery of workers' compensation benefits: (1) the employee knowingly made a false representation as to his physical condition; (2) the employer relied upon this false representation and such reliance was a substantial factor in the employment; and, (3) there was a causal connection between the false representation and the injury. *See also DeFrancisco* v. *Arkansas Kraft Corp.*, 5 Ark. App. 195, 636 S.W.2d 291 (1982).

Appellant's first point for reversal is that there is no substantial evidence to support the finding that appellant's claim was barred by the *Shippers* defense. On appellate review the evidence and inferences deducible therefrom must be viewed in the light most favorable to the finding of the Commission. We give the testimony its strongest probative force in favor of the action of the Commission. *Osage Oil Co.* v. *Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985).

The first element of the *Shippers* defense is that the claimant knowingly and willfully made a false representation as to his physical condition. It is undisputed that appellant suffered a back injury in 1978 for which he received workers' compensation benefits. However, the application for employment signed by appellant contained this question: "Have you ever been injured on the job where they paid your medical bills?" The answer to the question was checked "No," and appellant admitted at the hearing before the law judge that the answer to the question was false. Appellant also checked a "No" answer to the questions of whether a physician had ever told appellant that he could not do a particular type of job and whether appellant had ever had "back trouble or leg pains." Appellant admitted at the hearing that his answers to both of these questions were not correct. The Commission found that these statements were knowingly and willfully

made by appellant in light of the fact that he knew that he had previous back problems, he had been assigned an anatomical impairment rating, and he had been placed under restrictions as to the amount of weight that he could lift.

The Commission also found that appellee had relied upon appellant's false representation and its reliance was a substantial factor in his employment, thus meeting the second element necessary to establish the *Shippers* defense. Terry Ryan, who hired appellant, testified that the nurse forwarded appellant's application to her with a notation indicating that he had no physical problems. Appellant was then hired to work on the loading dock. Ryan testified that although appellee does hire people with back problems, it does not put them on the loading dock where heavy lifting is required. She stated that she relies upon the pre-placement screening conducted by the nurse, and had she known about appellant's back problem, he would not have been placed on the loading dock.

The final element is the establishment of a causal connection between the injuries. Appellant's second point for reversal basically challenges the sufficiency of the evidence on this element. Appellant argues that "[t]he full Commission misapplied prevailing Arkansas caselaw to find a causal relationship between a 1979 thoracic strain and emotional overlay and appellant's work-related 1986 L5-S1 lumbar injury, sufficient to meet the strict requirements of the *Shippers* affirmative defense." We disagree.

Appellant argues that there is a more stringent burden of proof on this element. In *Tahutini* v. *Tastybird Foods*, 18 Ark. App. 82, 711 S.W.2d 173 (1986), this court addressed a similar argument. The court stated that clear and convincing evidence was not required to prove the third element; rather, the employer must prove each element by a preponderance of the evidence. Therefore, the employer's burden of proof is the same on each element of the *Shippers* defense.

Appellant also argues that the administrative law judge erroneously shifted the burden of proof to him to disprove that this injury was causally related to the previous injury. However, the Commission made a *de novo* review of the record and made no such statement or indicated in any way that it was impermissibly shifting the burden of proof to appellant. When a decision of the

Workers' Compensation Commission is appealed, the appellate court gives no weight to the findings of the administrative law judge. *Tyson Foods Inc.* v. *Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988). We only review the Commission's decision in these circumstances.

The Commission found upon review of the medical records of Dr. Lamar Howard, that appellant's prior injury and the current back problems are related. The Commission quoted Dr. Howard's office notes of October 13, 1986, in which he stated: "[a]ll x-ray findings are old and are most likely related in my opinion to the previous trauma." Dr. Howard also recommended appellant see a specialist in "light of abnormal x-ray findings (that are old)".

The appellant offered the medical opinion of Dr. David Brown. He stated in a letter dated April 28, 1987:

> As far as the issue on Mr. Mack's mechanical low back pain, I cannot say if it was related to the previous injury or not. I think probably it is not. . . . He probably has poor engineering and uses his back with poor mechanics and has a tendency to re-injure his back. I would think the previous injury and this injury are probably unrelated from the injury standpoint, but are related from the back mechanics standpoint.

The Commission stated that it weighed the conflicting medical evidence and found that Dr. Howard's opinion was of greater weight. The Commission has the duty of weighing medical evidence as it does any other evidence and if the evidence is conflicting, the resolution of the conflict is a question of fact for the Commission. *Farmer's Ins. Co.* v. *Buchheit*, 21 Ark. App. 7, 727 S.W.2d 391 (1987).

Upon review of the evidence and all inferences deducible therefrom, viewing it in the light most favorable to the Commission's decision, we find substantial evidence exists to support the decision that appellant's claim is barred by the *Shippers* defense.

CRACRAFT and COOPER, JJ., agree.

ARKANSAS STATE POLICE and Arkansas Insurance Department *v.* E. Janet WELCH

CA 89-16 772 S.W.2d 620

Court of Appeals of Arkansas
Division II
Opinion delivered June 28, 1989

Richard S. Smith, Public Employee Claims Division, Arkansas Insurance Dep't, for appellants.

Richard S. Muse, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Arkansas Workers' Compensation Commission. Appellants, Arkansas State Police and Arkansas Insurance Department, appeal a decision of the Commission filed October 12, 1988, which awarded appellee wage loss disability benefits and obligated appellants to pay past and future chiropractic treatment by Dr. J.J. Carson. We affirm.

On July 3, 1981, appellee was involved in an automobile accident arising out of and in the course of her employment as a state trooper. Appellee sustained compensable neck and back injuries for which she received medical expenses, appropriate temporary total disability benefits, and a 10% permanent physical impairment rating to the body as a whole. It was determined that appellee's healing period ended September 29, 1986, and she then requested a hearing to determine the extent of her wage loss disability over and above the previously assessed 10% physical impairment rating. Additionally, appellee sought to have appellants pay for past and future treatments by Dr. Carson, a doctor from whom she was receiving chiropractic treatments. The case was heard by the administrative law judge on August 25, 1987, who awarded appellee wage loss benefits of 5% and directed payment of the cost of the chiropractic treatments of Dr. Carson. Appellant appealed to the full Commission, which affirmed the decision of the administrative law judge with one Commissioner dissenting.

Appellants raise the following three points for reversal: (1) The Commission erred in holding that the award of wage loss

disability is not barred by Act 10 of 1986, codified at Arkansas Code Annotated Section 11-9-522(b); (2) there is no substantial evidence of record to support the Commission's finding that appellee is entitled to an award of wage loss disability; and (3) the Commission erred, on both the facts and law, in holding that appellants are obligated to pay charges for past and future chiropractic treatment by Dr. J.J. Carson.

We first address appellants' contention that the court erred in not holding that appellee's wage loss benefits were barred by Act 10 of 1986 because appellee returned to work "at wages equal to or greater than" those she was earning on the day she sustained her compensable injury.

Appellant argues that Act 10 of 1986, codified at Arkansas Code Annotated Section 11-9-522(b) (1987), is remedial or procedural in nature and that a prospective application of the effective date of the act (July 1, 1986) should govern the Commission's October 12, 1988 opinion. Appellants contend that since wage loss cannot be evaluated until the end of a healing period, *Guffey* v. *Arkansas Secretary of State*, 18 Ark. App. 54, 710 S.W.2d 836 (1986), it is not until that time that a claimant has any legal interest in its provisions. Here, appellee's healing period ended September 29, 1986; therefore, appellants argue that her claim should be governed by Section 11-9-522(b) since it had been in effect for approximately two months before appellee's healing period ended. To the contrary, appellee generally argues that the right to wage loss disability benefits is a substantive right which vests at the time of the injury, assuming the claimant can prove entitlement thereto at the appropriate time by a preponderance of the evidence.

The statute in question is set out below:

> (b) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity. However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide

> and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

Ark. Code Ann. § 11-9-522(b) (1987).

In the case at bar, appellee's injury occurred and her claim was filed, prior to the effective date of Act 10 of 1986 (July 1, 1986). However, the decisions of the administrative law judge and the Commission were rendered after the act went into effect. It is well settled that changes in statutes relating only to remedies or procedural matters are generally held to be immediately applicable to existing causes of action and not just to those which may accrue in the future unless a contrary intent is expressed in the statute. *Fowler* v. *McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987). However, any changes in statutes relating to vested rights are characterized as substantive and require application of the law as it existed at the time the claimant sustained a compensable injury. *See id.* A vested right exists when the law declares that one has a claim, or that one may resist enforcement of a claim. *Forrest City Mach. Works, Inc.* v. *Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981).

Here, the Commission found that the change in Act 10 of 1986, codified at Arkansas Code Annotated Section 11-9-522(b) is substantive in nature because the statute "deals not with the procedure for enforcing a remedy provided under the Workers' Compensation Act but rather with the substance of the remedy itself, i.e., entitlement to an award of wage loss benefits." The Commission discussed other cases holding that changes in the Act were procedural thereby allowing an immediate application of the statute as amended. In this regard, the Commission stated that the case at bar is different from:

> *Popeye's Famous Fried Chicken* v. *Willis*, 7 Ark. App. 167, 646 S.W.2d 17 (1983) and *Alexander* v. *Lee Way Motor Freight*, 15 Ark. App. 41, 689 S.W.2d 3 (1985), which deal with the *procedure* for enforcing the already-existing right to a change of physician. It likewise differs from *Aluminum Company of America* v. *Neal*, 4 Ark.

> App. 11, 626 S.W.2d 620 (1982), which discusses the *procedure* for enforcing the extant right to attorney's fees. Welch's case is patently distinguishable from *Fowler* v. *McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987), which considered only the burden of proof provisions of Act 10. Since distribution of the burden of proof is clearly a procedural matter, *Fowler* is not controlling as to the *substantive* provisions of Act 10.

The Commission then concluded that the "provision of Act 10 of 1986 denying wage loss benefits to one who resumes work at the same or greater wages applies only to those persons who were injured on or after its effective date of July 1, 1986." The Commission then awarded appellee wage loss disability benefits by applying the law as it existed at the time appellee sustained her injury. The law at that time recognized that a claimant might suffer a wage loss capacity yet return to work earning higher wages than before the injury due to cost-of-living increases. *See City of Fayetteville* v. *Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984).

Our review of this record persuades us that the Commission correctly concluded that appellee's award of wage loss disability is not barred by Act 10 of 1986.

Appellants next contend that there is no substantial evidence of record to support the Commission's finding that appellee is entitled to an award of 5% wage loss disability.

While we agree with appellant's contention that appellee had the burden of proving her entitlement to wage loss disability by a preponderance of the evidence, *Bragg* v. *Evans-St. Clair, Inc.*, 15 Ark. App. 53, 688 S.W.2d 956 (1985), we do not agree that the Commission erroneously found that appellee met that burden entitling her to such an award. Evidence was presented at the hearing regarding appellee's medical treatment. It was undisputed that appellee was treated by both an orthopedic surgeon and a chiropractor for her work-related injuries. The surgeon assigned appellee the anatomical impairment rating of 10% and opined that prolonged sitting as required by appellee's job as a state trooper would aggravate her condition. The chiropractor advised against repetitive or heavy lifting and frequent bending at the waist.

Appellee's testimony reveals that she experiences difficulty and pain in performing the duties required of her in her job as a trooper, such as prolonged sitting while driving her vehicle, arresting unwilling suspects, and heavy lifting. Appellee also testified that her marksmanship scores decreased due to her neck and back problems and she was thereafter dismissed from the SWAT team. The testimony of appellee's husband was generally corroborative of appellee's testimony to the effect that she is in constant pain which affects their family life. A counselor for Arkansas Rehabilitation Services testified that appellee will have difficulty seeking future employment because of her injuries. His testimony revealed that due to appellee's compensable injury, she will be unable to return to work in her former capacity as an assembly line worker due to the prolonged sitting and repetitive arm movements. Also, he opined that she would be unable to return to work she once performed as a waitress due to the heavy lifting and bending required of that job.

In reviewing the evidence, the appellate court gives it its strongest probative force in favor of the Commission's findings and will affirm if fair-minded persons with the same set of facts before them could have reached the conclusion reached by the Commission. *Marrable* v. *Southern LP Gas, Inc.*, 25 Ark. App. 1, 751 S.W.2d 15 (1988). Here, in rendering its decision that appellee sustained a loss of earning capacity entitling her to a 5% wage loss award, the Commission considered all evidence of record, including the medical evidence. In granting the award, the Commission also took into consideration that appellants presented no evidence to rebut appellee's medical evidence. The Commission concluded:

> Although Welch is young (34) and finished high school, she is now disqualified from clerical chores involving prolonged sitting, from heavy manual labor, and from the more strenuous assignments of a police officer.

Giving the strongest probative force to the Commission's findings, we cannot say that fair-minded persons with the same facts before them could not reach the conclusion reached by the Commission and we, therefore, affirm on this point.

Lastly, we address appellants' contention that the Commission erred in holding that appellants are obligated to pay charges

for past and future chiropractic treatment by Dr. Carson. In this regard, appellants contend that Dr. Carson's treatments were unauthorized because appellee did not follow the change of physician procedure as required by the workers' compensation act. The reasoning advanced by the Commission in awarding the chiropractic services of Dr. Carson is as follows:

> Public Employee Claims Division also complains that Welch consulted Dr. Carson without following the change of physician procedure. However, this objection was waived by the decision to pay all medical incurred to him through November 18, 1985. By failing to contest part of his expenses, the employer has accepted Dr. Carson as an authorized treating physician and is estopped to say now that his treatment is not authorized. Welch made a *prima facie* case of reasonableness and necessity when she testified that she was receiving some relief from chiropractic manipulations. Although Dr. Kleinhenz prescribed medication and physical therapy, the circumstances of this case make the use of medication unwise. Because of the nature of Welch's work — long hours of driving and the alertness required of a law enforcement officer — she is precluded from the use of medication. While Dr. Kleinhenz had good intentions, we find that Welch has correctly chosen to seek treatment not utilizing medication because of the nature of her job duties. The choice of chiropractic treatment, as a reasonable alternative to the medication and physical therapy suggested by Dr. Kleinhenz, constitutes a compelling reason or circumstance justifying the change of physician, so long as the treatments remain reasonable and necessary.

Viewing all evidence of record in the light most favorable to the findings of the Commission and deferring to the Commission's superior position to resolve conflicts, we find substantial evidence to support the Commission's award of chiropractic treatments for appellee by Dr. Carson.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

James P. DZIGA *v.* MURADIAN BUSINESS BROKERS, INC.

CA 89-17 773 S.W.2d 106

Court of Appeals of Arkansas
Division I
Opinion delivered June 28, 1989

Pope, Shamburger, Buffalo & Ross, by: *Joseph L. Buffalo, Jr.,* and *Brad A. Cazort,* for appellant.

Ed Daniel, for appellee.

JAMES R. COOPER, Judge. This appeal from the Pulaski County Circuit Court involves the question of whether the appellee, a business broker, is entitled to a commission for finding a buyer for the appellant's delivery business. The trial court found the appellee was entitled to a commission of $10,000.00. The appellant claims that the appellee is not entitled to any commission because there was no contract of sale between the appellant and the buyers because there was no meeting of the minds. We find no error and affirm.

The appellant owns Dziga Delivery, an unincorporated business which delivers prescriptions for pharmacies in Pulaski County, Arkansas. The business has no salaried employees or delivery vehicles but has contracts with about a dozen individuals who handle the actual deliveries of prescriptions. The business has some physical assets, but its assets are largely intangibles, such as customer goodwill, the business name, experience, and ongoing customer contracts. According to the record, it made a profit of $49,070.00 on gross revenues of $198,830.00 in 1987.

The appellant and the appellee entered into a listing agreement in 1987 whereby the appellee agreed to attempt to sell the appellant's business, for which it would be paid a commission of $5,000.00 or ten percent of the purchase price, whichever was greater. Among other provisions the listing agreement included the following clause:

> Owner agrees that the commission shall be due and payable to the Broker immediately if the Owner, or any person acting on behalf of the Owner, enters into a contract of sale, accepts a deposit, opens an escrow or records a notice of intention to sell the property, during the period of this listing agreement, and the cancellation or rescission of any of the foregoing acts shall not act as a release of the

Owner from liability for the commission.

In November 1987, the appellee found buyers (the Gillaspys) for the business. The appellant and the Gillaspys executed an "Offer and Acceptance," which provided for a purchase price of $100,000.00, with $35,000.00 cash down payment with the "[b]alance of purchase price, $65,000.00 to be paid to Seller [the appellant] pursuant to a secured promissory note in said amount, payable $952.27 or more, per month, with interest thereon at 9% per annum."

The appellant and the Gillaspys consulted an attorney to draft the documents necessary to complete the sale. However, the appellant at some point insisted on collateral beyond the business assets themselves as security for the $65,000.00 promissory note. The Gillaspys refused, and the sale was never completed. The appellee then commenced this action to recover a commission from the appellant.

The appellant argues that the offer and acceptance was not an enforceable contract and that the appellee was therefore not entitled to a commission. This argument is premised on the contention that the meaning of the term "secured" in the offer and acceptance is unclear. Therefore, the appellant asserts, there was no mutual assent of the parties to an essential term of the contract, and the contract was thus a nullity. We do not agree. Although it is essential to the finality and completeness of assent that all terms should be definitely agreed upon, *Madden* v. *Hart*, 249 Ark. 1054, 463 S.W.2d 352 (1971), it does not follow that the parties must share identical, subjective opinions as to the meaning of those terms before a valid contract can be formed.

> Assent in the sense of the law is a matter of overt acts and expressions, not of inward unanimity in motives, design, or the interpretation of words. The meeting of minds, which is essential to the formation of a contract, is not determined by the secret intentions of the parties, but by their expressed or manifested intentions, which may be wholly at variance with the former. The question of whether a contract has been made must be determined from a consideration of the expressed or manifested intention of the parties — that is, from a consideration of their words and acts.

17 Am. Jur. 2d *Contracts* Section 19 (1964). The expressed intention of the parties in this case was that the buyers would provide the appellant with a secured promissory note in the amount of $65,000.00. "Secured" means "[s]upported or backed by security or collateral such as a secured debt for which property has been pledged or mortgaged." *Black's Law Dictionary* 1215 (5th ed. 1979). The appellant does not assert that the definition of "secured" is unclear but instead contends that the offer and acceptance lacked certainty because it did not specifically state what the collateral for the promissory note was to be. He argues that, because he intended to obtain collateral other than the business itself, and because the buyer expected that the business would serve as collateral for the promissory note, mutual assent was lacking and the trial court erroneously rewrote the contract for the parties.

> Courts often declare that they "can not make contracts for the parties," a statement that is quite true; but it is of much greater importance to realize that the courts must determine the requirements of justice and that the legal effects thus given to expressions to agreement are seldom exactly what one or both of the agreeing parties supposed or expected.
>
> By the foregoing it is not meant that courts are indifferent to the actual intentions and expectations of men or to the legal effects that one or both contracting parties thought that they were producing. But in the law of contracts, as in all other legal fields, "justice" is not attained by giving the parties unlimited freedom or power, by enforcing every result that either one of them expected and intended, or by never enforcing a result unless both of them expected and intended it.

A. Corbin, *Corbin on Contracts* Section 9 (1 vol. ed. 1952).

The law does not favor the destruction of contracts because of uncertainty, and courts will, if possible, construe the contract in a manner which gives effect to the reasonable intention of the parties. *Shibley* v. *White*, 193 Ark. 1048, 104 S.W.2d 461 (1937).

Although we agree that the offer and acceptance is

ambiguous because of the parties' failure to specify the manner in which the promissory note was to be secured, and must therefore be construed, we disagree with the appellant's contentions that the appellee was a third-party beneficiary of the offer and acceptance agreement and that the contract must therefore be strictly construed against the appellee as the party preparing the instrument.

> There is a presumption that parties contract only for the benefit of themselves and a contract will not be considered as having been made for the use and benefit of a third party unless it clearly appears that such was the intention of the parties. *Howell, et al.* v. *Worth James Const. Co.*, 259 Ark. 627, 535 S.W.2d 826 (1976).

Brown v. *Summerlin Assoc., Inc.*, 272 Ark. 298, 301, 614 S.W.2d 227, 229 (1981). Here, any benefit accruing to the appellee arose not from the terms of the offer and acceptance but instead from the provisions of the appellee's separate contract with the appellant. We find no indication that the parties to the offer and acceptance intended to make that agreement for the use and benefit of the appellee. Nor do we agree that the failure to specify the collateral for the promissory note had the effect of rendering the offer and acceptance void for lack of certainty.

> While a contract, incomplete on its face, may thereby be ambiguous, it is not necessarily void. Absolute certainty is not required. That is certain which may be rendered certain, according to the maxim, *Id certum est quod certum reddi potest.*

Shibley v. *White*, 193 Ark. at 1053. The record clearly shows that the parties to the offer and acceptance agreement intended to enter into a binding contract. The words "this is a legally binding document" are conspicuously printed in bold, capital letters on the face of the agreement. Moreover, the overriding purpose of the agreement was the sale of the business to the Gillaspys, and the nature of the collateral necessary to secure the promissory note was incidental to this overriding purpose; the nature of the collateral was therefore not an essential term of the contract. *See Leonard* v. *Downing*, 246 Ark. 397, 438 S.W.2d 327 (1969). Under these circumstances, and under the rules of construction previously cited, we think that the terms and nature of the

agreement necessarily imply that the parties intended only that *reasonable* collateral be provided as security for the promissory note. *See S.F. Bowser & Co.* v. *Marks*, 96 Ark. 113, 131 S.W. 334 (1910); 17 Am. Jur. 2d *Contracts* Section 255 (1964).

