Mark BONNER *v.* McKEE BAKING COMPANY, et al.

CA 89-21 776 S.W.2d 364

Court of Appeals of Arkansas
Division I
Opinion delivered September 13, 1989

Laura McKinnon, for appellant.

Bassett Law Firm, by: *Angela M. Doss* and *Curtis L. Nebben*, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Workers' Compensation Commission. Appellant, Mark Bonner, appeals from a decision denying him coverage under the Workers' Compensation Act upon a finding that he did not sustain a hernia injury arising out of and in the course of his employment. We find error and reverse and remand.

On October 1, 1986, appellant was employed by appellee, McKee Baking Company, in a laborer's position requiring heavy lifting. On that day he reported an injury to his right groin area and was transported by the plant nurse to the company physician, Dr. Robert H. Weaver, who diagnosed his injury as a strained muscle. His injury did not improve and was later diagnosed as a right inguinal hernia by another physician to whom appellant was referred by Dr. Weaver. Appellant filed a claim for his hernia injury and the case proceeded to a hearing before the administrative law judge on March 18, 1987, who denied benefits upon the basis that appellant's hernia was not a work related injury. Appellant appealed that decision to the full Commission which affirmed the decision of the administrative law judge on September 8, 1988, finding that appellant failed to establish that the occurrence of his hernia immediately followed as a result of sudden effort or severe strain as required by Arkansas Code Annotated Section 11-9-523(a) (1987). As his only point for reversal appellant argues there is no substantial evidence to support a finding that the claimant failed to prove each and every requirement of Arkansas Code Annotated Section 11-9-523(a) by a preponderance of the evidence.

Arkansas Code Annotated Section 11-9-523(a) (1987) sets out five essential elements which must be present for a hernia to be compensable:

> (1) That the occurrence of the hernia immediately followed as a result of sudden effort, severe strain, or the application of force directly to the abdominal wall;

(2) That there was severe pain in the hernial region;

(3) That the pain caused the employee to cease work immediately;

(4) That notice of the occurrence was given to the employer within forty-eight (48) hours thereafter;

(5) That the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two (72) hours after the occurrence.

The Commission denied coverage to appellant for failure of proof on subsection (1) above; however, its finding of fact on that element is in direct opposition to its finding of fact that there was compliance with subsection (3) above. With regard to this issue, the Commission's opinion states as follows:

> Bonner's testimony that he suffered from severe pain in the hernial region is credible, and we therefore find that the second subsection is satisfied. The third subsection is satisfied by his credible testimony that he thought the pain to be stomach cramps and went to the men's room to relieve himself before resuming work. The cessation of work need not be lengthy or continuous, so long as it immediately follows the experience of pain. *Osceola Foods, Inc.* v. *Andrew*, 14 Ark. App. 95, 685 S.W.2d 813 (1985).
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> Although Bonner testified at the hearing that he first felt pain while lifting a barrel, he told both the company nurse and the physician who treated him that the first time he felt pain was in the restroom. Since the preponderance of the evidence is that arising from the toilet is what triggered Bonner's pain, the question is whether arising from a toilet constitutes "sudden effort" or severe stain" required by subsection 1 (there being no contention that force was applied). All the cases have involved lifting heavy objects or reaching overhead, and we simply are not convinced that lifting oneself off a toilet seat is the type of effort or strain contemplated by the legislature when it enacted this statute. Since it is necessary to satisfy all 5 subsections of the statute in order to prevail, our finding that the hernia did not immediately follow a sudden effort

or severe strain is dispositive of the case.

The above excerpt from the Commission's opinion reveals that there are two inconsistent findings of fact going to essential elements pertaining to proof of appellant's claim. The Commission must apply consistent findings of fact in considering each of the five essential elements a claimant must prove to be entitled to hernia compensation. Here, the Commission has not done so. First, the Commission found compliance with the cessation of work requirement of element 3 upon finding that appellant felt pain first and then went to the toilet. Next, the Commission found noncompliance with the requirement that the hernia follow as a result of sudden effort or severe strain as required by subsection 1 upon finding that appellant's pain first occurred as he was "arising from the toilet." The Commission's findings in this regard are irreconcilable.