The initial determination of the existence of an ambiguity in a contract rests with the court, and if ambiguity exists, parol evidence is admissible, and the meaning of the term becomes a question for the fact finder. *Don Gilstrap Builders, Inc.* v. *Jackson*, 269 Ark. 876, 601 S.W.2d 270 (Ark. App. 1980). "We do not reverse on a factual issue as long as there is evidence to support the trial court's finding and the finding is not clearly against the preponderance of the evidence." *Country Corner Food and Drug, Inc.* v. *Reiss*, 22 Ark. App. 222, 227, 737 S.W.2d 672 (1987). The trial court, after hearing the conflicting testimony, found that the promissory note could have been secured by the assets of the business. There was evidence that, in addition to the tangible assets of furniture and pagers, the business generated monthly receipts totaling $16,152.50 per month. In light of this evidence, we cannot say that the trial court erred in finding that the business, physical assets, and accounts receivable would have provided reasonable security for the promissory note. We hold that the offer and acceptance constituted an enforceable contract.

The appellant also argues that the appellee is not entitled to a commission because he, as drafter of the agreement, was responsible for the use of a term which was too ambiguous to permit the formation of an enforceable contract. Because we have held that the offer and acceptance did constitute an enforceable contract, we need not address this issue.

The appellant next contends that, even if there were an enforceable contract, the appellee had not earned any commission. We articulated the general rule applicable in cases such as this in *Rector-Phillips-Morse, Inc.* v. *Huntsman Farms, Inc.*, 267 Ark. 767, 590 S.W.2d 317 (Ark. App. 1979):

> In *El Dorado Real Estate* v. *Garrett*, 240 Ark. 483, 400 S.W.2d 497 (1966), the Arkansas Supreme Court observed that one thread that seems to be woven in cases rendered by the Court between 1908 and 1963 relative to a broker's commission involving real estate — where a purchaser has been produced who is ready, willing and able

> to purchase the lands — it is not necessary that an enforceable contract be executed before the broker is entitled to his commission, unless the agreement between the seller and broker calls for an actual sale of the property.
>
> In *Sarna* v. *Fairweather*, 248 Ark. 742, 453 S.W.2d 715 (1970), the Supreme Court again re-emphasized that a broker earns his commission by producing a buyer ready, willing and able to take the property on the seller's terms, even if the contract were unenforceable, unless the agreement between the seller and agent required that the sale be actually consummated.

267 Ark. at 772, 590 S.W.2d at 320. And in *Whitfield* v. *Haggart*, 272 Ark. 433, 615 S.W.2d 350 (1981), Justice George Rose Smith observed that a seller's acceptance of a buyer's offer, without questioning the buyer's ability to purchase, indicates the seller's satisfaction on that point, relying on *Sarna, supra.* In *Graham* v. *Crandall*, 11 Ark. App. 109, 668 S.W.2d 548 (1984), this Court stated:

> In *Pinkerton* v. *Hudson*, 87 Ark. 506, 113 S.W. 35 (1908) the Arkansas Supreme Court stated:
>
> > "The law is well settled that 'where a real estate broker contracts to produce a purchaser who shall actually buy, he has performed his contract by the production of one financially able, and with whom the owner actually made an enforceable contract of sale. The failure to carry out that contract, even if the default be that of purchaser, does not deprive the broker of his right to commissions.' "
>
> This language is applicable to the case at bar. The sellers entered into an enforceable contract with the buyers who were supplied by the appellant. It does not matter for purposes of the broker's commission that the parties subsequently could not agree on the completion of the land sale, but the fact that they had entered into an enforceable contract, . . . entitled the broker to his commission, in the absence of a showing of fraud or misrepresentation.

11 Ark. App. at 112, 668 S.W.2d at 549-50.

Here, the appellee and the appellant had a binding contract which specified the conditions under which the appellee would be entitled to a commission for finding appellant a buyer for his business. The appellant entered into an "Offer and Acceptance," with the Gillaspys, and the terms of that contract were found by the trial judge to be sufficient to form a binding contract of sale with the buyers. Although the appellant never closed the sale with the Gillaspys, the court found the transaction to be susceptible of closing and found that the appellee had performed in such a manner as to entitle it to a commission.

Based on our review of the record, we cannot say the decision below is clearly against the preponderance of the evidence.

Affirmed.

ROGERS and CRACRAFT, JJ., agree.

ARKANSAS STATE BD. OF COSMETOLOGY *v.* Anna ROBERTS, d/b/a Anna's Beauty Shop

CA 88-411 772 S.W.2d 624

Court of Appeals of Arkansas
En Banc
Opinion delivered June 28, 1989

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

Clark & Adkisson, for appellee.

JOHN E. JENNINGS, Judge. Anna Roberts owns and operates Anna's Beauty Shop in Greenbrier. On April 23, 1987, an inspector for the Arkansas State Board of Cosmetology stopped by the beauty shop and found that Mrs. Roberts' establishment license and cosmetologist license had both expired. At a hearing on June 17, 1987, the Board found that Mrs. Roberts had violated the Arkansas Cosmetology Act. She renewed the licenses on July 23, 1987. On August 19, 1987, the Board conducted another hearing at which time it fined Mrs. Roberts a total of $500.00. She appealed the agency's decision to the Faulkner County

Circuit Court. The court heard additional testimony and in an order dated March 11, 1988, held that the Board did not follow proper administrative procedure in its dealings with Mrs. Roberts and that the fine imposed was arbitrary and capricious. The court reduced the fine to $50.00.

On appeal the Board contends that the trial court erred in taking additional testimony and in holding that the fine imposed by the Board was arbitrary and capricious. We hold that the trial court erred in modifying the fine imposed by the Board.

Arkansas Code Annotated Section 25-15-212(g) (1987) relates to the manner of review by the circuit court of an administrative agency decision. It provides:

> The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony may be taken before the court. The court shall, upon request, hear oral argument and receive written briefs.

Because Mrs. Roberts alleged in her pleading that she did not receive proper notice of the hearings conducted by the Board, the trial court did not err in taking additional testimony. The trial court's finding that the Board did not follow proper procedures, however, is not supported by the record. Mrs. Roberts' own testimony establishes that she received adequate and timely notice of both hearings. She did not attend the first meeting because she wanted to go to Florida and she threw away the notice of the second hearing because she thought she had resolved the matter by renewing her licenses. After the hearing the court said:

> I am also going to hold that the Board was arbitrary and capricious in what they did in the amount of the fine and failure to properly notify the respondent in this matter. There is some evidence here of good faith on her part because she has a letter in the file that she wrote in trying to find out about the hearing. She also called the office down there and tried to get some information from the receptionist and was told that with or without her presence the [Board] would go ahead and act. They should have advised

> her that if she came down to the Board and presented her case that maybe there would have been no penalty imposed on her. I find that the penalty of $500.00 is excessive and I am going to reduce it to $50.00. That will be the order and judgment of the court.

Mrs. Roberts' letter to the Board merely stated that she thought she had paid to renew her licenses, that she would be out of town at the time of the hearing, and that she would pay whatever penalty was necessary. We find no procedural irregularities.

Under applicable state regulations the Board was authorized to fine Mrs. Roberts a total of $1,000.00 under the circumstances presented. While the fine imposed, $500.00, is certainly substantial, neither the trial court nor this court may substitute its judgment for that of the Board in assessing the penalty. *See Arkansas State Board of Pharmacy* v. *Isely*, 13 Ark. App. 111, 680 S.W.2d 718 (1984); *Green* v. *Carder*, 282 Ark. 239, 667 S.W.2d 660 (1984). In *Garner* v. *Foundation Life Insurance Co. of Arkansas*, 17 Ark. App. 13, 17, 702 S.W.2d 417, 419 (1986), we said:

> The reviewing court may not displace the Board's choice between two fairly conflicting views even though the court might have made a different choice had the matter been before it *de novo*. The reviewing court may not set aside the board's decision unless it cannot conscientiously find from a review of the entire record that the evidence supporting the decision is substantial . . . .
>
> The question of whether a board's action is arbitrary and capricious is a narrow one, more restricted than the substantial evidence test. To set aside an agency decision on that basis, it must be found to have been willful and unreasoning and in disregard of the facts and circumstances of the case. This standard applies only where the board's action was unreasoned; its decision was not supported by any reasonable basis, and was made in willful disregard of the facts and circumstances. (Citations omitted.)

Here, the trial court had evidence before it that the

Board did not have — that Mrs. Roberts had been in business for eighteen years and had never failed to renew her licenses. The reason the Board did not have that evidence, of course, is that Mrs. Roberts did not appear at either hearing. In effect, the trial court reviewed the penalty assessed by the Board *de novo* and set the penalty at a level the court thought was fair. In doing so the court exceeded its authority. The court was authorized to set aside the penalty only if the agency decision was "willful and unreasoning" as opposed to being merely wrong. We cannot say that the Board's decision as to the penalty in the case at bar was arbitrary and capricious.

We acknowledge that under certain circumstances the penalty imposed by the administrative agency may be so harsh that its imposition may be described as arbitrary and capricious. This was the holding of the Arkansas Supreme Court in *Baxter* v. *Dental Examiners Board*, 269 Ark. 67, 598 S.W.2d 412 (1980) and in *Arkansas Board of Pharmacy* v. *Patrick*, 243 Ark. 967, 423 S.W.2d 265 (1968). Both of these cases, however, involved an agency decision to *permanently* revoke a professional license. Those penalties are different in degree from that imposed here.

Our conclusion is that the court erred in modifying the decision of the Board.

Reversed.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. I dissent because I think that the trial court was correct in finding that the Board's actions were arbitrary and capricious, and because I do not think it was error for the trial court to hear additional evidence in light of the fact that the appellee pled irregularities in the procedure employed by the Board.

Arkansas Code Annotated § 25-15-212(f) (1987) requires the trial court to remand a case to the Board when additional evidence is necessary. However, the following subsection, § 25-15-212(g), states, "that in cases of *alleged* irregularities in the procedure before the agency, not shown in the record, testimony may be taken before the court." (Emphasis supplied.) The appellee did allege irregularities in the procedure; she stated that she did not feel she was given adequate notice of the second

hearing. Although I am not prepared to say, as a matter of law, that the notice was untimely, I am concerned that the appellee's second hearing was held on the twentieth day from receipt of notice. Arkansas Rule of Civil Procedure 12(a) allows a defendant to file an answer within twenty days after service of summons, and this twenty days must pass before a default judgment can be entered against the defendant. Although administrative agencies are not bound by the Rules of Civil Procedure, I believe they do serve as a guideline to ensure fundamental fairness.

Furthermore, the appellee testified about other irregularities which, in my opinion, justified the taking of additional evidence and require affirming the trial court. According to the appellee, she attempted several times to contact the Board by telephone to find out what to do about her license and the hearing. She stated that she was told that the Board would conduct a hearing "with or without" her. She contacted the Board in writing prior to the first hearing and explained that she would be out of town, but the Board did not respond to her letter. The cover letter sent to the appellee with both notices stated that, in order to waive her right to attend and defend herself at the hearing, she was required to send an affidavit to the Board. This was not done, and indicates to me that, under the Board's own guidelines, the appellee had not waived her right to attend. Lastly, Debra Norton, the Board's director, testified:

> We also send a cover letter to that individual basically telling them they have a right to appear with counsel. They also have a right to waive their right to a hearing, *and we try to advise them that way*. If they do, then they would need to send an affidavit stating that.

(Emphasis added.) This language can be interpreted to mean that the Board actually tries to discourage the attendance of persons having a right to appear before them. In light of the Board's actions in this case, it is not an unreasonable construction.

I also think that the Board's assessment of a fine of $500.00 was arbitrary and capricious. The appellee was almost six months late in renewing her licenses. Although the appellee admitted that it was an oversight not to have renewed by April 23, 1987, the remainder of the time, from April 23 to July 23, cannot be found to be the fault of the appellee. In spite of the fact that the appellee

attempted to find out what was required of her, the Board never advised her that she could renew her license immediately and that she did not have to wait on the hearings to do so. Furthermore, Debra Norton admitted that no harm was done by the appellee's failure to timely renew. In *Carder* v. *Hemstock*, 5 Ark. App. 115, 633 S.W.2d 834 (1982), we said that in order to set aside an agency decision on the basis that it is arbitrary and capricious it must be found to have been unreasoned, not supported by any reasonable basis, and made in willful disregard of the facts and circumstances. Clearly, to me, the Board in this case acted in willful disregard.

Volkswagenwerk Aktiengesellschaft v. *FMC*, 390 U.S. 261 (1968), involved the interpretation of a statute by the Federal Maritime Commission. In reversing the Commission's decision, the United States Supreme Court stated:

> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law." But the courts are the final authorities on statutory construction, and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." "The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia . . . ."

390 U.S. at 272 (citations omitted). While the present case is a case of statutory enforcement and not construction, the same rationale applies. The deference that we generally give to the expertise of administrative agencies, *see Livingston* v. *Arkansas State Medical Board,* 288 Ark. 1, 701 S.W.2d 361 (1986), is not a substitute for sound judicial review.

In light of the procedural irregularities in this case and the arbitrary and capricious actions of the Board, I would affirm the trial court's reduction of the fine to $50.00.

James Wesley JOHNSON *v.* STATE of Arkansas

CA CR 88-230 773 S.W.2d 450

Court of Appeals of Arkansas
Division II
Opinion delivered June 28, 1989

William R. Simpson, Jr., Public Defender, by: *Didi Harrison*, Deputy Public Defender, for appellant.

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

JOHN E. JENNINGS, Judge. James Wesley Johnson was found guilty by a Pulaski County jury of battery in the second degree. He was also found to have committed four previous felonies, and was sentenced by the circuit court to eight years imprisonment.

On appeal, Johnson argues that the evidence is not sufficient to support the conviction and that the court erred in refusing to give an instruction on battery in the third degree, a lesser included offense. We find sufficient merit in the second argument to require reversal.

When the sufficiency of the evidence is questioned we must examine that issue before turning to allegations of trial error. *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984). The relevant part of Ark. Code Ann. § 5-13-202 (1987), defining battery in the second degree, is:

> (a) A person commits battery in the second degree if:
>
> (4) He intentionally or knowingly without legal justification causes physical injury to one he knows to be:
>
> (A) A law enforcement officer . . ., while such officer . . . is acting in the line of duty;

"Physical Injury" is defined by Ark. Code Ann. § 5-1-102(14) (1987) to mean "the impairment of physical condition or the infliction of substantial pain."

Scott Stubenrauch, a Little Rock police officer, testified that he saw Johnson standing on the front porch of a Bishop Street residence on March 22, 1988. Stubenrauch, who was in uniform, became suspicious and followed Johnson in the police car. When the officer pulled up beside him, Johnson approached the car, and the officer asked to talk with him. Stubenrauch was in the process of doing a "pat down search" for weapons when Johnson pushed back from the police car and reached for his right front pocket. Stubenrauch grabbed him and the two fell to the pavement. During the struggle Stubenrauch ended up on top, with a grip on both of Johnson's hands. The officer testified that Johnson took his left hand and beat it against the pavement "five, six, seven times." He said, "the pain was intense. When the pain got to me I had to turn loose of his hand." Stubenrauch testified that once he released his hand, Johnson immediately reached in his pocket, took something out, and swallowed it. The trial court sustained an objection to the last portion of the testimony.

The little finger on Stubenrauch's left hand was injured. He went to the hospital for x-rays where it was learned that the finger was bruised, not broken. He testified that he wore a splint for two days and didn't gain full function of the finger for about a week. He said that he could write only with pain.

Dr. Allen Lea testified that the injury was a "superficial abrasion" and that he would consider it a minor injury. He also

testified that he would expect Stubenrauch to have pain for two or three days.

Appellant argues that there is not substantial evidence to support a finding by the jury of impairment of physical condition or the infliction of substantial pain. We need not decide whether the evidence is sufficient to support a finding of impairment because it will support a finding of "the infliction of substantial pain." Admittedly this was a relatively minor injury. However, we think the testimony of the officer and the treating physician is adequate to support the jury's conclusion that Stubenrauch was in "substantial pain."

Johnson relies on *Hall* v. *State*, 11 Ark. App. 53, 666 S.W.2d 408 (1984) and *Kelley* v. *State*, 7 Ark. App. 130, 644 S.W.2d 638 (1983). Neither case is controlling here. In *Hall*, we held only that the evidence was insufficient to support a finding of "*serious* physical injury." We also expressly held, however, that evidence of bruising would support a finding of "physical injury." In *Kelley*, we did hold that the evidence was insufficient to support a finding of "physical injury." There the victim's injury was likened to a "fingernail scratch," it required no medical attention, and there was no testimony of pain. Here, Stubenrauch described his pain as "intense." Dr. Lea testified that he would expect the officer to be in pain for several days, and the injury required medical attention.

Appellant also argues that the trial court should have given an instruction on battery in the third degree. Ark. Code Ann. § 5-13-203 (1987) provides, in pertinent part:

> (a) A person commits battery in the third degree if:
>
> (2) He recklessly causes physical injury to another person . . . .

"Knowingly" and "recklessly" are defined by Ark. Code Ann. § 5-2-202 (1987):

> (2) "Knowingly." A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is

> practically certain that his conduct will cause such a result;
>
> (3) "Recklessly." A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation;

Here, the trial court reasoned that because there was no evidence from which the jury could find that Johnson acted "recklessly" in injuring the officer, the instruction on the lesser included offense was not required. We cannot agree. The State relies primarily on *Doby* v. *State*, 290 Ark. 408, 720 S.W.2d 694 (1986) and *Flurry* v. *State*, 290 Ark. 417, 720 S.W.2d 699 (1986). In *Doby* the defendant was convicted of possession of drugs with intent to deliver, and he argued on appeal that the trial court should have given an instruction on simple possession. In that case, police officers testified that Doby admitted having the drugs (including Dilaudid and Valium), and that he told them he sold the Dilaudid tablets for $45.00 each and the Valium tablets for $1.00 to $1.50 each. They also testified that Doby admitted he sold cocaine. Doby testified at trial and denied ever possessing any drugs. The supreme court said:

> Doby rested his entire defense on his credibility against that of the officers. So as a practical matter, it came down to whom should the jury believe. There would be no rational basis to find the officers lied in part in this case. Their testimony so sharply conflicted with Doby's that it would not be reasonable to expect a jury to pick and choose and come up with a finding of a lesser offense when to do so would require a finding that Doby was a liar and the officers liars in part. If Doby had admitted possessing the drugs, it might make sense to require the charge of the lesser offense. But his defense was that he was entirely innocent of any crime: he possessed nothing. Therefore, the jury only had one question to decide, whether he was guilty as charged.

The court said that because Doby denied he even possessed any drugs it was "a case of all or nothing." The court, in a four-

three decision, affirmed the trial court's refusal to give the lesser included offense instruction.

Flurry was a companion case to Doby, and again, the supreme court held in a four-three decision that the lesser included offense instruction was not required. Flurry was charged with raping his fourteen-year-old daughter. On appeal he contended that the trial court should have given instructions on the lesser included offenses of carnal abuse in the third degree and sexual misconduct. Significantly, Flurry testified that he was completely innocent and that nothing improper had occurred between him and his daughter. The court held that under these circumstances there was no rational basis for a lesser included instruction.

Johnson relies on *Henson* v. *State*, 296 Ark. 472, 757 S.W.2d 560 (1988). There the defendant was convicted of aggravated robbery and theft and the issue on appeal was whether the trial court erred in refusing to give an instruction on the lesser included offense of robbery. Although the supreme court said that the evidence would support a conviction for aggravated robbery, it held that the instruction on the lesser included offense should have been given. Henson did not testify at trial — he simply put the State to its proof. The supreme court unanimously held that *Doby* v. *State, supra*, was not controlling. The court said:

> When the facts are susceptible of more than one interpretation, a lesser included instruction should be given. Generally a robbery instruction is required when the charge is aggravated robbery. A similar example is that a possession instruction is generally required when the charge is possession with intent to deliver. However, the facts of a particular case may develop so clearly that there would be no rational basis for giving a lesser included offense instruction.
>
> Since the facts in this case are susceptible to more than one interpretation, robbery or aggravated robbery, the instruction should have been given. The evidence was not so conclusive as to demonstrate that only aggravated robbery could have been committed by the appellant. This is not a case of all or nothing.

296 Ark. at 474-475, 757 S.W.2d at 561.

We reach the same conclusion here. The defendants in *Doby* and *Flurry* both took the stand to deny any participation in wrongdoing. Johnson, like the defendant in *Henson*, did not testify. While the testimony in the case at bar certainly would support a finding that Johnson "knowingly" caused physical injury to the officer's finger, we also think that the jury could rationally find that he "recklessly" caused the injury, by finding that he had consciously disregarded a substantial risk that the injury would occur. *See* Ark. Code Ann. § 5-2-202(3) (1987). Where there is the slightest evidence to warrant an instruction on a lesser included offense, it is error to refuse to give it. *Henson* v. *State, supra.*

Reversed and Remanded.

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

Susan WRIGHT, Widow of Timothy Wright *v.* TYSON FOODS, INC.

CA 88-416 773 S.W.2d 110

Court of Appeals of Arkansas
Division II
Opinion delivered June 28, 1989

Hubbard, Patton, Peek, Haltom & Roberts, by: *J. David Crisp* and *Randall D. Goodwin*, for appellant.

Bassett Law Firm, by: *Angela M. Doss* and *W.W. Bassett, Jr.*, for appellee.

JOHN E. JENNINGS, Judge. Timothy Wright was a long haul truck driver for Nashville Trucking. He also worked as a "relief driver" for Tyson Foods, Inc. In the early morning hours of February 7, 1986, Wright was killed in a collision, while driving a Tyson truck loaded with chickens.

His widow, Susan Wright, the appellant, filed a workers' compensation claim for death benefits. The Commission found that, at the time of his death, Wright was an employee of Tyson Foods, but awarded only the minimum death benefits of $15.00 per week. On appeal, Mrs. Wright contends that the Commission erred in awarding only minimum benefits. On cross-appeal, Tyson Foods contends that the Commission erred in finding that Wright was an employee as opposed to being an independent contractor. We affirm on both direct appeal and cross-appeal.

The determination as to whether, at the time of an injury, a person was an employee or an independent contractor is a factual one. *D&M Construction Co.* v. *Archer*, 14 Ark. App. 198, 686 S.W.2d 799 (1985). When we review the Commission's decision on a question of fact, we affirm unless the decision is not supported by substantial evidence. We must view the evidence in the light most favorable to the Commission's findings. *Blevins* v. *Safeway Stores*, 25 Ark. App. 297, 757 S.W.2d 569 (1988). There may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case *de novo*. *Brower Mfg. Co.* v. *Willis*, 252 Ark. 755, 480 S.W.2d 950 (1972). The ultimate question in these cases is not whether the employer actually exercises control over the doing of the work, but whether he has the right to control, *see Irvan* v. *Bounds*, 205 Ark. 752, 170 S.W.2d 674 (1943), and the resolution of the issue depends upon the facts of each case. *Sands* v. *Stombaugh*, 11 Ark. App. 38, 665

S.W.2d 902 (1984). Ordinarily no one feature of the relationship is determinative. *Carter* v. *Ward Body Works,* 246 Ark. 515, 439 S.W.2d 286 (1969). In *Franklin* v. *Arkansas Kraft, Inc.*, 5 Ark. App. 264, 635 S.W.2d 286 (1982), we listed some of the factors that may be properly considered:

> (1) the right to control the means and the method by which the work is done;
>
> (2) the right to terminate the employment without liability;
>
> (3) the method of payment, whether by time, job, piece or other unit of measurement;
>
> (4) the furnishing, or the obligation to furnish, the necessary tools, equipment and materials;
>
> (5) whether the person employed is engaged in a distinct occupation or business;
>
> (6) the skill required in a particular occupation;
>
> (7) whether the employer is in business;
>
> (8) whether the work is an integral part of the regular business of the employer; and
>
> (9) the length of time for which the person is employed.

5 Ark. App. at 269-70, 635 S.W.2d at 289.

In the case at bar, Wright was one of a number of relief drivers used by Tyson Foods to haul chickens when one of their regular drivers became unavailable or when there were extra chickens to be hauled. The supervisor maintained a list of six or seven such "back-up drivers." When the supervisor needed an additional driver he would call a man on the list. Tyson Foods furnished the truck, already loaded with chickens, and the gas and oil for the trip. The supervisor, Jerry Robertson, would give the relief driver a time schedule showing when he should be at a certain chicken house. The supervisor testified that he expected the same work out of the relief drivers as he did from the regular drivers and that they were paid the same. He said that he would dismiss a relief driver for "hot rodding," tearing up a truck, or taking an unauthorized detour. He said that the relief drivers

were required to follow and respond to his directions. He testified that he considered the relief drivers to be "part-time Tyson employees." There was evidence that the relief drivers were covered by Tyson Foods' liability insurance, but that Tyson Foods is self-insured as far as workers' compensation is concerned. Another relief driver testified that he was expected to follow the same company rules as regular drivers. There was additional evidence, some tending to show that Wright was an employee and some that tended to show the contrary, but we are persuaded that the foregoing constitutes substantial evidence to support the Commission's finding that, at the time of his death, Wright was an employee rather than an independent contractor.

On direct appeal, appellant contends that the Commission erred in awarding only minimum death benefits. From March 19, 1984, until his death on February 17, 1986, Wright had received six payments from Tyson Foods for his work as a relief driver. The payments totaled $384.93. Within the year immediately preceding his death, he had been paid a total of $208.26. The parties agree that the applicable code provision is Ark. Code Ann. § 11-9-518 (1987) which provides:

> Weekly wages as basis for compensation.
>
> (a)(1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of accident and in no case shall be computed on less than a full-time workweek in employment.
>
> (2) Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek in the employment.
>
> (b) Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of

hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.

(c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

Appellant emphasizes the language of subsection (a)(1), "Compensation . . . in no cases shall be computed on less than a full-time workweek in the employment." Appellee, on the other hand, argues that subsection (c) is applicable "because of exceptional circumstances." The Commission held that *Travelers Insurance Co. et al.* v. *Perry*, 262 Ark. 398, 557 S.W.2d 200 (1977), was controlling. Appellant argues that *Travelers* is distinguishable and relies heavily on *Mack Coal Co.* v. *Hill*, 204 Ark. 407, 162 S.W.2d 906 (1942). We agree with the Commission that *Travelers* controls.

Mack Coal involved nine compensation cases filed by members of the United Mine Workers Union. The union had contracts with various coal companies which provided for a maximum five-day week. For reasons relating to the demand for coal, the coal mining business was necessarily seasonal, and there was evidence that the coal mines involved operated an average of 118 days per year. Although *Mack Coal* was decided under prior law, our understanding of its holding is that the court approved the Commission's application of what was then the equivalent of Ark. Code Ann. § 11-9-518(a)(1) (1987), as opposed to computing the claimant's wages under subsection (c). In other words, the court treated these seasonal mine workers as if they were full-time employees.

Gill v. *Ozark Forest Products, et al.*, 255 Ark. 951, 504 S.W.2d 357 (1974), also involved seasonal employment, this time in the timber industry. The employment was seasonal because of weather conditions and the supply of timber. In *Gill* there was no guarantee of a full work week for the claimant, but he always worked whatever number of hours were available to him. *Gill* was decided under Ark. Stat. Ann. § 81-1312 (Repl. 1960), the provisions of which are identical to present law. The court held that the employee's widow's benefits should be computed on the

basis of a full-time work week, relying on *Mack Coal, supra.*

In *Travelers Insurance Co. et al.* v. *Perry*, 262 Ark. 398, 557 S.W.2d 200 (1977), it was undisputed that Perry was injured in the course of his employment. Perry was employed by Manpower, Inc., on May 27, 1975, and from then until July 2, 1975, he worked a total of four days and was paid $63.00. The Commission thought the case was governed by the decision in *Gill, supra*, and awarded compensation based upon a full-time work week. The supreme court reversed, and said:

> However, the facts in *Gill* are easily distinguished. In *Gill* it was undisputed that the worker had a "contract of hire in force" which provided for a 40-hour work week at an agreed rate whenever work was available. The claimant always worked when needed.
>
> In this case there was no contract between Perry and Manpower. Perry simply made himself available for work and Manpower assigned him to an employer. Perry did not have a contract that required him to work or to be available for work.
>
> There is a dispute as to whether Perry made himself available at all times during this six-week period for work. It is undisputed that he was only paid for a total of four days over the six-week period of time.
>
> We find no substantial evidence to support the finding by the Commission that Perry's average weekly wage was $88.00.

262 Ark. at 400, 557 S.W.2d at 201.

In another case relating to the problem here, we said:

> The computation of such average wage, under particular fact situations, often becomes difficult in one's effort to arrive at a result just and fair to both employee and employer. It is generally considered contrary to that concept and against public policy to so compute an employee's wage that it will result in a compensation award that pays the employee more during his period of disability than he is accustomed to earn in his usual or normal year around activity.

Farm Air Corp. v. *Reader*, 11 Ark. App. 72, 77, 666 S.W.2d 717, 720 (1984) (quoting from 11 Schneider, *Workmen's Compensation Law* § 2175 (perm. ed. 1957)).

In the case at bar, over a period of about two years, the decedent earned a total of $384.93. We agree with the Commission that it was obliged under the supreme court's decision in *Travelers* to award only the minimum death benefits.

Affirmed.

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

Lonnie Ray HICKS *v.* STATE of Arkansas

CA CR 88-224 773 S.W.2d 113

Court of Appeals of Arkansas
Division I
Opinion delivered June 28, 1989

Michael Everett, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant Lonnie Ray Hicks was charged with possession of a controlled substance with intent to deliver after a search of the premises of his home at which officers discovered an ice chest which contained eight Ziploc bags of marijuana. He was convicted only of possession of a controlled substance, sentenced to six months in the county jail, and a $1,000.00 fine.

The search was conducted pursuant to a search warrant obtained by Roger L. Perry, a narcotics investigator for the Arkansas State Police. The warrant was issued by the Marked Tree Municipal Judge and was based on the sworn affidavit of Officer Perry. The affidavit is a printed form with language inserted on blank lines (emphasis below) and reads as follows:

> The undersigned, being duly sworn, deposes and says:
>
> That he has reason to believe that residence of Lonnie Hicks described as a white wood frame house with tan brick trim, located [by] traveling 5.1 miles South on HWY 75 from it's intersection with HWY 63. Five to seven pounds of Marihuana located in sheds and drums located behind the house.
>
> in POINSETT County, State of Arkansas, there is now being concealed certain property, namely MARIHUANA which is in violation of Arkansas [Statute] 82-2601
>
> That the facts tending to establish the foregoing grounds for the issuance of a Search Warrant are as follows: Information from a reliable C.I., who has provided accurate information which resulted in Felony Drug convictions on at least ten occasions. C.I. has seen the above items within the past ten days, on this date C.I. pointed out the above residence to investigators who took photos of said residence.
>
> s/ Roger L. Perry
>
> Sworn to before me, and subscribed in my presence, 10-30-86.
>
> s/ Burk Dabney
> Municipal Judge

Officer Perry also gave Judge Dabney recorded, sworn testimony but the tape was mislaid, was not transcribed, and could not be found when this case was tried. The search warrant was issued and executed the same day the affidavit was made. The search was conducted by Officer Perry and other officers of the Arkansas State Police and Poinsett County Sheriff's Office.

Prior to trial appellant filed a motion to suppress the evidence obtained in the search. After hearing the evidence presented and the arguments of counsel, the trial judge said that before the decision in *United States* v. *Leon*, 468 U.S. 897 (1984), he would have, on the same evidence, granted the motion to suppress; however, based on *Leon* and the Arkansas Supreme Court's application of that case in *Jackson* v. *State*, 291 Ark. 98, 722 S.W.2d 831 (1987), the motion to suppress was denied.

Counsel for appellant then requested the court to compel the prosecution to divulge the name of the confidential informant. It was argued that this was necessary to enable the appellant to examine the good faith of the officer who obtained the search warrant. The motion was denied and appellant argues on appeal that the trial court erred in using the good faith rule of *Leon* to deny the motion to suppress and in denying the motion to disclose the name of the confidential informant.

We first consider, however, the appellee's argument that the search warrant was issued upon probable cause disclosed by the affidavit of Officer Perry. We think the appellee is correct in its argument. In *Watson* v. *State*, 291 Ark. 358, 724 S.W.2d 478 (1987), the court said:

> In *Illinois* v. *Gates*, 462 U.S. 213 (1983), the two-pronged test of *Aguilar* and *Spinelli* was replaced by a different test — "a practical, common sense decision," based on all the circumstances, including the veracity and basis for knowledge of persons supplying information. It is sufficient if "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Under *Gates* it is the duty of the reviewing court simply to insure that the magistrate issuing the warrant had a substantial basis for concluding that probable cause existed. We are satisfied those requirements were met in this case. *Jackson* v. *State*, 291 Ark. 98, 722 S.W.2d 831 (1987); *Toland* v. *State*, 285 Ark. 415, 688 S.W.2d 718 (1985).

291 Ark. at 363.

The appellant's reply brief states he "agrees that the measure of the validity of an affidavit is the 'totality of circum-

stances' test," but it is argued that the words typed on the blank lines of the form stating "C.I. has seen the above items within the past ten days" are simply not sufficient to constitute the "basis of probable cause." It is claimed that the words do not say *what* the *above items* are nor whether they refer to *what was seen* or the *quantity* of what was seen. Moreover, appellant asks, why is there no definite date stated but only the vague "within the past ten days."

We think the appellant reads the affidavit too critically. In *Illinois* v. *Gates*, 462 U.S. 213 (1983), the United States Supreme Court said:

> [P]erhaps the central teaching of our decisions bearing on the probable-cause standard is that it is a "practical, nontechnical conception." *Brinegar* v. *United States*, 338 US 160, 176, 93 L Ed 1879, 69 S Ct 1302 (1949). "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.*, at 175, 93 L Ed 1879, 69 S Ct 1302. Our observation in *United States* v. *Cortez*, 449 US 411, 418, 66 L Ed 2d 621, 101 S Ct 690 (1981), regarding "particularized suspicion," is also applicable to the probable-cause standard:
>
> > "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same — and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."
>
> As these comments illustrate, probable cause is a fluid concept — turning on the assessment of probabilities in particular factual contexts —not readily, or even usefully, reduced to a neat set of legal rules. Informants' tips

> doubtless come in many shapes and sizes from many different types of persons. As we said in *Adams* v. *Williams*, 407 US 143, 147, 32 L Ed 2d 612, 92 S Ct 1921 (1972): "Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability." Rigid legal rules are ill-suited to an area of such diversity. "One simple rule will not cover every situation." *Ibid.*

462 U.S. at 231-32. A practical, nontechnical reading of the affidavit in this case reveals that Officer Perry states that he has reason to believe there are "five to seven pounds of Marihuana located in sheds and drums" behind the house of Lonnie Hicks and now being concealed there in violation of the law. The affidavit also states that a reliable informant (appellant's brief states that the reliability of the informant "is not the subject" of his argument) has seen the above items (obviously referring to the "five to seven pounds of Marihuana") within the past ten days. In *Watson* v. *State*, *supra*, the affidavit stated an informant had seen the marijuana "within the last two days." 291 Ark. at 362. In *Moore* v. *State*, 297 Ark. 296, 761 S.W.2d 894 (1988), the affidavit stated an informant told the affiant that the informant "had recently" observed marijuana in the appellant's residence. The affidavits were found sufficient in both of those cases. We think the affidavit was sufficient in the present case. Although the trial judge indicated he would not have upheld the validity of the affidavits in this case except on the basis of the *United States* v. *Leon*, *supra*, case, we affirm the court if it is correct even though the court states the wrong reason for its ruling. *Dandridge* v. *State*, 292 Ark. 40, 727 S.W.2d 851 (1987); *Marchant* v. *State*, 286 Ark. 24, 688 S.W.2d 744 (1985).

However, even if the affidavit was deficient, we would still sustain the trial court's decision on its stated finding of good faith by the police officer who conducted the search. In *Jackson* v. *State*, *supra*, the court said that *United States* v. *Leon* holds that objective good faith reliance by a police officer on a facially valid search warrant will avoid the application of the exclusionary rule in the event the magistrate's assessment of probable cause is found to be in error. It is true, as we stated in *Partin* v. *State*, 22 Ark. App. 171, 737 S.W.2d 461 (1987), that the Court in *Leon* also said that while great deference should be given to the

determination of the magistrate who issued the warrant, this deference is not boundless and does not preclude the inquiry into a knowing or reckless falsity contained in an affidavit for the issuance of a search warrant. We also cited *Franks* v. *Delaware*, 438 U.S. 154 (1978), where the Court said there must be specific allegations and a preliminary showing of perjury or reckless disregard for the truth and these allegations must be established by a preponderance of the evidence.

In the present case, there is nothing in the record to suggest that Officer Perry perjured himself in the affidavit or showed a reckless disregard for the truth. He repeated what he had told the judge in an effort to obtain the search warrant and stated to the court that it was true. In no way did counsel for appellant call into question at the suppression hearing the truthfulness of Perry's testimony. However, the appellant argues that the trial court erred in placing on him the burden of proving the lack of good faith of the police officer who made the affidavit. The Arkansas Supreme Court held in *Schneider* v. *State*, 269 Ark. 245, 599 S.W.2d 730 (1980), that the burden of showing the invalidity of a warrant and its supporting documents is upon the party moving to suppress the evidence obtained by execution of the warrant. 269 Ark. at 251. *Schneider* also cited *Franks* v. *Delaware*, *supra*, for the same holding we referred to in *Partin* v. *State*, *supra*. *See also, Beed* v. *State*, 271 Ark. 526, 534, 609 S.W.2d 898 (1980) (relying on the holding of *Schneider*).

The appellant also argues that the trial court erred in refusing to order the prosecution to disclose the identity of the confidential informant. He suggests that because of the *Leon* decision, Rule 17.5(b) of the Arkansas Rules of Criminal Procedure, which protects the name of the confidential informant, cannot be upheld. That Rule provides:

> INFORMANTS. Disclosure shall not be required of an informant's identity where his identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant.

In *Jackson* v. *State*, 283 Ark. 301, 675 S.W.2d 820 (1984), the Arkansas Supreme Court discussed the question of when the identity of an informant must be disclosed.

> Appellant also contends the trial court should have ordered disclosure of the confidential informant's identity. In this case the charges did not include the actual delivery of a controlled substance, only the possession with intent to deliver. In *Bennett* v. *State*, 252 Ark. 128, 477 S.W.2d 497 (1972), we required disclosure when the defendant was charged with the sale of drugs and the informant actually participated in the crime. We have not required disclosure where a defendant was charged only with possession and the informant merely supplied information leading to the issuance of a search warrant.

283 Ark. at 303 (citations omitted). But appellant argues that without knowing the identity of the confidential informant, so he could interrogate him, defense counsel has no way of showing that the officer gave untruthful testimony in order to obtain the search warrant.

In the recent case of *Moore* v. *State*, *supra*, the Arkansas Supreme Court again held that where "there is no evidence that the informant participated in the crime, was a witness to the crime, or possessed any exculpatory information, failure to identify the informant is not in any way prejudicial to the appellant's defense." 297 Ark. at 308. In *Moore*, the court also said the facts "clearly come within the 'good faith' exception announced in *United States* v. *Leon*." While the same argument made in the present case was apparently not made in *Moore*, nevertheless, it is difficult to see any justification for forcing the prosecution to disclose the confidential informant's identity in the present case, especially in view of our firm and well established rule against such action.

In *Roviaro* v. *United States*, 353 U.S. 53 (1957), the United States Supreme Court stated:

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. *Scher* v. *United States*, 305 U.S. 251, 254; *In re Quarles and Butler*, 158 U.S. 532; *Vogel* v. *Gruaz*, 110 U.S. 311, 316. The purpose of the privilege is the furtherance and protection of the public interest in effective law

> enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.
>
> . . . .
>
> . . . Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way . . . .
>
> . . . .
>
> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

353 U.S. at 59-62.

By balancing the public interest against the mere possibility that disclosure of the identity of the informant in this case would help appellant's defense, we find, after considering all the circumstances, that the trial court did not err in denying appellant's request for disclosure or in denying cross-examination designed to accomplish the same result.

Affirmed.

CRACRAFT and ROGERS, JJ. agree.

David KECK and Joan Keck *v.* Julian LONGORIA and Catherine W. Longoria

CA 88-229 771 S.W.2d 808

Court of Appeals of Arkansas
Division I
Opinion delivered June 28, 1989

David Goldman, for appellant.

Richard L. Slagle, for appellee.

MELVIN MAYFIELD, Judge. Joan and David Keck appeal a decision of the Garland County Chancery Court granting judgment to the appellees on the pleadings.

The pleadings disclose that the appellants are the owners of a home in Hot Springs, Arkansas, and the appellees, Julian and Catherine W. Longoria, are the owners of a piece of property, adjacent to appellants' property, on which the Vapors Theatre and Restaurant is located. In 1960 the owners of the Vapors, predecessors in title to appellees, excavated a portion of their property near the parties' common boundary line in order to enlarge their parking area and building. No retaining wall was constructed and no immediate damage resulted to appellants' land.

On October 20, 1986, appellants filed suit against appellees contending that the "excavation has, over the past several years, and specifically during the past year, caused a crumbling and deterioration of the existing wall of rock and dirt which has resulted in a loss of foundation and stability" to appellants' home and, as a result of the excavation and subsequent deterioration, appellants' home now has no subjacent lateral support and is

precariously perched on top of a 65-foot cliff. The appellants originally sought money damages but subsequently amended their complaint and asked that the chancery court of Garland County "fashion an appropriate remedy based on the facts and circumstances of this particular case."

The appellees filed answers to the pleadings filed by appellants and subsequently filed a motion for judgment on the pleadings. In response to that motion and pursuant to Ark. R. Civ. P. 12(c), appellant Joan Keck submitted an affidavit in which she stated that after the excavation in approximately 1960, the appellants had no problem for several years. "However, during the past two (2) years erosion has become so bad that the house now sits on the edge of a drop of approximately seventy-five (75) feet and the house has had to be shored up by B & F Engineering Company." The affidavit contains some specific details and these conclusions: "I am afraid the house is going to fall and I fear for the safety of my family and myself. It is apparent that the adjacent property offers no support to my property and that is why I have brought this action."

In granting judgment on the pleadings, the chancellor issued a letter opinion stating that he had reviewed the law in Arkansas and other states and concluded as follows:

> My decision is based upon a review of both Arkansas law and the authorities of other states. The general rule appears to be well established in all jurisdictions that a property owner is entitled to the continued subjacent lateral support of his neighbor's property, and the neighbor who excavates his property so as to remove the subjacent lateral support becomes liable for the resulting damages. Some Courts have also imposed liability on a subsequent land owner who negligently allows substituted artificial lateral support (retaining wall) to deteriorate through lack of maintenance or repair. Arkansas is included among such Courts. *Urosevic* v. *Hayes*, 267 Ark. 739, 590 S.W.2d 77 (1979). The Court found one jurisdiction, Colorado, which has imposed liability on a subsequent land owner whose predecessor caused excavation to be performed, constructed no retaining wall and the adjacent property owner was damaged. *Gladin* v. *Von Engeln*, 575 P.2d 418

(1978). Standing alone, this case clearly represents a minority view.