When compensation is denied, findings sufficient to justify such denial must be made by the Commission. *Wright* v. *American Transp.*, 18 Ark. App. 18, 709 S.W.2d 107 (1986). Here, the Commission erred in premising its denial of coverage to appellant upon two inconsistent findings of fact going to essential elements of appellant's claim for hernia compensation. Accordingly, that decision is reversed and this matter is remanded.

Additionally, appellee sought an award of costs for supplementing the abstract with the Commission's opinion and that of the administrative law judge because appellant failed to do so in compliance with Rules 9(b) and (d) of the Arkansas Supreme Court and Court of Appeals. We are authorized pursuant to Rule 9(e)(1) to grant costs to an appellee who supplements an appellant's abstract he considers deficient for failure to provide an impartial condensation of those matters of record which are necessary to an understanding of the questions presented on appeal. Here, although appellant's argument on appeal is that the findings and conclusions of the Commission are not supported by substantial evidence, he failed to abstract the very opinion upon which his argument is premised. Appellee's supplemental abstract provides us with this essential information; therefore, we grant his request for costs upon appellee's providing cost information as required by Arkansas Supreme Court and Court of Appeals Rule 9(e)(1). Accordingly, we

reverse and remand for the Commission to make new findings of fact and conclusions of law that are internally consistent. Either party aggrieved by the Commission's decision may then file a new notice of appeal.

Reversed and remanded.

CRACRAFT and JENNINGS, JJ., agree.

Richard Clark HENRY and Ronald Ladd Henry *v.* STATE of Arkansas

CA CR 88-243 775 S.W.2d 911

Court of Appeals of Arkansas
Division II
Opinion delivered September 13, 1989

Johnson & Harrod, by: *William E. Johnson*, for appellants.

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

JAMES R. COOPER, Judge. The appellants were convicted by

a jury of possession of a controlled substance, marijuana, with intent to deliver. They were sentenced to five years in the Arkansas Department of Correction and fined $5,000.00. On appeal they argue four points: that the trial court erred in denying their motion to quash the jury panel; that the trial court erred in refusing to exclude certain evidence requested by the appellants during discovery and not furnished by the State; that the trial court erred in refusing to suppress evidence seized as the result of an invalid search warrant; and that the trial court erred in refusing to order the State to reveal the identity of its confidential informant. Because the appellant's second and third points have merit, we reverse and remand.

We first address the appellant's contention that the trial court erroneously refused to exclude evidence requested during discovery but not provided by the State. The record shows that the appellants were arrested in September 1987, and trial was set for March 17, 1988. The appellant, Ronald Henry, filed a motion for discovery requesting the names and addresses of all witnesses the State intended to call, any written or recorded statements made by Ronald Henry, reports or statements of experts and the results of any tests or comparisons, and the prior criminal records of any witnesses. The appellant, Richard Henry, filed a discovery request which asked for the same information as well as other information not relevant to this appeal. The State responded that it had an "open file" policy and that anything in the file could be copied during business hours. The State also provided the names of ten witnesses; however, the State did not provide the addresses of the witnesses. The State did provide a copy of the information, a police report, an incident offense report, an arrest report, a copy of the search warrant and affidavit, and an inventory of the items seized in the search of Richard's house.

On March 14, 1988, three days before trial, the appellants were furnished a copy of a laboratory report analyzing the marijuana seized from Richard's house. However, the appellants were not informed of the existence of a report which indicated that the appellants' fingerprints were not found on the bags of seized marijuana. The existence of this fingerprint report was not revealed until after the trial had begun. Gary Dallas, an employee of the crime laboratory, was not revealed as a potential witness to the appellants, but he was permitted to testify. While testifying,

he read from a submission sheet which had been submitted with the marijuana to the crime lab. The existence of this submission sheet had not been revealed to the appellants.