In *Urosevic* v. *Hayes*, 267 Ark. 739, 590 S.W.2d 77 (Ark. App. 1979), cited by the chancellor in his letter opinion, this court said:

> The Arkansas Supreme Court apparently has not had occasion to pass upon this type issue; however, it is a well settled common law doctrine that the owner of land has the right to the lateral support of his soil in the natural state, and the law provides recourse for violation of this right,

267 Ark. at 741. After citing authority to support the above statement, we then stated:

> The rule does not preclude a landowner from excavating upon his land, but he owes a continuing duty to protect an adjoining landowner's property when the excavation removes lateral support. It is his duty to provide an artificial support if the conditions so require. 2 C.J.S. *Adjoining Landowners*, § 15. This duty extends to successive owners of the land that has been excavated. *Gorton v. Schofield*, 311 Mass. 352, 41 N.E.2d 12 (1942); *Braun* v. *Hamack*, 206 Minn. 572, 289 N.W. 553 (1940); *Lyons* v. *Walsh,* 92 Conn. 18, 101 A. 488 (1917). The duty is absolute and is not predicated upon negligence. *Williams* v. *Southern Railway Co.*, 396 S.W.2d 98 (Tenn. App. 1965); and *Levi* v. *Schwartz*, 201 Md. 575, 95 A.2d 322 (1953).

267 Ark. at 741-42.

Although the appellants rely upon the language in the above quoted paragraph, the cases cited there support the decision reached in *Urosevic* and that decision, as noted by the trial judge, is the general rule. In *Urosevic*, the appellant's predecessors in title had excavated their property and built a brick wall along the boundary line of the adjacent property, then owned by the appellees' predecessors in title. After the appellant and appellees purchased their respective properties, the brick wall was struck by lightning and a portion of the wall collapsed causing the erosion of some of the appellees' lands. The trial court held that while the lightning was not the fault of either party, the

subsidence of the appellees' lands would not have occurred but for the excavation that had previously been made upon appellant's land. However, the court held that additional pressure on the retaining wall was created by some fill having been placed to the wall on the appellees' lands. So, the chancellor balanced the equities and required the appellant to bear half the cost of restoring the wall and the appellees to bear half the cost. This court affirmed the chancellor saying that equity had the power and duty to devise a remedy appropriate to the circumstances of the case.

The controlling factor that distinguishes *Urosevic* from the present case is that the appellant's predecessors in title in *Urosevic* had built a retaining wall which the chancellor found the appellant had some duty to maintain. Here, no type of retaining wall had been erected by appellees' predecessors in title. In that situation, it seems to be the general rule that the subsequent owner of the land is not liable for damages caused by the excavation made by his predecessor in title. The *Urosevic* case is discussed in 4 UALR L.J. 103 (1981), where the general rule is stated as follows:

> A present owner of land is not liable for damages caused by an excavation made by his predecessor in title where the excavator did not provide artificial support to replace the natural support he removed.

Note, *Property—Lateral Support—Effect of An Act of God on Absolute Liability*, 4 UALR L.J. 108 (1981). (In footnote (3) it is stated: "Lateral support refers to the support land receives from adjacent land. It is to be distinguished from subjacent support, the support the surface of the land receives from underlying strata. The right to subjacent support arises when one party owns the surface of the land and another owns the strata beneath it." Thus, the case at bar really involves "lateral" rather than "subjacent" support.)

The Restatement (Second) of Torts § 817 (1977) states:

> (1) One who withdraws the naturally necessary lateral support of land in another's possession or support that has been substituted for the naturally necessary support, is subject to liability for a subsidence of the land of the other

that was naturally dependent upon the support withdrawn.

But Comment j to Restatement (Second) of Torts § 817(1) (1977) makes it clear that the person liable "[I]s the actor who withdraws the naturally necessary support. . . . The owner or possessor of this land is not liable under the rule stated . . . unless he was an actor in the withdrawal of support." The same rule is stated in 5 Powell, *The Law of Real Property* § 699 at 289 (1987), as follows:

> The cause of action exists against the person who made the withdrawal of support causing subsidence. Thus, the action cannot be brought against the possessor of the supporting land at the time of the subsidence for a withdrawal of support made by a predecessor of such possessor or by someone formerly in possession of the supporting land . . . . The complaint is insufficient unless it alleges that the defendant made the withdrawal of support.

The appellees in the present case cite several cases in support of this general rule. *See McKamy* v. *Bonanza Sirloin Pit, Inc.*, 195 Neb. 325, 237 N.W.2d 865 (1976) (obligation to prevent injury to adjacent lands from removal of lateral support rests only upon the owner causing the excavation, not a subsequent owner); *First National Bank and Trust Co.* v. *Universal Mortgage & Realty Trust*, 38 Ill. App. 3d 345, 347 N.E.2d 198 (1976) (only persons who remove another's lateral support can be held liable); *see also Spoo* v. *Garvin*, 32 S.W.2d 715 (Ky. Ct. App. 1930); *Paul* v. *Bailey*, 109 Ga. App. 712, 137 S.E.2d 337 (1964); *Frederick* v. *Burg*, 148 F. Supp. 673 (W.D. Penn. 1957).

Thus, we think it is clear that the general rule does not hold the owner or possessor of property liable for the withdrawal of lateral support unless he is the one who withdraws the support. Our *Urosevic* case does not hold contrary to this general rule. The liability imposed upon the appellant in that case resulted from the existence of the retaining wall built by appellant's predecessors in title and the duty imposed by equity to keep that wall repaired. In the present case, there is no wall or artificial support for the appellees to maintain or keep in repair.

Appellants also cite *Gladin* v. *Von Engeln*, 575 P.2d 418

(Colo. 1978), in support of their cause of action, but in that case the liability of the subsequent purchaser of the property was based upon the *negligence* of the purchaser. Here, the appellants' complaint does not allege that the appellees have been negligent in regard to the lateral support of the appellees' property.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Ellis POLK *v.* STATE of Arkansas

CA CR 88-187 772 S.W.2d 368

Court of Appeals of Arkansas
En Banc
Opinion delivered June 28, 1989

Dan J. Kroha, for appellant.

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

MELVIN MAYFIELD, Judge. On April 15, 1988, the appellant was found guilty in a nonjury trial of Failure To Vacate in violation of Ark. Stat. Ann. § 50-523 (Repl. 1971) [now Ark. Code Ann. § 18-16-101 (1987)] and was fined the sum of $300.00.

The court made specific findings of fact, which are supported by substantial evidence, as follows:

> Defendant was charged with violation of Ark. Stat. Sec. 50-523 (failure to vacate) as a result of an Affidavit For Warrant Of Arrest filed by Martha J. Garrich.
>
> On March 26, 1987, the affiant, Martha J. Garrich, acquired ownership of subject property by Warranty Deed from her parents, Vernon A. Fisher and Eunice E. Fisher. The deed was recorded in Deed Book 468 at page 765 of the records of White County (S-1).
>
> At the time the deed was executed, the Fishers were living on and had possession of the premises, and continued to occupy the premises until on or about October 5, 1987, several months after execution of the deed.
>
> On October 5, 1987, the defendant entered into a written Lease Agreement with Eunice Fisher as Lessor (DX-1). The Agreement contained no term specified, and provided for the payment of no rent, in consideration of defendant occupying and maintaining the premises.
>
> At the time the Lease Agreement was executed (October 5), the Affiant, who is also the daughter of the Fishers, was in the hospital, and was not aware that her parents had vacated the property or that defendant was in possession until October 22, 1987.
>
> On October 22, Mrs. Garrich went to the property and confronted defendant, demanding that he vacate her

property or begin paying rent to her.

Mrs. Garrich showed defendant her Warranty Deed, which at that time did not have the Clerk's Certificate of Record attached but did reflect in the upper right hand corner the Book and page where the deed was recorded, and also reflected the date on which the deed was executed.

Defendant refused to discuss Affiant's claim or to offer to pay rent to Affiant, relying upon his Lease Agreement with Mrs. Fisher.

Mrs. Garrich then caused a 10-day Notice To Vacate to be prepared, which was duly served upon defendant on October 26, 1987, but defendant continued to occupy the premises.

On November 12, 1987, Mrs. Garrich executed an Affidavit For Warrant Of Arrest of defendant for failure to vacate the premises, which resulted in the issuance of a Warrant Of Arrest and which resulted in defendant's arrest on November 24.

Defendant continued to occupy the premises until December 26, 1987, and Mrs. Garrich now has possession of the property.

Since defendant remained in possession of the property for (2) months after the Notice To Vacate was served, the Court finds defendant guilty of the offense of failure to vacate.

On appeal, the appellant argues that the evidence is insufficient to sustain his conviction. Ark. Stat. Ann. § 50-523, *supra*, provides in pertinent part as follows:

> Any person who shall rent any dwelling house, or other building or any land, situated in the State of Arkansas, and who shall refuse or fail to pay the rent therefor, when due, according to contract, shall at once forfeit all right to longer occupy said dwelling house or other building or land. And if, after ten (10) days' notice in writing shall have been given by the landlord, his agent or attorney, to said tenant to vacate said dwelling house or other building or land, said tenant shall wilfully refuse to

> vacate and surrender the possession of said premises to said landlord, his agent or attorney, said tenant shall be guilty of misdemeanor . . . .

Appellant argues that under the statute no violation occurs until one "shall refuse or fail to pay the rent . . . according to contract." We do not agree.

In *Poole* v. *State*, 244 Ark. 1222, 428 S.W.2d 628 (1968), the court said:

> In the case at bar appellant's right to possession of the property terminated upon the expiration of the week for which she had it rented. Appellant claims no title or right in the property and claims no right to retain its possession. She does not base her continued possession upon any claim of right whatever, except a right to force the owner to the expense of bond, attorney's fee, and irrecoverable court costs in civil litigation. The option in pursuing a civil remedy lies with the property owner and any defense available to appellant in a civil action is still available under the penal code. Section 50-523, supra, by its provisions, relates only to one who "shall refuse to or fail to pay the rent therefor, when due, according to contract" *and after ten days notice to vacate, "shall wilfully refuse" to do so.* Thus limited in its scope, § 50-523 relates only to one who has become a trespasser on property as a result of giving up all legal rights to its possession and after ten days notice wilfully refusing to remove therefrom with the necessary criminal intent to deprive the rightful owner of his property. [Emphasis in the original.]

244 Ark. at 1225-26.

It is, therefore, clear that the appellant in the case at bar was guilty of violating Ark. Stat. Ann. § 50-523 because the agreement he made with Mrs. Fisher contained no term, and when Mrs. Garrich confronted appellant, showed him her deed, and demanded he vacate or pay rent to her, he did neither. The appellant agrees that a tenancy at will, in the absence of a statute to the contrary, may be terminated on reasonable notice. 51C C.J.S. *Landlord and Tenant* § 173(b) at 481 (1968). The appellant was served with a notice to vacate on October 26, 1987.

We think 30 days thereafter constituted a reasonable period in which to vacate but he failed to do so for another 30 days. Therefore, we think he became a trespasser at the end of 30 days after his notice to vacate. Moreover, Ark. Code Ann. § 18-16-203(c) (1987) [formerly Ark. Stat. Ann. § 50-513 (Repl. 1971)] provides that where lands or tenements are held by one without special agreement for rent the owner may recover a fair and reasonable compensation for the use and occupation. Thus, we think the obligation of appellant to pay rent was implied.

In addition to *Poole* v. *State*, *supra*, we think the case of *Williams* v. *City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985), supports appellant's conviction. In that case, the appellant was convicted of criminal trespass under Ark. Stat. Ann. § 41-2004 (Repl. 1977) [now Ark. Code Ann. § 5-39-203 (1987)]. The court held that this statute was not applicable to an ordinary landlord-tenant relationship.

> No case has been cited nor have we found an appellate case where a holdover tenant has been convicted of criminal trespass. This court held in *Grays* v. *State*, 264 Ark. 564, 572 S.W.2d 847 (1978) that criminal trespass is a lesser included offense in the crime of burglary. There is no doubt but that this court has previously considered the criminal trespass statute to require an illegal entry and such entry to constitute the criminal offense. *Grays* v. *State*, supra; commentary to Ark. Stat. Ann. § 41-2004. On the other hand we have treated Ark.Stat. Ann. §§ 50-523 and 34-1504 [Supp. 1985] as the correct statutes in the holdover tenant situation. Both statutes deal with individuals who fail to pay rent.

284 Ark. at 554-55. Thus, it can be seen that the court in *Williams* thought that Ark. Stat. Ann. § 50-523 (which the appellant in the present case was convicted of violating) was a correct statute to use in the holdover tenant situation.

Affirmed.

JENNINGS and ROGERS, JJ., dissent.

JOHN E. JENNINGS, Judge, dissenting. The majority accurately sets out the facts of this case by incorporating the trial court's specific findings. Furthermore, it is clear that the trial

court's findings are supported by the evidence. The problem is that under the facts of the case at bar the appellant cannot be said to have violated Ark. Stat. Ann. § 50-523 (Repl. 1971). In *Poole* v. *State*, cited by the majority, the supreme court said:

> Section 50-523, supra, by its provisions, relates only to one who "*shall refuse or fail to pay the rent therefor, when due, according to contract*" and after ten days notice to vacate, "shall wilfully refuse" to do so. [Emphasis mine.]

244 Ark. at 1226; 428 S.W.2d at 630.

The court was undoubtedly correct, because this is what the statute says. The appellant was no doubt wrong in relying on his lease with Mrs. Fisher, rather than believing Mrs. Garrich's claim, and this course of action may well have subjected him to civil liability. He has no criminal liability, however, under Ark. Stat. Ann. § 50-523. He did not "refuse or fail to pay the rent therefor, *when due, according to contract*." Under his contract with Mrs. Fisher no rent was due. He had no contract with Mrs. Garrich.

Penal laws are strictly construed, and all doubts in construing a criminal statute must be resolved in favor of the defendant. *Lawson* v. *State*, 295 Ark. 37, 746 S.W.2d 544 (1988). If the language of such provisions is not clear and positive, or if it is reasonably open to different interpretations, every doubt as to construction must be resolved in favor of the one against whom the enactment is sought to be applied. *Wilcox* v. *Safley Construction Co.*, 298 Ark. 159, 766 S.W.2d 12 (1989). *See also Gober* v. *State*, 22 Ark. App. 121, 736 S.W.2d 18 (1987).

While it would seem, at first blush, that under the facts of the case at bar the appellant might have been charged with criminal trespass under Ark. Code Ann. § 5-39-203 (1987) (formerly Ark. Stat. Ann. § 41-2004 (Repl. 1977)), I agree with the majority that a conviction under this statute was probably foreclosed by the supreme court's decision in *Williams* v. *City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985). I cannot, however, understand how this lends support to the majority's decision. Even if Ark. Stat. Ann. § 50-523 is the only statute under which the appellant might be prosecuted, we must still ask whether his conduct violates that statute.

I respectfully dissent.

ROGERS, J., joins.

Hugh CARVER and Jean Carver *v.* Norman JONES, Francis Jones, Emmett G. Tullis and Stella Tullis

CA 89-15 773 S.W.2d 842

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

George Steel, Jr., for appellants.

Young, Patton & Folsom, by: *David Folsom*, for appellee.

GEORGE K. CRACRAFT, Judge. Hugh and Jean Carver appeal from an order of the chancery court holding that Emmett and Stella Tullis have an implied easement for ingress and egress across the Carvers' lands and enjoining the Carvers from interfering with the Tullises' use of the easement. The order further enjoined appellants from interfering with the use of the road by Norman and Francis Jones, the Tullises' tenants. We find no error and affirm the decree.

In 1969, appellees Tullis conveyed forty acres off the west side of their property to appellants. Appellees Tullis testified that, for many years prior to the conveyance to appellants, access from a county road to the property retained by the Tullises was gained by a lane which ran though the property sold to appellants. Appellees Tullis testified that they continued to use that roadway for access to their remaining property after the conveyance, as the conveyance left them landlocked and they had no other means of access to the county road.

Appellees Jones are the owners of a tract of land lying east of that retained by Tullis, but they do not deraign their title from a common source. The Joneses have an independent means of access to their own property. However, the existence of a creek on the western portion of the Joneses' property makes their access to that portion of their land west of the creek, and to the Tullises'

abutting land, extremely difficult, if not impossible, except in a specially equipped vehicle during very dry seasons. In June 1987, appellees Tullis purported to grant the right to use the easement across appellants' land to the Joneses, so as to provide them with a "reasonable passageway" to the western portion of the Joneses' own property. In July 1987, appellees Tullis leased the hunting rights on their property to appellees Jones for a period of five years at an annual rental of $120.00.

Appellants then barricaded the entrance to the roadway in question and successfully prohibited appellees from using it to connect the Tullises' land with the county road. Appellees brought this action to enjoin further interference with their use of the road. The chancellor granted injunctive relief in the following language:

> 6. That Plaintiffs Tullis have an easement in the nature of a way of necessity over the above-described land. That this easement by way of necessity is to allow Plaintiffs Tullis and their assigns full use and enjoyment of their tract of land.
>
> 7. That said easement right of way is for the purpose of connecting the Tullis tract of land with the county road.
>
> 8. That Defendants Carver and their assigns be, and they are hereby permanently enjoined against closing said right of way so that it may be freely used by Plaintiffs Tullis, their assigns, and persons authorized by Plaintiffs Tullis in the proper use of the way to pass over the way of Defendants Carver tract of land and to further permanently enjoin against interfering in any way with the use by Plaintiffs Norman Jones and Francis Jones or the persons authorized by Plaintiffs Tullis to use said right of way.

As the Tullises' right to use the roadway rests on an entirely different footing from that of the Joneses, we will treat their respective rights separately.

RIGHT OF APPELLEES TULLIS TO USE THE ROAD

Appellants contend that the evidence does not sustain the finding that appellees Tullis had an easement across appellants' land and that the court therefore erred in entering the injunction.

Appellants contend that the use by appellees was permissive only, and could not ripen into an easement by prescription or adverse use. Citing *Burdess* v. *Arkansas Power & Light Co.*, 268 Ark. 901, 597 S.W.2d 828 (1980), and *Corruthers* v. *King*, 235 Ark. 977, 363 S.W.2d 413 (1963), they argue that, as the lands are open and unenclosed, there is a presumption that the use of the road was not adverse but permissive. However, these are rules applied to acquiring easements by prescription, and they have no application to easements that arise by implication of law.

The reasons for, and general rules relating to, easements by implication are recited in *Greasy Slough Outing Club, Inc.* v. *Amick,* 224 Ark. 331, 274 S.W.2d 63 (1954), as follows:

> Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership, whether by voluntary alienation or judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case, the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage, in substantially the same condition in which it appeared and was used when the grant was made.

Id., 224 Ark. at 337, 274 S.W.2d at 67 (citations omitted). *See also Kennedy* v. *Papp*, 294 Ark. 88, 741 S.W.2d 625 (1987). Thus, in order to establish an easement by implied reservation, where there was a unity of title and a subsequent sale of a portion of the land over which the easement is claimed, use of the easement must have been apparent, continuous, and necessary, and it must appear that a continuance of its use is essential to the further use and enjoyment of the estate retained. The necessity for the easement is to be determined at the time of the grant, with the word "necessary" meaning that there can be no other reasonable mode of enjoying the dominant tenement without the easement; there must be an element of absolute necessity. *Greasy Slough Outing Club, Inc.* v. *Amick, supra.*

Here, appellees Tullis testified that the roadway over which they claimed the easement was in existence and used for ingress and egress to that portion of the land they retained since before they made the conveyance to appellants. The use of the roadway was open and continuous, and there was no other means of access to their property. They testified that they have continued to use the way and still have no means of access to their land other than through appellants' land or the land of third persons.

Although appellants argue that the element of necessity did not exist as to the Tullises, they do not point out to us, and we are unable to determine, where in the record there was evidence of any means of access open to appellees Tullis at or after the time of the conveyance other than across the lands conveyed to appellants. On the other hand, appellee Emmett Tullis testified positively that his property was landlocked as a result of the conveyance to appellants. Whether use of the easement was necessary was a question of fact for the trial court to determine. *Greasy Slough Outing Club, Inc.* v. *Amick, supra.* The chancellor found that appellees Tullis had satisfactorily proven those factors that give rise to an easement by implication. While we review chancery cases *de novo*, we do not reverse the chancellor's findings unless they are clearly against the preponderance of the evidence, or clearly erroneous. Ark. R. Civ. P. 52(a). From our review of the record, we cannot conclude that the chancellor's finding in this case is clearly erroneous.

RIGHT OF APPELLEES JONES TO USE THE ROAD

We agree with appellants that the June 1987 instrument executed by appellees Tullis conveyed to the Joneses no rights to cross appellants' land. Easements by necessity and by implication are appurtenant to the dominant estate and run with the land. *See Brandenburg* v. *Brooks*, 264 Ark. 939, 576 S.W.2d 196 (1979). It is clear that "[a]n appurtenant easement is incapable of existence separate and apart from the particular land to which it is annexed. So, it cannot be conveyed by the party entitled to it separate from the land to which it is appurtenant. It can be conveyed only by a conveyance of such land." 2 G. Thompson, *Commentaries on the Modern Law of Real Property* § 322, at 63-64 (Repl. 1980) (footnotes omitted). *See also* 28 C.J.S. *Easements* § 45 (1941). Here, the June 1987 instrument

merely purported to grant to the Joneses the right to cross appellants' property in order that the Joneses would have easier access to the western portion of their own property. It was not linked to any interest in the land to which the easement was appurtenant, i.e., the Tullis property, and was thus an ineffective attempt to transfer the easement.

Nor does the property owned by appellees Jones have as an appurtenance to it an easement by implication. Although the Joneses are the owners of land abutting that of the Tullises, they acquired their title from a different source, and there was therefore no severance of that unity of title from which easements by implication of law arise. Any rights that the Joneses have to use the road must therefore arise solely from their status as lessees of an interest in the estate to which the easement across appellants' property is appurtenant.

Where an easement is annexed as an appurtenance to land, whether by express or implied grant or reservation, or by prescription, it passes with a transfer of the land, even though not specifically mentioned in the instrument of transfer. *Warren* v. *Cudd*, 261 Ark. 690, 550 S.W.2d 773 (1977). We are cited no authority supporting the proposition that the use of an appurtenant easement for purposes connected with the dominant estate may be made only by the owner of the fee. To the contrary, we find the rule of general application to be that a lessee of the dominant estate is entitled to the use of its appurtenant easements in connection with the use and enjoyment of his leasehold interest. *See* 51C C.J.S. *Landlord and Tenant* § 293 (1968); 28 C.J.S. *Easements* §§ 90 and 109 (1941). Nor are these rules limited only to leases of all rights incident to ownership of the dominant estate. As a general rule, an easement may be used by those who own or legally occupy any part of the estate to which the easement is appurtenant. *See* 28 C.J.S. *Easements* § 90.

In *Keen* v. *Paragon Jewel Coal Co.*, 203 Va. 175, 122 S.E.2d 543 (1961), the right of a mineral rights lessee to transport coal from the dominant estate across an easement by implication on adjoining lands was in issue. In a well-reasoned opinion, the Virginia court said:

> Keen's contention that the defendant is not the owner of a dominant estate is without merit. In the kind of

> easement here, which is sometimes called a pure easement, the servitude imposed upon the servient estate is for the benefit of and goes along with the land composing the dominant estate, and is, therefore, appurtenant to it.
>
> "The right of way thus acquired remains vested in the grantee and his successors in title so long as the necessity therefor continues to exist." *Smith* v. *Virginia Iron etc. Co., supra*, 143 Va. page 164, 129 S.E. page 276; *Rhoton* v. *Rollins*, 186 Va. 352, 363, 42 S.E.2d 323.
>
> Defendant as the lessee of the coal underlying its leased lands has all the rights for the removal of the coal that its lessors had, and had the right to grant. If the owner of the fee simple as the owner of the coal and owner of the surface had the right to use the road for all needful purposes, no additional burden is put upon the servient tenement if coal products are hauled over the road by one person and surface products by another. *It is the tenement itself to which the easement of necessity is appurtenant, and not the person or persons who may make use of it.*

Id., 122 S.E.2d at 547 (emphasis added).

Here, for a valuable consideration, the Tullises leased the hunting rights on their land to the Joneses for a period of five years. The right to use the easement passed with that transfer of a leasehold interest, whether mentioned in the instrument of transfer or not. On the facts of this case, we conclude that, so long as the Joneses use this road for purposes connected with the exercise of their right to use and enjoyment of their leasehold interest in the Tullises' land, the appellants have no right to interfere.

Affirmed.

COOPER and ROGERS, JJ., agree.

Ivory MITCHELL and Zella Mitchell *v.* Anna MITCHELL

CA 88-267 773 S.W.2d 853

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

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

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

GEORGE K. CRACRAFT, Judge. Ivory and Zella Mitchell appeal from an order granting a judgment in favor of their son, Jimmy Mitchell, and his wife, Anna Mitchell, and declaring an equitable lien on real property owned by appellants to secure payment thereof. We affirm the court's award of the money judgment, but find error in its award of an equitable lien, and so modify the order.

Anna Mitchell, appellee, brought this action for divorce against Jimmy Mitchell, and made his parents, the appellants, third-party defendants for the purpose of settling her claim of a marital interest in real property to which appellants held legal title. She prayed that the court declare that appellants held title to the property in trust for her and her husband. Appellants denied that appellee and her husband had any equitable interest in the property.

At trial, appellee testified that during the marriage, appellants had given her and her husband title to a two-acre tract of land on which she and her husband lived. Appellee and her husband subsequently sold the land, and put a major portion of the $10,000.00 received into the construction of a house on another tract of land owned by appellants. Appellee testified that they built the house on the agreement that, upon completion, appellants would convey the title to the house and the surrounding six acres to her and her husband. At the time this action was commenced in chancery court, appellee and her husband had completed the construction of the house and were living there. However, after appellee filed for divorce, appellant ordered appellee to vacate the property. Appellee stated that, although they had performed their part of the agreement by constructing a house on appellants' property, appellants had refused to convey the property to her and her husband.

Appellants testified that they never agreed to convey the property to appellee and their son, but had agreed only that they would let them live on the property, rent free, until rentals at the rate of $200.00 per month equaled the couple's investment of labor and materials in the house. Appellants denied that the couple had furnished labor and materials in the amount stated by appellee, and estimated that the value of same was only $4,200.00. Appellants stated that appellee and their son lived rent free in the house for twenty-six months, and that the unpaid rent of $5,200.00 off set and exceeded the couple's investment.

The chancellor found that it was grossly inequitable for appellants to permit appellee and her husband to build the house and then declare that they had no interest in it. Finding that it "was wrong, inequitable, and an unjust enrichment," the chancellor held that appellee and her husband were entitled to recover

the sum of $6,264.06, and imposed an equitable lien upon the house and a three-quarter-acre tract of land to secure payment. It is from this order that appellants appeal.

Appellants first contend that the trial court erred in awarding appellee and her husband damages based on the theory of unjust enrichment, and by not allowing appellants' right to a setoff. They argue that appellee's theory of recovery, as set forth in the pleadings, was that appellants held title to the property in trust for appellee and her husband. Appellants argue that, therefore, it was error to decide the case on the theory of unjust enrichment, which had not been pled. Appellants further contend that, if appellee had pled a right to recover in *quantum meruit* or unjust enrichment, appellants would have asserted their right to a setoff in regard to the rental value of the property. We find no merit in appellants' contentions.

A quasi-contract is a legal fiction created by the law to do justice. It does not rest on an express or implied agreement between the parties, but on the principle that one should not be unjustly enriched at the expense of another. *Dews* v. *Halliburton Industries, Inc.*, 288 Ark. 532, 708 S.W.2d 67 (1986). A constructive trust is also based upon unjust enrichment, and may be applied when one who holds title to property orally agrees to hold the property for the benefit of another. It is an implied trust that arises whenever it appears from the evidence that the beneficial interest should not go with the legal title. *Horton* v. *Koner*, 12 Ark. App. 38, 671 S.W.2d 235 (1984). Appellants correctly state that appellee's theory of recovery against them, as stated in her complaint, was that of a constructive trust. While pleadings are required so that each party will know the issues to be tried and be prepared to offer his proof, Rule 15(b) of the Arkansas Rules of Civil Procedure provides that issues not raised in the pleadings, but tried by express or implied consent of the parties, shall be treated in all respects as if they had been pled.

In the pleadings, appellants denied appellee's allegation that an agreement existed between the parties for conveyance of the property. At trial, however, appellants testified that there was, in fact, an agreement, but that it was only an agreement to allow appellee and their son to live on the property, rent free, until they had recouped the monies they had invested.

They further testified that if for any reason appellee and their son did not live on the property long enough to fully recoup their investment, appellants had agreed to pay them the balance. Having injected these issues into the case, and asserted their defense of a setoff, appellants cannot contend that the pleadings were not treated as having been amended to conform to the proof. We find no error in the trial court's award of damages on the theory of unjust enrichment.

Nor can we agree that the trial court failed to allow appellants a setoff. Appellee testified that she and her husband initially invested $8,000.00 into the construction of the house, and that they invested additional monies each month that they lived on the property. While the chancellor granted a judgment in favor of appellee and her husband in the amount of $6,264.06, he could have arrived at a much higher figure than he did, based on appellee's testimony. Therefore, we cannot say that the chancellor did not consider all or part of a $200.00 per month rent as a setoff against appellee's claim. It is the province of the chancellor, sitting as 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). Factual determinations made by the chancellor must be upheld unless clearly erroneous. *Looper* v. *Madison Guaranty Savings & Loan Assoc.*, 292 Ark. 225, 729 S.W.2d 156 (1987).

Appellants next contend that the trial court erred in allowing into evidence appellee's testimony regarding invoices and receipts of building materials. Appellants argue that appellee's proof of her expenditures for materials and labor was not based on personal knowledge, and, pursuant to Rule 602 of the Arkansas Rules of Evidence, such testimony was inadmissible. We do not agree.

Rule 601 of the Arkansas Rules of Evidence provides that every person is competent to be a witness except as otherwise provided in the rules. The trial court begins with the presumption that every person is competent to be a witness. *Jackson* v. *State*, 290 Ark. 375, 720 S.W.2d 282 (1986). In *Chappel* v. *State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986), this court outlined the following criteria for determining the competency of a witness: (1) the ability to understand the obligation of an oath; (2) an

understanding of consequences of false swearing; (3) the ability to receive and retain accurate impressions; and (4) the capacity to transmit a reasonable statement of what has been seen, felt, or heard. Rule 602 provides that a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. The rule further provides that evidence to prove personal knowledge is not limited to the witness's own testimony.

Appellants argue, that as appellee could not testify with accuracy as to the exact amounts she and her husband had spent on materials, nor positively state that materials indicated on the invoices actually went into the construction of the house, the evidence is insufficient to sustain a finding of $6,264.06 in damages. While appellee was not able to identify the materials described in the invoices as having been utilized in the construction of the house, this is not decisive in determining her competency to testify as to the monies invested.

Appellee testified from personal knowledge that, of the $10,000.00 received from the sale of the two-acre tract of land, at least $8,000.00 of that sum went into building materials for the house. She further testified that she was with her husband on many occasions when the items shown on the invoices were picked up at a lumberyard. Appellee stated that, although some of the materials had been billed to and paid for by appellants, she and her husband had reimbursed them for those expenditures, either in cash or by contribution of labor on other construction jobs in which appellant Ivory Mitchell, a building contractor, had an interest. Appellee testified that she and her husband worked on the construction of the house for over two and one-half years. She stated that additional monies were saved and put into the house, and that she had tried for the two and one-half year period to invest $200.00 per month, the amount they would have paid in rent, in the house. According to appellee's testimony, she and her husband had invested labor and materials in the house in amounts far in excess of the $4,200.00 stated by appellants.

[redacted] The record indicates that the evidence was sufficient to support that appellee had personal knowledge of the monies and labor invested by appellee and her husband into the construction of the house. We conclude that the chancellor could have found

that appellee and her husband were entitled to a sum ranging from nothing at all to a figure much higher than that which he actually awarded.

Finally, appellants contend that the trial court erred in awarding appellee and her husband an equitable lien against appellants' property and ordering that the property be sold to satisfy the judgment awarded. We agree. While there are circumstances under which imposition of an equitable lien would be proper, we cannot conclude that the facts of this case present such a situation.

Ordinarily, an equitable lien arises from an express or implied agreement to create a lien on property, real or personal, as security for an obligation. A loan or advancement of money, in and of itself, does not give rise to a lien unless there is trickery or fraud involved in its procurement. *Lowery* v. *Lowery*, 251 Ark. 613, 473 S.W.2d 431 (1971); *Warren* v. *Warren*, 11 Ark. App. 58, 665 S.W.2d 909 (1984). In some instances, however, an equitable lien can arise absent an express or implied agreement.

> An equitable lien may arise independently of any express agreement; it may arise by implication from the conduct and dealings of the parties. As the rule is frequently stated, in the absence of an express contract, an equitable lien, based on those maxims which lie at the foundation of equity jurisprudence, may arise by implication out of general considerations of right and justice, where, as applied to the relations of the parties and the circumstances of their dealings, there is some obligation or duty to be enforced.
>
> However, the tendency is to limit rather than extend the doctrine of constructive liens, and, in order that such a lien may be claimed, either the aid of a court of equity must be requisite to the owner so that he can be compelled to do equity or there must be some element of fraud in the matter as a ground of equitable relief. Such a lien will not be implied and enforced where the facts and circumstances present no grounds for equitable relief, and there is an adequate remedy at law.

53 C.J.S. *Liens* § 8, at 467-468 (1987) (footnotes omitted).

Here, there is no evidence of an express or implied agreement between the parties to create an equitable lien on appellant's property in favor of appellee and her husband. The court denied appellee's claim of a constructive trust, but found that, in order to avoid unjust enrichment, appellants were obligated in quasi-contract to reimburse appellee and her husband for the material and labor expended in the construction of the house. The court then entered a money judgment in favor of appellee and her husband and, without making any findings as to the grounds for such relief, imposed an equitable lien on appellants' property to secure payment of the judgment.

Equity cases are tried *de novo* on appeal upon the record made in the chancery court. When this court finds error, it is not required to remand the case for further proceedings, but may enter such judgment as the chancery court should have entered. *Ferguson* v. *Green*, 266 Ark. 556, 587 S.W.2d 18 (1979). In this case, the trial court erred in finding that appellee and her husband had an equitable lien on appellants' property, and ordering that the property be sold in satisfaction of the lien. The court should have ordered that execution may issue on the judgment rendered, and, to that extent, we modify the chancellor's decree.

Affirmed as modified.

COOPER and ROGERS, JJ., agree.

David ANTHES and Edward Anthes *v.* Edward THOMPSON, et al.

CA 88-176 773 S.W.2d 846

Court of Appeals of Arkansas
Division I
Opinion delivered July 5, 1989
[Rehearing denied August 16, 1989.]

Larry E. Graddy, for appellant.

Clark & Adkisson, for cross-appellant Hendrix College.

Laws, Swain & Murdoch, P.A., for appellee Jack Hill.

Hicks & Madden, by: *Stuart W. Hankins* and *Sherry S. Means*, for appellee James W. Bryan.

MELVIN MAYFIELD, Judge. The appellants, David and Edward Anthes, appeal from a judgment entered in a foreclosure suit which they filed against the appellees.

In 1960, appellants' parents, Paul and Ludie Anthes, leased a tract of land in Conway, Arkansas, from Hendrix College and built the Townhouse Motel and Restaurant on it. In 1975, with the written permission of Hendrix College, the Antheses assigned the lease to their sons (the appellants) David and Edward Anthes.

On March 17, 1977, appellants sold the motel and restaurant and assigned their interest in the lease to the Thompsons, who signed a promissory note for $165,000.00, payable to appellants and secured by the improvements on the property. On August 1, 1985, the balance due on this note was $90,564.60.

On August 30, 1977, the Thompsons sold to Charles E. Palmer and his wife, Virginia Palmer; on May 30, 1978, the Palmers sold to Thomas E. Huggett and his wife, Leslie K. Huggett; on November 2, 1979, the Huggetts sold to Roderick V. Spencer; on November 21, 1979, Spencer sold to Mahesh N. Kapadia and his wife, Mamta M. Kapadia; on January 13, 1981, the Kapadias sold to Bhanwan Pema and his wife, Savitaben Kana; on June 8, 1982, Pema and Kana sold to Jack Hill and James Bryan; on November 11, 1982, Hill and Bryan sold to Raymond Krayecki and his wife, Shirley Krayecki; on February 8, 1984, an order was entered in Faulkner County Circuit Court in a suit filed by Hill and Bryan against the Krayeckis which authorized Hill and Bryan to "retake possession of the property known as the Townhouse Motel and Restaurant" and assume the indebtedness due to the Antheses, the Thompsons, the Palmers and the Kapadias. In January 1985, the motel burned (Hill was later convicted of arson for burning it) but Hill continued to make payments to the appellants until August 1985.

On September 20, 1985, appellants filed this foreclosure suit

and, on October 31, 1985, Hill petitioned for bankruptcy. The bankruptcy stay was removed by order of the bankruptcy court on March 6, 1986, and the matter proceeded to trial. An amended complaint filed by appellants made all subsequent owners of the motel parties to the suit and sought judgment against them on the promissory note. Most of the subsequent owners filed cross-claims against their successors.

In the meantime, Hendrix College had a contractor demolish the remainder of the buildings and remove the debris including the concrete parking lot and swimming pool. Hendrix then intervened in this suit seeking reimbursement for the expense of restoration of the land, unpaid rent, back taxes for 1984, and treble damages for unlawful detainer pursuant to Ark. Stat. Ann. § 34-1516 (Repl. 1962) [now codified as Ark. Code Ann. § 18-60-309(b)(2) (1987)].

The court dismissed the suit against Pema and Kana and the Krayeckis holding that there had been no valid service on them. The court granted judgment for the Antheses against all subsequent owners except Hill and Bryan. The court said judgment was not granted against them because "the court has no proof before it that Hill and Bryan assumed the obligations of the previous owners who now seek to hold them liable thereon." The court also held that all who had been owners, except Hill and Bryan, and those on whom no effective service was obtained, were liable to Hendrix College for some taxes it had paid which the lessees were obligated to pay, and held all of them, including Hill and Bryan, liable for unpaid rent. The Antheses appeal the finding that there was insufficient proof in the record to show that Hill and Bryan assumed the obligations of the previous owners. Hendrix College filed a cross-appeal and argues that the court erred by not awarding it treble damages for unlawful detainer and by not assessing liability for taxes against Hill and Bryan.

On their appeal, the Antheses point out an exhibit introduced into evidence which they contend proves that Hill and Bryan agreed to assume the obligations of the previous owners. They direct our attention to Plaintiffs' Exhibit No. 8, which is a certified copy of an order, filed February 8, 1984, in Faulkner County Circuit Court in a suit brought by Hill and Bryan against the Krayeckis. Attached to the order and incorporated by

reference is a copy of the contract of sale by which Hill and Bryan sold the Townhouse Motel to the Krayeckis. The order provides in part:

> 2. That the plaintiffs are entitled to retake possession of the property known as the Townhouse Motel and Restaurant and plaintiffs assume the indebtness [sic] described in paragraph 1 A, B, C, D, and E of the contract of sale between the plaintiffs and the defendants dated November 4, 1982.

The specified paragraphs of the attached contract of sale provide that consideration for the sale is $450,000.00 "paid and to be paid as follows:"

> (a) By Buyer assuming and discharging, according to the terms and conditions thereof, the unpaid obligation due Eddie and David Anthes pursuant to the promissory notes dated April 1, 1977, having a combined unpaid balance of $121,112.95.
>
> (b) By Buyer assuming and discharging, according to the terms and conditions thereof, the promissory note in favor of Edward and Louise Thompson, dated July 28, 1977, and having an unpaid principal balance of approximately $71,381.26.
>
> (c) [An obligation not involved in this case.]
>
> (d) By Buyer assuming and discharging, according to the terms and conditions thereof, the promissory note in favor of Charles E. and Virginia Palmer, dated May 16, 1978, and having an unpaid principal balance of $78,477.28.
>
> (e) By Buyer assuming and discharging, according to the terms and conditions thereof, the promissory note in favor of Mahesh N. Kapadia and Mamta M. Kapadia dated June 12, 1982, for $20,000.00 with a current balance of $19,403.02.

In his letter opinion, the trial judge discussed the above order as follows:

> The evidence indicates that Pema and Kana returned

> the motel to Hill and Bryan and that Hill and Bryan then sold it again on November 4, 1982, to Krayecki. Krayecki gave the motel back to Hill and Bryan which is evidenced by Plaintiff's Exhibit #8 which consists of an Order of the Circuit Court of Faulkner County, Arkansas, in Civil case 83-383 wherein is found a copy of the contract from Hill and Bryan to Krayecki. In the order, Hill and Bryan, as between them and Krayecki, agree to assume the obligations to Anthes, Thompson, Palmer and Kapadia. However, the requisite privity between Krayecki and Anthes, Thompson, Palmer and Kapadia is missing (as required in the cases already cited) and by the time of this document there had already been a missing link in the chain anyway.

In making this decision, the court relied on the cases of *Georgia State Savings Ass'n* v. *Dearing*, 128 Ark. 149, 193 S.W. 512 (1917); *Lesser-Goldman Cotton Co.* v. *Fletcher*, 153 Ark. 17, 239 S.W. 742 (1922); and *Carolus* v. *Arkansas Light & Power Co.*, 164 Ark. 507, 262 S.W. 330 (1924). The trial court's reasoning is explained by *Carolus*:

> In *Thomas Mfg. Co.* v. *Prather*, 65 Ark. 27, we said: "This court long ago ruled, in line with the doctrine which generally obtains in this country, that, where a promise is made to one upon a sufficient consideration, for the benefit of another, the beneficiary may sue the promisor for a breach of his promise. This doctrine operates as an exception to the elementary rule of law that a stranger to a simple contract, from whom no consideration moves, cannot sue upon it. Therefore it should be applied cautiously, and restricted to cases coming clearly within its compass. 'There must be, first, an intent by the promisee to secure some benefit to the third party; and second, some privity between the two — the promisee and the party to be benefited — and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him, personally.' "

164 Ark. at 512-13.

On our *de novo* review, we cannot agree with the trial court's decision for two reasons. First, we think that privity is

established. In *Cunningham* v. *Federal Land Bank*, 192 Ark. 156, 90 S.W.2d 503 (1936), the Arkansas Supreme Court said:

> Under repeated opinions of this court we have consistently held that a grantee in a deed who expressly assumes and agrees to pay an outstanding mortgage debt against the lands conveyed by accepting such deed binds himself to the mortgagee or his assignees for the debt. This right inures to the mortgagee and his assignees as a matter of law, and no election or other affirmative action upon his part is necessary or required to establish it. *See Pfeifer* v. *W.B. Worthen Co.*, 189 Ark. 469, 74 S.W.(2d) 220, and cases cited therein.

192 Ark. at 159. The record contains a copy of a Security Agreement, introduced into evidence as Plaintiffs' Exhibit No. 6, which was executed when the appellants sold and assigned their motel and lease interest to the Thompsons. The debt secured by the Security Agreement was assumed by Hill and Bryan when they executed the contract of sale to "retake" the motel from the Krayeckis and when the order of the Faulkner County Circuit Court was entered authorizing their execution of the contract and their assumption of the outstanding mortgage debt due to the appellants. If any privity was necessary, it clearly existed between the Krayeckis (the promisee) and the appellants (the party to be benefited by Hill and Bryan's promise to pay the debt due appellants by the Krayeckis). The requirements set out by our supreme court in the *Cunningham* v. *Federal Land Bank* case are established by undisputed evidence.