On March 15, 1988, the appellants filed a motion to suppress the unrevealed laboratory report and a motion for a continuance. Both motions were denied by the trial court. At a hearing, Rex Harris, the criminal investigator for the Ashley County Sheriff's Department, testified that the report had been in the Sheriff's file.

Arkansas Rules of Criminal Procedure 17.1 imposes a duty on the State to disclose to defense counsel, upon a timely request, all material and information to which a party is entitled in sufficient time to permit his counsel to make beneficial use of it. *Williamson* v. *State*, 263 Ark. 401, 565 S.W.2d 415 (1978). Furthermore, information held by the police is imputed to the prosecution's office. *Lewis* v. *State*, 286 Ark. 372, 691 S.W.2d 864 (1985). In this case it is uncontroverted that the crime laboratory results were in the police files but it is not clear whether they were properly delivered to the prosecutor. Under these circumstances, we think that *Lewis, supra*, is controlling and hold that the State did not comply with A.R.Cr.P. 17.1.

The prejudice suffered by the appellants is clear. The theory of their defense was that the marijuana was brought into the house by a visitor, Todd Johnson. Without the disclosure of the laboratory report on the marijuana until three days before trial the defense did not have adequate opportunity to conduct its own tests on the marijuana. By not revealing the exculpatory fingerprint report until trial, the defense did not have an opportunity to make full use of the information. The defense could not prepare for cross-examination of the crime laboratory analyst. Furthermore, the marijuana laboratory report was crucial to the State in light of the fact that the police had lost four of the five confiscated bags of marijuana. In cases where prejudice will result from the State's failure to comply with pretrial discovery rules, the trial court must take appropriate action to remove that prejudice by excluding the evidence, ordering discovery, granting a continuance or entering another order appropriate under the circumstances. *Shuffield* v. *State*, 23 Ark. App. 167, 745 S.W.2d 630 (1988). We think that the record shows that the appellants, at the very least, suffered surprise when the existence of the

fingerprint report was revealed at trial and when Gary Dallas testified. The prejudice caused by this surprise could, perhaps, have been cured had the requested continuance been granted. However, because the trial court refused to grant either a continuance or suppress the evidence, we hold that the appellants were prejudiced by the trial court's failure to act, and we reverse and remand for a new trial.

We will address the other points raised by the appellants which are likely to recur on retrial. The appellant's second argument concerns the affidavit used to establish reasonable cause for issuance of the search warrant. The affidavit states:

> Before Hamburg Municipal Judge Timothy Tarvain [sic]. The undersigned, being duly sworn, deposes and says that he (is positive) (*has reason to believe*) that (*on the person of*) (*on the premises known as*) Rt.1, Hamburg Ar[.] 1.5 miles north of Pine Hill Store on east side of Hwy [.] 133. Residence described as "A" frame house two story brown in color in the County of Ashley, State of Arkansas, there is now being concealed certain property, namely controlled substances (marijuana) (drug parafanalia) [sic] which is in violation of the following Arkansas Statute(s) or Law(s): 82-2617. The facts tending to establish the foregoing grounds for issuance of a search warrant are as follows:
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> . . .
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> The officer has obtained information from a reliable informant. The informant is believed reliable because (*information from the informant has been used before and has aided in obtaining convictions*) or (the informant is well known in the community and has established a reputation for truth and veracity in the community) (other reasons for reliability of witness: ___). Other grounds for the search warrant have been established, namely controlled drug buy made by C.R.I.

(Emphasis indicates options selected by the affiant.) The affidavit was a preprinted form and was signed by David Johnson. A search warrant was issued and a search was made of the home of Richard Henry. The officers conducting the search found four bags of

marijuana, the largest containing 1.87 ounces. One small bag was found in Richard's car and a large amount of cash, $11,140.00, was found on the person of Ronald Henry.