In the second place, privity is not always necessary in the situation in this case. In discussing third-party beneficiaries, 4 Corbin, *Corbin on Contracts* § 788 at 108-11 (1951) states:

> Where one sells his business, stock in trade, choses in action, or other property and the buyer undertakes to pay the seller's debts, an action by a creditor lies against the buyer on his promise. And this is true even though the creditor who sues may not have been specifically pointed out. . . .
>
> If one who has contracted to buy property assigns the contract rights to one who expressly assumes payment of

> the price, the vendor is a creditor beneficiary and can maintain action for the full price against the assuming assignee. If a leasehold is assigned and the assignee (or sublessee) promises the assignor to pay the rent or to perform other obligations of the assignor to the landlord, the landlord can enforce this promise.

The theory upon which the above examples are based is not explained by Corbin. However, in a one-volume hornbook, *Corbin on Contracts* at 759 (1952), he concludes a discussion of the various theories used to explain the rights of third-party beneficiaries by stating:

> These theories were merely complex rationalizations, used for the purpose of attaining a desired result, a result that is now very generally attained without them and a result that is desirable in many cases to which none of them can readily be applied.

In Arkansas we have cases where privity is of little, if any, importance. One example is *Freer* v. *J.G. Putman Funeral Home*, 195 Ark. 307, 111 S.W.2d 463 (1937). In that case a contract between Dr. Freer and John Finney contained a provision that in the event of Finney's death any balance of an account due to Finney would be paid by Dr. Freer on Finney's funeral expense. After Finney's death, the funeral home sued Dr. Freer for its bill. The court said:

> We are confronted with the argument that formerly the courts held that there must have been some privity or obligation as between Finney and the appellee in order to bind appellant; that none being shown here the appellee is without remedy. We find that formerly under some of the more ancient authorities that proposition might have been deemed as well considered. We prefer, however, to take a different view, which we think is more consonant with absolute justice, as well as in conformity with the contract. That view is supported by a substantial array of authorities to the effect that the more nearly absolute becomes the duty of the defendant to pay, in the same proportion is the power to sue increased. Here there is an absolute duty to pay. It admits of no denial and none is offered. There is the correspondingly increased right to sue.

195 at 311-12. We cite this case only to show that the need for privity can vary. *Freer* was cited in *Howell and Tall Timber Development Corp.* v. *Worth James Construction Co.*, 259 Ark. 627, 535 S.W.2d 826 (1976), where this standard was set:

> It is true, as Tall Timber asserts, the presumption is that parties contract only for themselves and a contract will not be construed as having been made for the benefit of a third party unless it clearly appears that such was the intention of the parties. . . . In the case at bar, there is substantial evidence that it was the clear intention of the parties to contract for the benefit of appellee and that appellee was a beneficiary of their contract. We have repeatedly held that a contract made for the benefit of a third party is actionable by such third party.

259 Ark. at 629 (citations omitted).

In *Southern Farm Bureau Casualty Ins. Co.* v. *United States*, 395 F.2d 176 (8th Cir. 1968), the court in applying Arkansas law analyzed our cases running from the strong emphasis on privity in *Carolus* v. *Arkansas Light and Power Co., supra*, to the *Freer* case which placed no reliance on that concept. The Eighth Circuit court decided that Arkansas worked on the theory that "where a contract clearly intends a benefit to a third party, privity is not required, and the third party acquires an enforceable right." 395 F.2d at 179. Another hornbook, Calamari & Perillo, *The Law of Contracts* Sec. 17-2 (2nd ed. 1977) suggests this test:

> A key which unlocks many of the cases is the determination of to whom the performance is to be rendered. If the performance is to run directly to the promisee, the third party is ordinarily an unprotected incidental beneficiary, but if it is to run to the third party, he is ordinarily an intended beneficiary with enforceable rights.

Id. at 608-09. A footnote cites several cases in support of the text. One case, *Lenz* v. *Chicago & N.W. Ry. Co.*, 86 N.W. 607 (Wis. 1901), states: "Payment direct to the third person is, of course, a benefit to him, and, if that is required by a contract, the intent to so benefit is beyond question." *Id.* at 609.

It thus seems that regardless of privity, the general rule

is very close to the rule in *Howell* v. *Worth James Construction Co., supra*, which says "the presumption is that parties contract only for themselves and a contract will not be construed as having been made for the benefit of a third party unless it clearly appears that such was the intention of the parties." Applying that rule here, we think it beyond question that Hill and Bryan agreed with the Krayeckis, in a contract approved by a court order, that Hill and Bryan would assume the balance due to the appellants. That this provision was clearly for appellants' benefit is proved by the fact that Hill and Bryan made the payments on that balance directly to the appellants and continued to do so for more than six months after the motel burned.

For the reasons stated above, we modify and remand with directions that the appellants' judgment be entered against Hill and Bryan also.

■ Hendrix College argues on a cross-appeal that the trial court erred in refusing to grant treble its damages for rents accrued after the notice to vacate. It relies on Ark. Code Ann. § 18-60-309(b)(2) (1987) which provides that when unlawful detainer is found to apply to commercial property the liquidated damages is three times the rental per month. Ark. Code Ann. § 18-60-304 (1987) provides for a three-day written notice to quit before a person shall be deemed guilty of unlawful detainer. The trial court found that no written three-day demand of a definite time to vacate the premises was ever served on any of the tenants or lessees. Hendrix directs us to a stipulation at page 635 of the transcript, in which counsel for the Antheses stipulated that they had received notice on November 8, 1985, to vacate by November 30, 1985. Hendrix's claim for treble damages is also made against Hill and Bryan. It is not contended that their counsel made any stipulation about receiving notice to vacate. Therefore, there is no evidence that the required notice was served on them. As to the Antheses, we cannot say the chancellor was clearly wrong in not holding them liable for treble damages when we consider that there must be a finding of willful, wrongful holding over before Ark. Code Ann. § 18-60-304 would apply. *See Warmack* v. *Merchants National Bank*, 272 Ark. 166, 612 S.W.2d 733 (1981); *Johnson* v. *Taylor*, 220 Ark. 46, 246 S.W.2d 121 (1952).

■ The court did grant Hendrix judgment for $4,805.68

for taxes it paid that the lessees were obligated to pay. This was a joint and several judgment against all parties who had owned the motel, and were served with valid summons, except Hill and Bryan. Hendrix cross-appeals from the failure to make this judgment run against Hill and Bryan also. We agree with Hendrix. The agreement that Hill and Bryan made with the Krayeckis to retake possession of the motel and assume the indebtedness that the Krayeckis had assumed when they bought the motel surely included the lease obligations to Hendrix. There is evidence that Hill paid Hendrix rent as called for in the lease. The attorney who represented Hill and Bryan in the Faulkner County Circuit Court case in which Hill and Bryan agreed to retake possession of the motel testified that they agreed to assume and discharge the lease obligations. The third-party beneficiary rule which we have applied to make Hill and Bryan liable to the Antheses also makes them liable to Hendrix for the taxes paid by Hendrix.

Thus, we modify the $4,805.68 judgment for taxes and remand with directions that this judgment for taxes paid be entered against Hill and Bryan also.

The trial court also granted joint and several judgment for Hendrix against all the parties who had owned the motel, and were served with summons, for rents due. This judgment ran against Hill and Bryan also. Although Hill and Bryan did not appeal from the judgment entered by the court, they join the appellants, David and Edward Anthes, in arguing that no rent should have been granted beyond August 31, 1985, the end of the lease from Hendrix. The Antheses contend the holding over past the end of the lease was mainly due to the requirement of the federal bankruptcy law that stayed proceedings until it was lifted. Nevertheless, it was not Hendrix College that was in bankruptcy. Appellants and Bryan also think Hendrix moved too slowly in attempting to gain possession, but we think that was for the trial court to decide, and we find no error in that respect.

On their appeal, the Antheses also contend that the trial court erred in not giving them "judgment over" against all subsequent purchasers of the motel for the judgment given Hendrix against the Antheses for the taxes paid by Hendrix and the rent due to Hendrix. Although the Antheses had asked for

that relief in the response they filed to Hendrix's pleading asking for judgment for the taxes and rent, the trial court made no reference to the issue or any finding in that regard. While we hear appeals from chancery *de novo*, we have the discretionary power to remand for further proceedings on the whole case or certain issues. *Ferguson* v. *Green*, 266 Ark. 556, 566, 587 S.W.2d 18 (1979).

We remand for the trial court to make the judgments granted appellants and Hendrix College run against Hill and Bryan also. We also direct the trial court to make a determination, with findings, on appellants' request for "judgment over" on Hendrix's judgment for taxes and rent against appellants.

Affirmed as modified, and remanded for further proceedings consistent with this opinion.

CRACRAFT and ROGERS, JJ., agree.

HALLIBURTON COMPANY v. E.H. OWEN FAMILY TRUST

CA 88-259 773 S.W.2d 453

Court of Appeals of Arkansas
En Banc
Opinion delivered July 5, 1989
[Rehearing denied August 16, 1989.*]

*Cracraft, J., would grant rehearing.

Kinard, Crane & Butler, P.A., for appellant.

Bill F. Jennings, for appellee.

MELVIN MAYFIELD, Judge. Appellant, Halliburton Company, appeals a decision of the Columbia County Chancery Court holding that certain conveyances made by E.H. Owen, individually, into the E.H. Owen Family Trust were void as to appellant. On appeal, as at trial, appellant contends that the trust was

fraudulent, illusory, and created for an illegal purpose; therefore, the entire trust should have been declared void.

As stated by the chancellor in his letter opinion, the basic facts are as follows:

> E.H. Owen is an individual who has been in the oil and gas business for many years. He has for some time conducted his business as Owen Drilling Company, Inc., a corporation, of which he is the principal stockholder and officer. For many years as an oil and gas producer, the business engaged the services of Halliburton Company, the plaintiff. Plaintiff provides services which are required in the drilling and producing of oil and gas wells.
>
> On March 10, 1982, E.H. Owen executed a document entitled Letter of Guaranty whereby he agreed to be liable for indebtedness of Owen Drilling Company, Inc. to plaintiff for a sum not to exceed $125,000.00. In the fall of 1984 Owen Drilling Company, Inc. was indebted to plaintiff in the sum of approximately $150,000.00. By trust agreement dated December 1, 1984, and declared by its terms to be effective October 1, 1984, E.H. Owen as trustor, joined by his wife Bobbie Jean Owen, created the E.H. Owen Family Trust. E.H. Owen and Bill F. Jennings, his attorney, were named trustees and E.H. Owen or his designee was named beneficiary of the income produced by assets of the trust. The trust itself contained words of conveyance whereby certain working interests in producing oil wells were conveyed to the trust. The trust further provided that in the event of the death of E.H. Owen, income generated by the trust would be then paid to the wife of E.H. Owen and his daughter, Gina Gaye Owen.
>
> . . .
>
> . . . On October 17, 1985, Owen Drilling Company, Inc. and E.H. Owen personally executed and delivered to plaintiff a promissory note in the principal sum of $149,807.70 which evidenced indebtedness to plaintiff. Subsequently, suit was brought against the corporation and E.H. Owen and judgment granted to plaintiff. The judgment was against Owen Drilling Company, Inc. and E.H. Owen individually, jointly and severally.

Efforts of appellants to collect the judgment proved fruitless as neither the corporation nor E.H. Owen had sufficient assets available to satisfy the judgment. Consequently, appellant filed this suit asking that the E.H. Owen Family Trust be declared void.

By his letter opinion the judge held that the trust document did nothing to alter control over the assets which E.H. Owen enjoyed prior to the creation of the trust; that Owen had total power as trustor to remove the trustees at any time; that under Ark. Code Ann. § 4-59-203 (1987), paragraph 1 of the trust agreement dated December 1, 1984, between E.H. Owen as trustor and Bill F. Jennings and E.H. Owens as trustees, which purports to convey to the trustees certain property rights, was void as to appellant; and that the assignments from E.H. Owen and wife, attached as exhibits to the trust agreement and declared to be effective as of October 1, 1984, were also void.

On March 16, 1988, an order was entered stating the matter had been heard and findings made. In pertinent part, those findings and the court's orders were:

> XVII.
>
> That the actions of E.H. Owen herein was a conveyance in trust for the use of the person so making the conveyance and that Halliburton Company was a creditor existing at the time of such conveyance.
>
> XVIII.
>
> That the actions of E.H. Owen and Owen Drilling Company, Inc., are in violation of Arkansas [Code] Annotated 4-59-203 and therefore void.
>
> IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED that the trust agreement dated December 1, 1984, between E.H. Owen as Trustor, joined by his wife, Bobbie Jean Owen, and Bill F. Jennings and E.H. Owen as trustees, is void as to Halliburton Company.
>
> IT IS FURTHER CONSIDERED, ORDERED, AND ADJUDGED that the assignments from E.H. Owen and wife attached as exhibits to the trust and declared to be

effective on October 1, 1984, are void as to Halliburton Company and are subject to all means of execution and garnishment herein.

Two Certificates of Levy were filed in this case on April 8, 1988. They certified that on March 28, 1988, E.H. Owen, individually, and as agent for Owen Drilling Company, Inc., and as trustee for the E.H. Owen Family Trust, was served with a writ of execution by the sheriff of Columbia County upon a circuit court judgment for $194,968.61, which levied on 34 separate and described properties in LaFayette County, Arkansas, and 2 properties in Miller County, Arkansas.

On April 13, 1988, another order was entered which provided in part:

AMENDED ORDER

Now on this 30th day of March, 1988, comes on for hearing the petition of the defendant for an amendment to the Order previously entered on March 16, 1988, . . . the Court doth find:

I.

That the Court did enter its original order on March 16, 1988, after hearing the petition pursuant to an order of this Court for trial.

II.

That the Defendant, E.H. Owen Family Trust, did on November 25, 1987, deliver to the Plaintiff's attorney and the Court a pleading styled Response to Petition, which pleading was in effect an amendment to the answer to the complaint filed herein but which answer was inadvertently not filed until February 17, 1988.

III.

That Plaintiff agrees that the answer delivered to it on November 25, 1987, and which was filed with this Court on the date of the hearing herein, is an effective answer and should be considered the same by the Court.

IV.

> That this is the date regularly set for the trial of this matter.

The findings of fact and conclusions of law which follow in the amended order are identical to those stated in the original order. The amended order then concludes:

> IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED that the Court in a Letter Opinion dated March 14, 1988, did make findings of facts and conclusions of law in the above styled case, which Letter Opinion is included herein and made a part of this Order as if set out word for word.
>
> IT IS FURTHER CONSIDERED, ORDERED, AND ADJUDGED that the assignments from E.H. Owen and wife attached as exhibits to the trust and declared to be effective on October 1, 1984, are void as to Halliburton Company and are subject to all means of execution and garnishment herein.

The record contains no further explanation for the amended order which, as we read it, deletes the first holding in paragraph XVIII of the March 16, 1988, order that held the trust agreement itself was void. Thus the amended order holds only the assignments to the trust void and apparently shields all property acquired by the trust subsequent to December 1, 1984, from appellant's judgment.

A trust is a fiduciary relationship in which one person is the holder of the title to property subject to an equitable obligation to keep or use the property for the benefit of another. The settlor (trustor) of a trust is the person who intentionally causes the trust to come into existence. The trustee is the person who holds title for the benefit of another. G.T. Bogert, *Trusts*, § 1 (1987). In the absence of direction to the contrary by the trustor or by statute, the interest of a beneficiary of a trust is available to the beneficiary's creditors for payment of his debts. Bogert, *supra*, § 39. However, a clause, known as a spendthrift clause, may be inserted into the trust agreement which provides that the beneficiary is unable to transfer his right to future payments of

income or capital and his creditors are unable to subject the beneficiary's interest in the trust to the payment of their claims. Bogert, *supra*, § 40. In *Pool, Trustee* v. *Cross County Bank*, 199 Ark. 144, 133 S.W.2d 19 (1939), the court defined a spendthrift trust in these words:

> Section 923 (p. 557) of Jones on Arkansas Titles reads as follows:
>
> "A spendthrift trust is one created to provide support for designated beneficiary and to guard against his improvidence. It impounds the *corpus* of testator's estate in such a way that the *cestui* cannot receive it, or even the income therefrom except at certain intervals. All power of alienation of the trust fund is withheld from the *cestui*. . . . It is also protected against his creditors. . . . as is the income, . . . No merger of life estate and remainder will defeat the trust. *Cestui* acquires no vested estate, but title and absolute control pass to trustee. Such trusts are valid in Arkansas, though not in England and certain states."

199 Ark. at 149-50 (citations omitted). The Arkansas Supreme Court specifically established the validity of spendthrift trusts in *Bowlin* v. *Citizens Bank & Trust Co.*, 131 Ark. 97, 198 S.W. 288 (1917), where it rejected the English doctrine condemning spendthrift trusts and adopted the American doctrine upholding them "both upon reason and because the American doctrine is supported by the increasing weight of authority." 131 Ark. at 101. Recently, in *Cotham* v. *First National Bank of Hot Springs*, 287 Ark. 167, 679 S.W.2d 101 (1985), the Arkansas Supreme Court reaffirmed the validity of spendthrift trusts in rejecting an attempt by the beneficiaries to terminate a spendthrift trust. After citing *Bowlin, supra*, the court stated:

> Similarly, in *Clemenson* v. *Rebsamen*, 205 Ark. 123, 168 S.W.2d 195 (1943), we said a spendthrift trust was created when legal title and absolute control of the corpus passes to the trustee for the purpose of creating an income for the beneficiary, and, by the terms of the trust, the beneficiary is only entitled to some stated income for life or a term of years, and the beneficiary does not have the right to voluntarily or involuntarily alienate his interest.

287 Ark. at 171-72.

The appellant argues that in the instant case there was a transfer of property by Owen into a trust which contained a spendthrift clause, that this was fraudulent, and that the chancellor erred in failing to void the trust. While the chancellor made no ruling as to fraudulent intent, we do not think a finding in this regard is necessary. The trust agreement by which E.H. Owen created the E.H. Owen Family Trust named Bill F. Jennings and E.H. Owen as co-trustees and E.H. Owen as the beneficiary of the trust with power to designate other beneficiaries. The agreement gave the trustees the right to distribute up to 20% of the trust corpus in any full calendar year to the beneficiary for the support, education and general welfare of the beneficiary and to transfer title to part or all of the trust assets to the beneficiary. Further, the agreement contained a "spendthrift clause" which provided in part:

> The interest of the beneficiary of any trust created by this entire trust investment shall not be subject to or liable for any anticipations, assignments, sales, pledges, debts contracts or liabilities of said beneficiary and said interest shall not be seized by creditors of said beneficiary, or by anyone [by] attachment, garnishment [,] execution or otherwise.

The agreement also gave Owen investment control over the trustees, the right to remove the trustees with or without cause and the right to modify, amend or revoke in whole or in part, the trust agreement or the trust.

The Restatement (Second) of Trusts § 156 (1959), provides:

> (1) Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest.

Comment *a* to this section provides:

> a. *Intention to defraud creditors not required.* The rules stated in this Section are applicable although the transfer is not a fraudulent conveyance. The interest of the

settlor-beneficiary can be reached by subsequent creditors as well as by those who were creditors at the time of the creation of the trust, and it is immaterial that the settlor-beneficiary had no intention to defraud his creditors.

Illustration:

1. *A* transfers property to *B* in trust to pay the income to *A* for life and to pay the principal on *A*'s death to *C*. By the terms of the trust it is provided that *A*'s interest under the trust cannot be transferred or reached by his creditors. *A* can transfer his interest; his creditors can reach his interest.

This rule is widely accepted. Some jurisdictions are covered by specific statutes; others by case law. *See, e.g., In re Robbins*, 826 F.2d 293 (4th Cir. 1987); *Matter of Nichols*, 42 Bankr. 772 (M.D. Fla. 1984); *Matter of Hall*, 22 Bankr. 942 (M.D. Fla. 1982); *Altman* v. *C.I.R.*, 83 Bankr. 35 (D. Hawaii 1988); *Vanderbilt Credit Corp.* v. *Chase Manhattan Bank*, 473 N.Y.S.2d 242, 100 A.D.2d 544 (1984); and *In re Howerton*, 21 Bankr. 621 (N.D. Texas 1982). In holding Keogh plans not exempt from creditors in *Matter of Witlin*, 640 F.2d 661 (5th Cir. 1981), the court explained:

> There is, of course, a strong public policy that will prevent any person from placing his property in what amounts to a revocable trust for his benefit which would be exempt from the claims of his creditors. Many states have enacted statutes which give effect to this policy. . . . We find no Congressional policy that would counter the common law principle.

640 F.2d at 663.

In 76 Am. Jur. 2d *Trusts* § 168 (1975), it is said:

> Public policy does not countenance devices by which one frees his own property from liability for his debts or restricts his power of alienation of it; and it is accordingly universally recognized that one cannot settle upon himself a spendthrift or other protective trust, or purchase such a trust from another, which will be effective to protect either the income or the corpus against the claims of his creditors,

> or to free it from his own power of alienation. The rule applies in respect to both present and future creditors and *irrespective of any fraudulent intent* in the settlement or purchase of a trust. It applies even where one seeking to settle or purchase a trust in his own benefit is a spendthrift in fact, and irrespective of the sex or marital or contemplated marital status of the beneficiary. [Emphasis supplied.]

And, in addition to the overwhelming authority just discovered, at the time the E.H. Owen Family Trust agreement was signed on December 1, 1984, there was in existence in Arkansas a legislative act prohibiting the very trust established by E.H. Owen. Ark. Stat. Ann. § 68-1301 (Repl. 1979) provided as follows:

> Every deed of gift and conveyance of goods and chattels in trust to the use of the person so making such deed of gift or conveyance, is declared to be void as against creditors existing, and subsequent purchasers.

(This section was codified as Ark. Code Ann. § 4-59-203 (1987). It was replaced by Act 967 of 1987, codified as Ark. Code Ann. § 4-59-201 through 213 (Supp. 1987)).

In this case, E.H. Owen established the E.H. Owen Family Trust at a time when he was indebted to appellant for $150,000.00. The chancellor found that E.H. Owen still had control over his property even after placing it in the trust. He was the sole beneficiary of the trust and had absolute power over the corpus, the income, the designation of the beneficiaries and his co-trustee. The chancellor entered an order holding the trust agreement void as to appellant, then inexplicably entered an amended order holding only that the "assignments from E.H. Owen and wife attached as exhibits to the trust and declared to be effective on October 1, 1984," were void as to appellant.

Appellee argues that this ruling was correct because the appellant had failed to join Owen Contracting Company, S H & J Drilling Company, Homer National Bank, Peoples Bank, Bobby Owen, Gina Owen, M & S Oil Investments, and others who had transactions with the trust, as parties to the suit and for the court to hold the entire trust void would do injury to these parties "who

have not had their day in court." The first answer to this argument is that appellee filed a motion in the trial court claiming that additional parties should be joined as necessary parties to the litigation. The court held that if the pleading was a motion it was served later than ten days before the time specified for hearing in violation of Rule 6 of the Arkansas Rules of Civil Procedure; and if it was an amendment to a pleading, disposition of the cause would be unduly delayed because of the late filing. The pleading was stricken and the motion denied. That decision was not raised on cross-appeal.

Furthermore, it is clear from the trust agreement itself that at the time of trial, appellee was the only beneficiary of the trust, and therefore, the only necessary party to the suit. Paragraph 2(A) of the trust agreement provided in pertinent part:

> Income shall be distributed to E.H. Owen or such other person or persons he may designate to the Trustee in writing; and Trustee does now predesignate in writing that upon his death, E.H. Owen's wife and his daughter, Gina Gaye Owen, shall receive the income from this trust if either or both survive him. In the event that either does not survive him, then upon the Trustor's death, the survivor shall receive the income from this trust.

Thus, appellant's wife and daughter were named only as contingent beneficiaries in case of his death. The trust instrument gave appellant the power to revoke the trust prior to that happening and this leaves them with only a contingent expectancy. Ark. R. Civ. P. 19 provides in part that a person shall be joined as a necessary party when he claims an interest in the subject of the action and disposition of the action in his absence would result in prejudice as a practical matter. The record does not show that there are other parties who should be joined in this suit, and it is obvious that the decision in this case will not have any legal effect upon the interest of anyone who is not a party to the suit.

We find that the chancellor's first order, voiding the trust agreement and assignments to the trust as to the appellant, was the correct holding. Consequently, we modify the court's amended order to reflect that the trust agreement dated December 1, 1984, by which the E.H. Owen Family Trust was created is

also void as to appellant.

Affirmed as modified.

JENNINGS and CRACRAFT, JJ., dissent.

JOHN E. JENNINGS, Judge, dissenting. While I agree that the chancellor's decree should be affirmed as modified, I must dissent because, in my view, it should be modified in a different way. As the majority opinion says, the chancellor's amended order held that the "assignments" from E.H. Owen and his wife, attached as exhibits to the trust, were void as to the creditor, Halliburton Company.

If the majority opinion holds that this case is primarily governed by Ark. Code Ann. § 4-59-203 (1987), I agree. That code section provides:

> Every *deed of gift and conveyance* of goods and chattels *in trust* to the use of the person so making such deed of gift or conveyance, *is declared to be void as against creditors* existing, and subsequent purchasers. (Emphasis added.)

Clearly, under this statute it is the conveyance, not the trust itself, which is declared void as against creditors. In the case at bar, the words of conveyance were contained in the trust instrument itself.

Paragraph (1) of the trust provided:

> Trust Property. For good and valuable consideration, the Trustor does hereby grant, bargain, sell, assign, transfer, and deliver to the trustees the property listed in Exhibit A attached hereto, to have and hold such property and any other property which the Trustees may, pursuant to any of the provisions of this Agreement, at any time hereafter hold or acquire, for the uses and purposes and upon the terms and conditions set forth.
>
> The wife of the Trustor joins in this conveyance for the sole purpose and does hereby release and relinquish all her property rights, dower and homestead to said Trustees in the property described in Exhibit A.

"Exhibit A" was merely a list of property conveyed into the trust by the first paragraph of the trust itself. The attachment

contains no words of conveyance and is not actually an "assignment." Therefore, we should, on our *de novo* review, modify the order to reflect that the conveyance contained in the first paragraph of the trust, together with exhibit A, is void as against the appellant, Halliburton Company.

Appellant advances only two arguments in support of its contention that the trust itself, as opposed to the conveyance into the trust, is void: (1) that the chancellor erred in failing to find that the trust was fraudulent, and (2) that the court erred in failing to declare that the trust was illusory. The majority correctly notes that the chancellor made no finding of fraud, and then holds that no such finding is necessary. If the majority holds that the trust itself is void because it is illusory, I cannot agree. Section 99 of the Restatement (Second) of Trusts (1959) provides:

> Beneficiary as Trustee.
>
> 1. One of several beneficiaries of a trust can be one of several trustees of the trust.
>
> 2. One of several beneficiaries of a trust can be the sole trustee of the trust.
>
> 3. The sole beneficiary of a trust can be one of several trustees of the trust.
>
> 4. If there are several beneficiaries of a trust, the beneficiaries may be the trustees.
>
> 5. The sole beneficiary of a trust cannot be the sole trustee of the trust.

In a comment to subsection 5 the drafters of the Restatement notes:

> Where one person has both the legal title to property and the entire beneficial interest, he holds it free of trust. There is no separation of the legal and beneficial interests, and there are no duties running from himself to himself, and no rights against himself. He is in a position where he can dispose of the property as freely as any owner can do, since there is no one who can maintain a proceeding against him to prevent him from so doing, and if he transfers the

> property there is no one who can make him accountable for the proceeds or can reach the property in the hands of the transferee. He cannot himself maintain an action against the transferee since he can not base an action upon his own voluntary act in making the transfer.

This would be an "illusory" trust in the sense that appellant urges, i.e., the trust itself would be invalid. Under these circumstances the legal and equitable estates would be merged. *See* G.T. Bogert, *Trusts*, § 30, at 96 (6th ed. 1987). In the case at bar, E.H. Owen was neither the sole trustee nor the sole beneficiary, although, as the majority correctly notes, Owen's wife and daughter were only contingent beneficiaries. As Bogert points out, "If T and X are appointed trustees for T alone, there has been no disposition to treat the act of trust creation as void. The diversity of the character of the legal and equitable titles and the obligation of the cotrustees to the beneficiary have been held to obviate any difficulty." Bogert, *supra*, § 30, at 97.

While I am not sure that it is necessary to discuss spendthrift trusts in this opinion, I have no quarrel with the applicability of § 156 of the Restatement of Trusts. That section, however, does not suggest that it is either necessary or appropriate to declare void the trust instrument itself, as opposed to the conveyances into the trust.

I am persuaded that the chancellor did not err in refusing to declare the entire trust instrument void. Therefore, I respectfully dissent.

CRACRAFT, J., joins in this dissent.

Larry E. HERITAGE *v.* STATE of Arkansas

CA CR 88-254 775 S.W.2d 80

Court of Appeals of Arkansas
Opinion delivered July 5, 1989

Richard Tuberville, for appellant.

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

PER CURIAM. The appellee in this criminal case, the State of Arkansas, has filed a motion to dismiss the appeal on grounds that the appellant has failed to file a brief. The State asserts that the appellant's attorney has been contacted both by the Clerk of the Supreme Court and the Court of Appeals and the Attorney General's office, but that no brief has been filed.

Our Clerk's records indicate that the record in this appeal was filed on November 3, 1988, and the appellant's brief was due to be filed on December 13, 1988. The appellant's attorney, who was apparently retained by the appellant rather than appointed according to our records, has not filed a brief. No motion for extension of time or motion to file a belated brief has been filed, nor has the attorney, Richard Tuberville, responded to a letter sent by our Clerk on January 19, 1989, notifying him that his brief was overdue.

Although Ark. Sup. Ct. Rule 10 provides for dismissal of civil cases where no brief is filed, there is no corresponding rule in criminal cases. Therefore, we allow the appellant until

August 7, 1989, to file a brief. The appellant may retain new counsel if he wishes, or, if the appellant now believes himself to be indigent and therefore unable to afford retained counsel, he may apply for appointment of counsel by filing the appropriate documents with the Clerk of this Court. If no brief is filed within the period allowed by this per curiam, either by present counsel, new counsel, or by the appellant *pro se*, this appeal will be dismissed.

The Clerk of this Court is directed to serve a copy of this per curiam on the appellant; the appellee; the surety on the appellant's bond, Ace Bonding Company; and on the Arkansas Supreme Court Committee on Professional Conduct.

Motion denied.

Benjamin Dewayne SCOTT *v.* STATE of Arkansas

CA CR 88-181 775 S.W.2d 513

Court of Appeals of Arkansas
Opinion delivered July 5, 1989

Angela Baxter, for appellant.

No response.

PER CURIAM. The attorney for the appellant in this criminal case has moved for an award of attorney's fees. We grant the motion and award $550.00. However, counsel for indigent defendants in criminal cases desiring an award of attorney's fees should take note of the warnings in *Fiveash* v. *State*, 12 Ark. App. 391, 676 S.W.2d 769 (1984); *Stefanovich* v. *State*, 10 Ark. App. 233, 662 S.W.2d 476 (1984); and *Cristee* v. *State*, 4 Ark. App. 33, 627 S.W.2d 34 (1982).

Motion granted.

AMERICAN LIVESTOCK INSURANCE COMPANY
v. Gene GARRISON

CA 89-94 774 S.W.2d 431

Court of Appeals of Arkansas
Division II
Opinion delivered August 23, 1989

Daggett, Van Dover, Donovan & Cahoon, by: *Jesse B. Daggett*, for appellant.

Green & Henry, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Arkansas County Circuit Court. Appellant, American Livestock Insurance Company, appeals from a judgment against it and in favor of appellee, Sheriff Gene Garrison, in the sum of $1,700.00 plus penalty, interest and attorney's fees. We find error and reverse and remand.

Appellee filed suit seeking recovery for the death of his Brahman bull under an insurance policy purchased from appellant. The policy of insurance was a named peril policy containing a provision providing $2,000.00 coverage for the bull in the event of, among other things, the "(e) Collapse of bridges or culverts, earthquake and/or floods." Appellee demanded payment under

this provision of the policy after his insured bull fell through a hole in an old truck bed utilized as a bridge while head butting or fighting with another bull. Appellant denied payment of appellee's claim under another provision of the policy which disallows coverage for:

> (c) Wilful misconduct or negligence of the Insured, his servants or Agents.
>
> (d) The Insured, his servants or Agents having caused or suffered anything to be done whereby the risks hereby insured is, or may be increased.

The suit was tried to a jury on October 25, 1988, and a verdict was returned for appellee. The trial court awarded judgment for the insurance to appellee for $1,700.00 and also assessed a 12% statutory penalty, prejudgment interest and reasonable attorney's fees. From the judgment comes this appeal.

For reversal, appellant raises the following three arguments: 1) There is no evidence that the bridge collapsed; 2) the evidence compels the conclusion that the appellee was negligent; and 3) the court erred in preventing appellant's attorney from making a closing argument.

We find error in appellant's third argument which requires that the case be reversed and remanded for a new trial. Therefore, because appellant's first two arguments present questions of fact and law which will inevitably arise on remand, we will not address them for purposes of this appeal.

We agree with appellant's last contention that the court erred in refusing its attorney the opportunity of making a closing argument. At the close of the trial, appellee's attorney waived closing argument and the court submitted the case to the jury over appellant's objection that it was entitled to argue its case at the conclusion of all proof notwithstanding appellee's waiver. The court disallowed appellant a closing argument stating as follows:

> It appears to the Court that if the Plaintiff waives closing argument and the Defendant is then allowed to argue then Plaintiff is in a position of having to respond to the Defendant's closing argument and has lost his right to go first and give his first argument which is given to the

> Plaintiff because of his heavier burden of proof. Therefore, I say it would be that the fairest thing to do would be if one side waives the first argument then all arguments are over with. The Plaintiff is in effect giving up more than the Defendant is.

Appellee argues that the court's rationale is correct because closing arguments of attorneys are not evidence but are offered to help the jury understand the evidence and applicable law. Appellee also alleges that there is no absolute right, constitutional or otherwise, giving appellant the right to make a closing argument after a waiver of same by appellee because the purpose of an appellant's closing argument is to give him "the opportunity to argue against those statements made by the Plaintiff in closing." While we agree with appellee that a closing argument is not evidence, we do not agree that the only possible purpose to be served in allowing appellant herein to make a closing argument would be to "argue against" appellee's statements.

Arkansas Code Annotated Section 16-64-110 (1987) establishes the order in which a trial shall proceed after the jury is sworn. Subsection (6) of that statute states that at the conclusion of the evidence:

> (6) The parties may then submit or argue the case to the jury. In the argument the party having the burden of proof shall have the opening and conclusion; and if, upon the demand of his adversary, he refuses to open and fully state the grounds upon which he claims a verdict, he shall be refused the conclusion.

Additionally, Arkansas Code Annotated Section 16-89-123 (1987) deals with the order of final arguments and states in pertinent part that "the party having the burden of proof shall have the opening and conclusion of the argument."

Although both statutes above and the cases interpreting them deal primarily with the order in which parties present their closing arguments, each recognizes and establishes the right of either party bearing a burden of proof on an issue to present a closing argument to the jury, regardless of the order in which they do so. In the case at bar, the trial court's actions totally precluded appellant from exercising this right. Here, both parties had

burdens of proof. Appellee's burden was to establish that the bridge "collapsed" in order to recover under his policy of insurance and appellant's burden was to establish its affirmative defenses justifying its denial of coverage by proving that: 1) appellee's negligence caused the loss of the bull; or 2) that appellee caused or suffered anything to be done which increased the risk of loss; or 3) that the bull was killed as a result of a fight with another bull.

In *Schwam* v. *Reece*, 213 Ark. 431, 210 S.W.2d 903 (1948), the Arkansas Supreme Court stated that the party having the burden of proof shall make the opening and closing argument, and where there is more than one party it is within the court's discretion to fix the order of closing arguments. In reviewing the exercise of a trial court's discretionary decision, the test is whether the ordinary, reasonable, prudent judge, under all the facts and circumstances before him, would have reached the conclusion that was reached. *Looper* v. *Madison Guar. Sav. & Loan Ass'n*, 292 Ark. 225, 729 S.W.2d 156 (1987).

Although the appellant in the instant case did not have the burden of proof as a whole, it did have the burden of proving its affirmative defenses, and in light of the principles discussed herein, we hold that the trial court abused its discretion in denying appellant's attorney the right to present a closing argument to the jury simply because appellee waived his right to do so.

Reversed and remanded.

JENNINGS and MAYFIELD, JJ., agree.

Donna GOSNELL *v.* INDEPENDENT SERVICE FINANCE, INC.

CA 89-155 774 S.W.2d 430

Court of Appeals of Arkansas
Division I
Opinion delivered August 23, 1989

Peel & Eddy, by: *Richard L. Peel*, for appellant.

Jack, Lyon & Jones, P.A., by: *John W. Fink*, for appellee.

JUDITH ROGERS, Judge. Appellant, Donna Gosnell, brings this appeal from a judgment entered against her in the amount of $3,620.14, which was awarded to appellee, Independent Service Finance, Inc., a wholly owned collection subsidiary of St. Vincent Infirmary. We reverse.

The facts of this case are virtually undisputed. Appellant's late husband, Karl Gosnell, Sr., had been a patient at St. Vincent's Infirmary on three separate occasions for which three

separate accounts were created. Of these three accounts, appellant was only responsible for payment on one of them. On December 30, 1987, appellee received a check for $4,000 from appellant. The check was marked as being payment for account #537948-2 which was shown to have a balance of $649. Although appellant was not an obligor on that account, there is no dispute over the propriety of application of the payment to that account since it was applied as directed by appellant.

After payment of this account, there remained a balance of $3,351 to be applied to other accounts. Appellee applied the overpayment as partial payment on account #592442-8, an account on which appellant had no liability. Appellant was liable, however, for account #588140-4 in the amount of $3,620.14, and suit was brought by the hospital on this account. That account was the only one of the three incurred by Mr. Gosnell on which appellant also was liable. The circuit court, sitting without a jury, entered judgment against appellant for that debt.

The dispute is over the propriety of applying the funds to an account on which appellant had no responsibility, rather than applying them to the account on which appellant was also liable.

On appeal, appellant argues that the decision of the circuit court was clearly erroneous and was contrary to the law concerning application of monies to debtor's accounts. When examining a trial judge's findings where there was no jury, the standard of review is whether those findings were clearly against a preponderance of the evidence, and recognition must be given to the trial judge's superior opportunity to determine the credibility of the witness and the weight to be given to their testimony. *Hooper-Bond Ltd. Partnership Fund III* v. *Ragar*, 294 Ark. 373, 742 S.W.2d 947 (1988).

The trial court relied upon the general rule that where there are two or more obligations owed by a debtor, the creditor is entitled to apply a part payment as he chooses if the application has not been directed by the debtor. *Misenhimer* v. *Perkins Oil Co.*, 248 Ark. 434, 451 S.W.2d 864 (1970); *Miles* v. *Teague*, 246 Ark. 1288, 441 S.W.2d 799 (1969). However, this rule of law does not apply to the facts of this case since the appellant was only liable on one of the two accounts remaining after her payment had been credited against the one account she had specified.

■ Appellant correctly relies on the old case of *Farris* v. *Morrison*, 66 Ark. 318, 50 S.W. 693 (1899), in which the supreme court stated:

> If the debtor makes the payment generally, without appropriating it to any particular debt, the creditor may then appropriate it to any debt due from the debtor making the payment. *Bell* v. *Radcliff*, 32 Ark. 645. But the creditor cannot appropriate the payment to the debt of a third party, for which the payer is not liable.

See also Gowan v. *Robinson*, 191 Ark. 356, 86 S.W.2d 19 (1935); *Ramey-Milburn Co.* v. *Ford*, 146 Ark. 563, 226 S.W. 132 (1920). The general rule necessarily presupposes the relationship of debtor and creditor. *City of Olive Hill* v. *Gearhart*, 289 Ky. 53, 157 S.W.2d 481 (1941). It was undisputed by the parties that appellant was not liable on the account to which her payment was applied. Therefore, the trial court erred in awarding judgment to appellee.

Appellant also argues that the amount of judgment should be reduced by $300 to reflect an amount which had not been properly credited to one of the accounts. That argument need not be addressed since we find that the trial court's decision was clearly erroneous and contrary to the law regarding application of payments on debts. However, we note that appellee concedes that this amount had not been credited, and that if it had been credited to #537948-2, that account would only have a balance of $349. Therefore appellant's check for $4,000 was sufficient to pay the correct balance of that account as well as the entire balance of the account in dispute which had a balance of $3,620.14. Accordingly, we reverse.

REVERSED.

CRACRAFT and COOPER, JJ., agree.

Bruce ROBERSON *v.* DIRECTOR OF LABOR

E 87-210 775 S.W.2d 82

Court of Appeals of Arkansas
Division I
Opinion delivered August 30, 1989

Appellant, pro se.

Allan Pruitt, for appellee.

GEORGE K. CRACRAFT, Judge. Bruce Roberson appeals from an order of the Arkansas Board of Review denying him benefits for a period of eight weeks, pursuant to Ark. Code Ann. § 11-10-515(a)(1)(B) (1987), on a finding that he had failed without good cause to accept available and suitable work offered to him. We find no error and affirm.

The record indicates that appellant had been unemployed for a period of eighteen months. He was offered a job as a maintenance supervisor at wages of six dollars per hour. Appellant stated that although he had never been a maintenance supervisor, he had desired such a position. He first accepted the employment, but refused it the next day because it did not include benefits such as health insurance and paid vacation and holidays, and because it provided for a six-month period of temporary employment. Appellant testified that he might be required to purchase tools and safety equipment, but he admitted that he had made no such inquiry. He also complained that the job was located fifteen miles from his residence, and that the commuting distance would be too great.

Arkansas Code Annotated § 11-10-515 (1987), in relevant part, provides that a party shall be disqualified for benefits for a period of eight weeks if he fails, without good cause, to accept available suitable work. In determining whether work is

suitable for an individual, the Board shall consider, among other factors, the degree of risk involved to his health, safety, and morals, his physical fitness, his unemployment, his prospects of obtaining work in his customary occupation, the distance of available work from his residence, and the prospects for obtaining local work.

In its determination, the Board of Review considered that appellant had previously been employed in similar work, and that he had been unemployed for a long period of time. It considered the fact that he had been told that he would be interviewed for a full-time position within six months, at which time the additional benefits would be available to him, that he had found the wages to be satisfactory, and that he was qualified for the position. The Board of Review found the commuting distance to be reasonable and the evidence regarding the purchase of tools to be inconclusive. The Board found no evidence that the temporary employment would have prevented his seeking permanent employment elsewhere in the interim. Considering the above factors, the Board found that appellant had refused an offer of suitable work without good cause.