The appellants filed a motion in limine requesting that the evidence seized during the search be suppressed. At a hearing on the motion, Rex Harris testified that he and David Johnson, a patrolman for the Crossett Police Department, obtained the search warrant from Judge Tarvin. He stated that he knew who the confidential informant was and that the controlled drug buy had been made within two weeks of the September 18 search. However, he admitted that, at the time the search warrant was issued, there had not been any convictions stemming from information received from the informant. David Johnson testified that he told Judge Tarvin that he had been conducting a surveillance of the residence and that there was a lot of out-of-state traffic at the residence and a lot of unusual visits. There was no recorded testimony taken under oath in support of the search warrant.

The critical flaw in the affidavit is the absence of any indication of when the criminal activity was observed. *Herrington* v. *State*, 287 Ark. 228, 697 S.W.2d 899 (1985).

> [W]hile inferences the magistrate may draw are those which a reasonable person could draw, certain basic information must exist to support an inference. All the magistrate had in this case was the affidavit and the information which we have recited. We find one defect that cannot be cured. The affidavit mentions no time during which the criminal activity occurred. . . .
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> . . .
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> It is the uniform rule that some mention of time must be included in the affidavit for a search warrant. . . . The only softening of this position occurs when time can be inferred from the information in the affidavit. For example, where an affidavit recited that the contraband was "now" in the suspect's possession and that the search was urgent, that was found to be adequate to satisfy the time requirement. . . . In another case where the affidavit said that contraband was "recently" seen, coupled with the use

> of present tense as to the location of the contraband, that was held to be sufficient. . . . Time is crucial because a magistrate must know that criminal activity or contraband exists where the search is to be conducted at the time of the issuance of the warrant. . . . That is not an unreasonable nor technical demand of the law. (Citations omitted).

Herrington, 287 Ark. at 231, *quoting Collins* v. *State*, 280 Ark. 453, 658 S.W.2d 877 (1983).

Although the affidavit does state that "there is now being concealed certain property," this language is found in the printed form section of the affidavit and there is no other indication of time. The affidavit does not state when the informant made the controlled drug buy, where the buy was made, or from whom the informant purchased the drugs. Further, there are no facts asserted in the affidavit indicating that there were other drugs located in the residence sought to be searched. Although at the hearing on the motion the officers were able to pin down the time to within one week of the search, there is no indication in the record that this information was before the magistrate and there is no indication that this information was recorded and given under oath as required by Ark. R. Cr. P. 13.1(b).

The State urges us to apply the good faith exception announced in *United States* v. *Leon*, 468 U.S. 897 (1984). However, the Arkansas Supreme Court made it clear in *Herrington, supra*, that if a time factor cannot be ascertained or inferred, there is no sufficient basis for a probable cause determination and the good faith exception will not apply.

The search warrant is also flawed because there are no indicia of the reliability of the confidential informant. In *Freeman* v. *State*, 268 Ark. 614, 594 S.W.2d 858 (1980), we stated that an affidavit may be based on hearsay when reliability of the informant can be established. The affiant must set forth particular facts bearing on the informant's reliability, and shall disclose, as far as practicable, the means by which the information was obtained. In the present case, the officers admitted that, at the time the warrant was issued, the informant had not aided in any convictions. All other statements in the affidavit about the informant are merely conclusions and there is nothing in the

record which establishes the reliability of the informant. Therefore, in view of the fact that the magistrate was unintentionally misled as to reliability of the informant and because there is nothing in the record before us that indicates reliability, the warrant would be invalid even if there had been an appropriate reference as to the time frame in which the criminal activity occurred. We hold that, for both reasons explained above, the trial court erred in failing to grant the appellant's motion to suppress the evidence seized pursuant to the search warrant.

The appellant also argues that the trial court erred in refusing to quash the jury panel because the jury was selected in violation of Ark. Code Ann. § 16-32-107 (1987). Subsection (b) states:

> If the jurors are not present in court, the judge shall direct the sheriff to summon the number of jurors needed, the names of whom shall be taken from the jury book in the same order as they appear thereon, exempting those who have been excused from attendance.