The duty and obligation of an unemployed individual to accept available and suitable work may exist regardless of whether the work is temporary employment or full-time employment. The suitability of the work does not require that the employment offered be equal in every respect to the individual's prior working conditions, or that the pay be equal or better than previously earned. *Wacaster* v. *Daniels*, 270 Ark. 190, 603 S.W.2d 907 (Ark. App. 1979). While the term "good cause" may be difficult to define, it means a justifiable reason for not accepting a particular job. *Id.* The question of what constitutes "good cause" is a question of fact for the Board to determine from the particular circumstances of each case.

On appeal, we review the findings of the Board of Review in the light most favorable to the prevailing party, and will reverse only if we conclude that those findings are not supported by substantial evidence. From our review of the record, we cannot conclude that the Board's finding that appellant had failed without good cause to accept suitable and available work offered him is not supported by substantial evidence.

Appellant next contends that the Board of Review erroneously failed to consider additional evidence submitted by him when making its determination of the issue of good cause. We disagree.

While his appeal was pending before the Board of Review, appellant filed with the Board a letter setting forth a list of what he considered to be the tools he would be required to purchase and their costs. The Board refused to consider the information and so recited in its opinion. We conclude that this action was proper, for the Board of Review is not permitted to accept additional evidence in appeals pending before it. *Smith* v. *Everett*, 6 Ark. App. 337, 642 S.W.2d 320 (1982).

Affirmed.

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

Charles Edward HOING *v.* Vanessa Lee HOING

CA 89-80 775 S.W.2d 81

Court of Appeals of Arkansas
Division I
Opinion delivered August 30, 1989

Robert S. Blatt, for appellant.

Rose, Kinsey & Cromwell, by: *Jan R. Cromwell*, for appellee.

JUDITH ROGERS, Judge. The sole issue on appeal in this divorce action concerns the chancellor's award of custody of the parties' minor child to the appellee. For reversal, the appellant argues that the chancellor's decision is contrary to the weight of the evidence and the best interests of the child. We disagree and affirm.

The child, Christopher, who was two-years-old at the time of the divorce, was the only child born of this three-year marriage. During the pendency of the divorce, he was placed in the temporary custody of the appellant with visitation being granted to the appellee. From a previous marriage, the appellee had an eight-year-old daughter, Ashley, who resided with the parties and Christopher during the marriage. Custody of Ashley with the

appellee has not been contested.

As stated in the decree of November 15, 1988, the chancellor found that Christopher's best interests would be served by placing him in the permanent custody of the appellee, subject to the liberal rights of visitation granted to the appellant. The chancellor found that the appellee was able to provide a stable home environment, which would include Ashley, Christopher's half-sister, with whom he shared a good relationship.

As in all custody cases, the primary consideration is the welfare and best interests of the children involved. All other considerations are secondary. *Digby* v. *Digby*, 263 Ark. 813, 567 S.W.2d 290 (1978). The appellate court reviews chancery cases *de novo* on appeal, and the chancellor's findings of fact will not be reversed unless they are clearly against the preponderance of the evidence. *Kesterson* v. *Kesterson*, 21 Ark. App. 287, 731 S.W.2d 786 (1987); Ark. R. Civ. P. 52(a). Since the question of the preponderance of the evidence turns largely on the credibility of the witnesses, the appellate court defers to the superior position of the chancellor, especially so in those cases involving custody. *Rush* v. *Wallace*, 23 Ark. App. 61, 742 S.W.2d 952 (1988).

In making his argument for reversal, the appellant primarily contends that the appellee was shown to be lacking in moral values, as evidenced by her involvement in extra-marital relationships. He also argues that he has been the child's primary caretaker, that he enjoys a special relationship with his son, and that he can provide a good home for him owing to the support of his family. The appellant further points to instances in which he alleged that the appellee had left the children unattended, that the appellee was a poor homemaker, and that Christopher was returned after a period of visitation with the appellee unkempt and dirty.

In the case at bar, the testimony was sharply conflicting, particularly with regard to the appellee's misconduct. However, the appellee candidly admitted to having had a relationship with Tarrell Morrison, whom she was still seeing as of the time of divorce. The appellee testified that this behavior never occurred in the presence of the children, and she acknowledged that her relationship with Mr. Morrison had been "the wrong thing to do," and that she had "made a very bad mistake." She denied having

been sexually involved with anyone other than Mr. Morrison.

While our courts have never condoned a parent's promiscuous conduct or lifestyle when conducted in the presence of the child, we have recognized the distinction between those human weaknesses and indiscretions which do not necessarily affect the welfare of the child, and that moral breakdown leading to promiscuity and depravity which does render one unfit to have custody of a minor child. *Respalie* v. *Respalie*, 25 Ark. App. 254, 756 S.W.2d 928 (1988). Our Supreme Court has also held that the child's welfare is the controlling consideration, and custody is not awarded as a reward to, or punishment of, either parent. *Johnson* v. *Arledge*, 258 Ark. 608, 627 S.W.2d 917 (1975).

Implicit in the chancellor's decision are findings of the appellee's fitness to have custody and the absence of evidence that the child had been harmed by the appellee's conduct, nor did the chancellor find that it had occurred in the presence of the child. Undoubtedly, the chancellor also found credible the appellee's remorseful attitude toward her past conduct. The chancellor did order in the decree that the child at all times be kept in a wholesome environment and under adult supervision, and we are confident in the chancellor's ability to ensure the continuing protection of the child's best interests.

In reaching his decision, the chancellor also noted that the appellee, an LPN, had regular working hours, while the appellant, a television technician, had long and varied work hours, and had to rely on his mother who lives in another town in order to care for the child. The record also reveals that the appellant had two children from two previous marriages — one whose name he could not remember, and the other for whom he was in arrearages in child support. Obviously, these factors weighed heavily in the chancellor's decision. We also take it from his findings in the decree that the chancellor was reluctant to separate Christopher from his sibling, Ashley. This is a factor relating to the best interests of the child. *See Ketron* v. *Ketron*, 15 Ark. App. 325, 692 S.W.2d 261 (1985). Based on the evidence before us, we cannot say that the chancellor's award of custody to the appellee is clearly against the preponderance of the evidence.

AFFIRMED.

COOPER and CRACRAFT, JJ., agree.

Karen RIDDLE *v.* Ronald Gene RIDDLE

CA 89-11 775 S.W.2d 513

Court of Appeals of Arkansas
Division II
Opinion delivered September 6, 1989
[Rehearing denied October 25, 1989.*]

*Rogers, J., would grant rehearing.

Hardin, Jesson & Dawson, by: *Robert T. Dawson* and *J. Leslie Evitts III*, for appellant.

Willard Crane Smith, Jr., for appellee.

JAMES R. COOPER, Judge. The appellant in this child custody case, Karen Riddle, is the mother of Robert Ibison and Brian Riddle. Robert Ibison was born on September 21, 1983. The appellee is not his father. The appellant raised him as a single parent until her marriage to the appellee, Robert Gene Riddle, in February 1986. Brian Riddle was born to the marriage on August

10, 1987. The parties separated on May 7, 1988, and the appellant filed a complaint for divorce on May 13, 1988. After a hearing, the chancellor granted a divorce to the appellee on his counterclaim, granted custody of Robert Ibison to the appellant, and granted custody of Brian Riddle to the appellee. From that decision, comes this appeal.

The appellant contends that the chancellor erred in failing to grant her custody of both children, and she argues that the chancellor clearly erred in finding that there was a closer bond between Brian and the appellee than between Brian and the appellant. She also contends that the chancellor erred in splitting custody of the children in the absence of exceptional circumstances. We affirm.

We first address the appellant's contention that the chancellor erred in finding a closer bond between Brian and the appellee. This point is, in fact, an argument that the chancellor erred in concluding that it would be in Brian's best interest to be in the appellee's custody because: (1) the appellant had been Brian's primary caretaker during the marriage; (2) awarding custody to the appellee is tantamount to awarding custody of Brian to his paternal grandparents; (3) the chancellor's award of custody to the father was an overreaction to the abolition of the "tender years" doctrine unsupported by the evidence; and (4) it was impossible for the chancellor to determine that a closer bond existed between Brian and the appellee when the chancellor had never seen the child.

Although we review chancery cases *de novo*, we do not disturb the chancellor's findings unless they are clearly against the preponderance of the evidence. Because the question of the preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the chancellor's superior opportunity to assess credibility. Ark. R. Civ. P. 52(a); *Callaway* v. *Callaway*, 8 Ark. App. 129, 648 S.W.2d 520 (1983).

The appellant asserts that the evidence shows clearly that she was the primary caretaker of the children and that the appellee offered only minimal assistance to her. However, the record is replete with evidence to show that the appellee is capable of caring for a young child, and that he had been an active parental caretaker during the marriage. There was testimony

that the appellee had prepared meals for the children and had dressed and bathed Brian. There was evidence that the appellee had acted as the primary daytime caretaker for the children when the appellant worked a day shift and the appellee worked an evening shift. The appellant's sister, called as the appellant's witness, testified that the appellee is a good father who took good care of the children when they were in his care, and she stated that she had no concern about the appellee's ability to care for the children. Finally, the appellant herself admitted that the appellee had always helped care for Brian.

The appellant states that, under the guise of granting custody to the appellee, the chancellor in fact awarded custody of Brian to his paternal grandparents, and asserts that, should the chancellor's decision be affirmed, "it will be the appellee's parents who will be assuming the responsibility for the continued care, education, and control of Brian, rather than the Appellee." This assertion is not supported by the record. Although it is undisputed that the appellee has been living with his parents since the parties' separation, he testified that this arrangement was temporary and that he intended to find his own lodgings after the divorce and custody questions were concluded. He also testified that, although his mother had helped with the boys while they were in his custody after the separation, he had been the primary caretaker. He testified that during this time he had returned from work at 3:00 p.m., picked the children up at their day care, cared for them until the next morning, and dropped them off at the day care. We find no merit to this argument.

Next, the appellant asserts that the chancellor's order granting custody of Brian to his father was an overreaction on the chancellor's part in the form of an exaggerated attempt to avoid application of the "tender years" doctrine. This point is based solely on the following statement by the chancellor at the hearing: "[T]he tender years doctrine is no longer something this Court will consider." The "tender years" doctrine is a rule of law whereby a court will presume the mother to be the more suitable custodian of a child of tender years and will award custody to her for the sake of the child's welfare. *See* 59 Am. Jur. 2d *Parent and Child* § 25 (1987). However, Ark. Code Ann. § 9-13-101 (1987) provides that child custody awards in divorce actions shall be made solely in accordance with the best interests of the children

and without regard to the sex of the parent. In light of our statement in *Drewry* v. *Drewry*, 3 Ark. App. 97, 622 S.W.2d 206 (1981), that the clear language of § 9-13-101 indicates that the legislature fully intended to abolish any gender-based legal preference in child custody determinations, the chancellor's comment was merely a correct statement of the law. We find no evidence to support the appellant's allegation of overreaction.

The appellant also asserts that the chancellor erred in finding that there was a closer bond between Brian and the appellee when the chancellor had never seen the child. The chancellor found that:

> [B]etween the two parties, the father has demonstrated more devotion to the parties' child, Brian, and has also shown himself to be capable of physically caring for the child and the Court finds that there is a deeper emotional attachment between him and the child than there is between him — between the child and the Plaintiff.

We think the chancellor's statement indicates that, between the parties, he found the appellee to be the parent most devoted and emotionally attached to Brian, a finding which is clearly relevant to Brian's best interest and one which could be made without the child being present. Both parties expressed love for the children in their testimony. The chancellor's finding that the appellee was the more devoted must therefore have been based on his evaluation of the earnestness, sincerity, and veracity of the parties as they testified. Personal observation is of great value to a court which is called upon to choose between mother and father in a custody case. *See Holt* v. *Taylor*, 242 Ark. 292, 413 S.W.2d 52 (1967). Chancellors in such cases must utilize, to the fullest extent, all their powers of perception in evaluating the witnesses, their testimony, and the best interests of the children. We know of no cases in which the superior position, ability, and opportunity of the chancellor to observe the parties carry as much weight as those cases involving minor children. *Calhoun* v. *Calhoun*, 3 Ark. App. 270, 625 S.W.2d 545 (1981). We will not disturb the chancellor's finding on this issue. We hold that the chancellor did not clearly err in finding it to be in Brian's best interest to grant custody to the appellee.

The appellant next contends that, given the chancellor's

finding that the appellant was not an unfit parent, the chancellor erred in granting custody of one child to each of the parties, rather than granting custody of both children to the appellant. The appellant cites *Stamps* v. *Rawlins*, 297 Ark. 370, 761 S.W.2d 933 (1988), for the proposition that custody of a child may be awarded to a stepparent only when the natural parent is shown to be unfit, and *Ketron* v. *Ketron*, 15 Ark. App. 325, 692 S.W.2d 261 (1985), for the proposition that young children should not be separated from one another by dividing their custody in the absence of exceptional circumstances. On the basis of this authority, she argues that she was correctly granted custody of Robert Ibison because she was not shown to be unfit, and that she must therefore be granted custody of Brian to prevent the children from being separated.

We do not agree that the law of child custody must be applied in such a rigid and mechanical fashion. Moreover, the cases cited by the appellant do not mandate such a result. *Ketron* v. *Ketron*, *supra*, is cited as authority for the argument that the prohibition against separating children applies with equal force in cases where the children are half-siblings. A careful reading of *Ketron*, however, shows that we did not so hold in that case, but instead merely noted that the chancellor's reluctance to divide custody of the half-brothers was "consistent with" the rule that young children should not be separated from each other in the absence of exceptional circumstances. *Ketron*, 15 Ark. App. at 328.

Our chief concern with the theory advanced by the appellant is that it requires no consideration of the children's best interests: should the chancellor find that the natural parent of one step-sibling is not unfit and that exceptional circumstances are not present, he must, under the appellant's formulation, grant custody of all the children to that parent, without considering whether their best interests would be better served by granting custody to the other parent. The appellant's theory is thus in conflict both with Ark. Code Ann. § 9-13-101 (1987), which mandates that custody be awarded "solely in accordance with the welfare and best interests of the children," and with the well-settled principle that, in child custody determinations, the best interests of the child is the paramount concern. *See, e.g.*, *Stephenson* v. *Stephenson*, 237 Ark. 724, 375 S.W.2d 659 (1964)

(unyielding consideration); *Benson* v. *Benson*, 237 Ark. 234, 372 S.W.2d 263 (1963) (controlling consideration); *Haller* v. *Haller*, 234 Ark. 984, 356 S.W.2d 9 (1961) (polestar). In the case at bar there was evidence to show that, of the parties, the appellee had the more settled lifestyle, while the appellant engaged in numerous activities which took her out of the home and required that the child be left in the care of another. Moreover, the chancellor specifically found that it would be in the best interest of the appellee's stepson, Robert, for the appellee to be granted visitation. We hold that the circumstances justified the chancellor's order dividing custody of the half-brothers, and we affirm.

Affirmed.

MAYFIELD, J., agrees.

ROGERS, J., concurs.

JUDITH ROGERS, Judge, concurring. I reluctantly concur with the majority opinion. The chancellor's findings in a child custody case will not be reversed unless they are clearly against the preponderance of the evidence. *Rush* v. *Wallace*, 23 Ark. App. 61, 742 S.W.2d 952 (1988). Because our standard of review is so stringent, I cannot say that the chancellor's findings are clearly erroneous. My concern in this case is the absence of stated findings addressing the custody of the parties' child and the separation of the minor children.

An examination of the record indicates that the paternal grandfather, Johnnie Riddle, testified that he counted the number of days his son, appellee, had custody of the two children upon the parties' separation. He testified, "it was important to write them down even though he wasn't seeking custody, because he was going to, and he knew that and I knew that." This chain of events calls into question appellee's motive and sincerity in seeking custody of these children. The evidence reveals that originally appellee sought custody of the parties' child, Brian Riddle. Appellee then amended his counterclaim asking for custody of both Brian Riddle and Robert Ibison, appellant's child.

The appellant's sister, Rita Tuck, testified that she admired appellant and that appellant was a good mother who took care of her children. Only on cross examination did she testify that

appellee took pretty good care of the children when appellant was not around. The day care worker, Carol Allen, testified that the children were well-adjusted. She further testified that appellant brought and picked up the children most of the time.

Certainly both parties had proven themselves fit and capable of taking care of the children. Absent the chancellor being able to see any interaction between the children or between the children and their parents, it is difficult to read the record and conclude that one party had demonstrated more love and devotion than the other party. This determination is made even more difficult by the fact that no expert testimony was given and no home study was conducted.

One factor to be considered in the determination of the best interest of the child is the importance of keeping siblings and half siblings together. That is why we have said in past cases that when separating young children exceptional circumstances must be present. *See Ketron* v. *Ketron*, 15 Ark. App. 325, 692 S.W.2d 261 (1985). This is however only one factor in the determination, but it is and should be an important factor. When families separate, the more stability we can provide in continuity of care and the presence of familiar faces, the more important this factor becomes. I am not convinced, however, that the chancellor did not consider this factor when he found it was in the best interest to separate these children and award custody of Robert Ibison to appellant and Brian Riddle to appellee. I therefore concur with the majority opinion.

My concern is that we continue to weigh the impact of separating siblings in custody cases, and that we should try to continue to keep young siblings together. We must assume the chancellor considered the splitting of the children and decided that the other factors such as appellee's love, devotion and ability to care for the child outweighed this child's further separation from another family member.

Milton Wayne DRISCOLL *v.* OKLAHOMA GAS & ELECTRIC COMPANY, SELF INSURED

CA 88-428 775 S.W.2d 84

Court of Appeals of Arkansas
Division I
Opinion delivered September 6, 1989

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

Thompson, Paddock & Llewellyn, P.A., by: *William P. Thompson*, and *Richard L. Spearman*, for appellee.

JOHN F. JENNINGS, Judge. The claimant, Wayne Driscoll, began working for Oklahoma Gas and Electric Company in 1979. He was originally a meter reader and later worked in a storeroom. It was stipulated that on June 11, 1986, Driscoll sustained a compensable back injury while lifting a ramp. He was seen by Dr. Jean-Pierre Michaud who diagnosed him as having "an abnormality at L5-S1 disc space with bulging and possible small herniation in that area." Dr. Michaud released Driscoll to return to light work on November 9, 1986, and eventually estimated his anatomical impairment at ten percent to the body as a whole.

In May 1987, Driscoll lifted a "hand coil" weighing more than twenty-five pounds and experienced back pain again. He saw Dr. Michael Brown who made a diagnosis of degenerative disc disease and eventually assigned an anatomical rating of five percent.

The Commission awarded Driscoll permanent partial disability benefits in an amount equal to five percent of the body as a whole. The Commission also held that Driscoll was not entitled to

any wage loss disability because he quit his job without good cause. In so holding the Commission relied on Ark. Code Ann. § 11-9-522(c) (1987), which provides:

> (c)(1) The employer or his workers' compensation insurance carrier shall have the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his average weekly wage at the time of the accident.
>
> (2) Included in the stated intent of this section is to enable an employer to reduce or diminish payments of benefits for a functional disability, disability in excess of permanent physical impairment, which, in fact, no longer exists, or exists because of discharge for misconduct in connection with the work, or because the employee left his work voluntarily and without good cause connected with the work.

On appeal, Driscoll contends that the Commission's finding that he quit work without good cause is not supported by substantial evidence and that the Commission erred as a matter of law in applying § 11-9-522(c)(2) in his case, because his injury occurred prior to July 1, 1986, the effective date of the act. Because we agree with the claimant's second contention, it is unnecessary to discuss the first.

The appellee argues that the issue is controlled by *Fowler* v. *McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987). In *Fowler*, the question was whether the statute now codified at Ark. Code Ann. § 11-9-704(c)(4) (1987) (also enacted as part of Act 10 of 1986) would be applied retrospectively. The code section we were concerned with in *Fowler* provided in part, "In determining whether the party has met the burden of proof on an issue, administrative law judges and the Commission shall weigh the evidence impartially and without giving the benefit of the doubt to any party." 22 Ark. App. at 199. In *Fowler* we held that the Commission should apply the rule to cases heard after July 1, 1986, the effective date of the act, regardless of the date of the injury, because the amendment is properly characterized as procedural in nature.

In *Arkansas State Police* v. *Welch*, 28 Ark. App. 234, 772

S.W.2d 620 (1989), the issue was whether Ark. Code Ann. § 11-9-522(b) (1987) should be applied retrospectively in relation to the date of the injury. That subsection provides:

> (b) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity. However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

In *Welch* the claimant was injured in 1981, and the case was heard by the full Commission in 1988. The Commission held that Ark. Code Ann. § 11-9-522(b) was substantive in nature because the statute "deals not with the procedure for enforcing the remedy provided under the Workers' Compensation Act, but rather with the substance of the remedy itself, i.e., entitlement to an award of wage loss benefits." 28 Ark. App. at 237. The Commission distinguished *Fowler* because that case dealt with a portion of Act 10 that was procedural in nature. The Commission concluded that "the provision of Act 10 of 1986, denying wage loss benefits to one who resumes at the same or greater wages, applies only to those persons who were injured on or after its effective date of July 1, 1986." 28 Ark. App. at 238. We agreed with the Commission and affirmed. We said, "[A]ny changes in statutes relating to vested rights are characterized as substantive and require application of the law as it existed at the time the claimant sustained a compensable injury." 28 Ark. App. at 237.

Welch cannot be distinguished from the case at bar and is controlling. Subsections (b) and (c) of Ark. Code Ann. § 11-9-522 are obviously related to one another. Each subsection authorizes a denial of an award for wage loss disability under

stated circumstances. Because the primary injury in this case occurred prior to the effective date of the act, Ark. Code Ann. § 11-9-522(c)(2) should not have been applied. This case is remanded to the Commission for consideration of the issue of wage loss disability.

Reversed and remanded.

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

[redacted]