The record reflects that there was a list of 152 persons in the jury book. Of the 152, approximately 50 had been excused. A list of 30 jurors was prepared by the judge and Dean Nelson, the Ashley County Circuit Clerk. According to Nelson, the list reflected the persons who had been present at a prior impaneling of the jury. The record also reflects that some of the potential jurors were not called because they had not returned questionnaires or had not been served. However, no reason was given for not calling many of the jurors except for the fact that they had not appeared at the prior impaneling.

In *Welch* v. *State*, 269 Ark. 208, 599 S.W.2d 717 (1980), the names of prospective jurors were selected at random, placed in alphabetical order, and placed on the jury wheel, and a smaller active jury panel was drawn. The appellant argued that putting this smaller list in alphabetical order and summoning the jurors in that order rather than in the order that they had been drawn from the wheel was in violation of Arkansas law. In affirming, the Supreme Court noted that no possibility of prejudice had been shown and that the names were put in alphabetical order for convenience rather than any sinister purpose. We find the same rationale in the present case: the trial

court clearly was attempting to avoid the expense and time of calling jurors who had not bothered to respond to their call to duty. However, even though the appellants here have failed to demonstrate prejudice, we note that it is a better practice for trial courts to follow the method of jury selection prescribed in the Arkansas Jury Wheel Act. *See Hall* v. *State*, 259 Ark. 815, 537 S.W.2d 155 (1976).

The appellants' final point concerns the identity of the confidential informant who allegedly made the controlled drug buy and is referred to in the affidavit for the search warrant. It is the appellants' contention that the trial court erred in refusing to order the State to reveal the name of the confidential informant. We find no error because the appellants were not charged with the sale of drugs involving the informant; they were charged with possession with intent to deliver. Information supplied by the informant was not used at trial and the confrontation clause, U.S. Const. amend. VI, was not violated. Therefore, the State did not have a duty to disclose the name of the informant. *Williams* v. *State*, 14 Ark. App. 32, 684 S.W.2d 821 (1985).

Reversed and Remanded.

ROGERS, J., agrees.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. I concur in the reversal of this case because the affidavit for the search warrant did not show the underlying basis for the officer's belief that his informant was credible and reliable. I do not agree, however, that the affidavit was defective because there was an insufficient reference to the time the criminal activity was observed.

The case of *Herrington* v. *State*, 287 Ark. 228, 697 S.W.2d 899 (1985), holds that the good faith exception to the exclusionary rule applied in *United States* v. *Leon*, 468 U.S. 897 (1984), would be followed in Arkansas so that the absence of a reference to time in an affidavit would not make the subsequent warrant automatically defective. The court said:

> Rather, in such a situation, we look to the four corners of the affidavit to determine if we can establish with certainty the time during which the criminal activity was observed.

If the time can be inferred in this manner, then the police officer's objective good faith reliance on the magistrate's assessment will cure the omission.

287 Ark. at 232 (emphasis supplied).

In the present case, the affidavit, after describing a certain residence, clearly states that "there is *now* being concealed" in that residence certain controlled substances. I think this time reference is sufficient and to hold otherwise negates the good faith rule of *Leon* and *Herrington.*

Dayna L. LAWSON *v.* Elizabeth BROOKS, Acting Director of Labor

E 88-195 779 S.W.2d 185

Court of Appeals of Arkansas
Division II
Opinion delivered September 13, 1989

Appellant, pro se.

Bruce H. Bokony, for appellee.

JAMES R. COOPER, Judge. The appellant in this Employment Security Division case appeals from the Board of Review's dismissal of her appeal from a decision of the Appeal Tribunal. We reverse and remand.

The record shows that the Appeal Tribunal found that the appellant had been discharged from her last employment on February 25, 1988, for misconduct connected with the work, and was therefore disqualified from receiving benefits. The decision of the Appeal Tribunal was mailed to the appellant on June 15, 1988. On October 4, 1988, the appellant filed a petition for appeal to the Board of Review. This petition was untimely under Ark. Code Ann. § 11-10-524(c) (1987), which requires that an appeal from the decision of the Appeal Tribunal be initiated within twenty days of the date that the Appeal Tribunal's decision is mailed to the parties. By a letter dated October 24, 1988, the Board informed the appellant that her appeal was untimely and that she would be afforded a hearing to determine whether the late filing was due to circumstances beyond her control. The letter also notified the appellant that the hearing, scheduled for 10:30 a.m. on November 15, 1988, would be conducted by telephone, and that the appellant was required to provide the Board with the telephone number at which she could be reached at the time set for the hearing. To facilitate the latter requirement, the Board provided the appellant with a postage-paid envelope addressed to the Board of Review, and a form which read as follows:

> I wish to participate in the hearing scheduled for November 10, 1988 and may be contacted at the telephone number listed below.

The transcript contains an official Board of Review envelope, addressed to the Board of Review and bearing a stamp indicating that it was received by the Board on October 31, 1988. The transcript also contains a completed copy of the above-quoted form indicating the appellant's desire to participate in the hearing, signed by the appellant and including the requested telephone number. This form also bears a stamp showing it was received by the Board on October 31, 1988, as does a letter from the appellant to the Board stating that:

> This letter is to inform you that I was re-enstated [sic] of July 11, 1988; Therefore, I am not considered being

> discharged (fired). The time that I was off is considered as "displanary [sic] layoff." Why the hastel [sic]?
>
> Hopefully no other action will be needed.
>
> P.S. Here's a copy of my settlement.

The following page of the record contains a photocopy of a document indicating that the appellant's union grievance had been settled, that she would return to work without back pay as of July 11, 1988, and that all time off would be considered to be disciplinary layoff.

On November 8, 1988, the Board issued a decision dismissing the appellant's appeal, stating that it did so upon "written motion of the claimant-appellant in this case requesting that this appeal to the Board of Review be withdrawn." In a letter to the Board of Review dated November 21, 1988, the appellant stated that she did not intend to withdraw her appeal in her letter of October 31, 1988, but meant only to provide evidence that she had been subjected to disciplinary layoff rather than termination.

The record shows that the appellant's appeal to the Board was not timely filed. Nevertheless, due process requires that the appellant be afforded a hearing to determine whether the late filing was due to circumstances beyond her control. *Paulino* v. *Daniels*, 269 Ark. 676, 599 S.W.2d 760 (Ark. App. 1980). We think that any doubt which may have been raised by the comment in the appellant's October 31 letter to the effect that she hoped no further action would be required should have been dispelled by her submission of the completed form expressing her desire to participate in the hearing and providing the telephone number at which she could be reached. We hold that the Board erred in dismissing the appellant's appeal, and we remand for a hearing to determine whether the late filing was the result of circumstances beyond the appellant's control. *See Paulino* v. *Daniels, supra.*

Reversed and remanded.

MAYFIELD and ROGERS, JJ., agree.

Anthony Lawayne ROBINSON *v.* STATE of Arkansas

CA CR 89-69 775 S.W.2d 916

Court of Appeals of Arkansas
Division II
Opinion delivered September 13, 1989

Meadows, Davis & Goldie, by: *James E. Goldie*, for appellant.

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

JAMES R. COOPER, Judge. On March 11, 1988, the appellant pled guilty to the offense of making and uttering a hot check. Imposition of sentence was suspended for three years conditioned upon the appellant paying a probation fee, making restitution

payments in the amount of $50.00 per month, and refraining from violating the law. The appellant's sentence was imposed on August 26, 1988, after he was found by the trial court to have been in possession of stolen property, marijuana, and a shotgun. The trial court also found that the appellant had failed to make the ordered restitution payments. He was sentenced to six years in the Arkansas Department of Correction with three years suspended. On appeal, the appellant argues that the contraband was found in his car after the police stopped him without probable cause and the evidence of the contraband should have been suppressed. We affirm.

Roy Choate, the appellant's probation officer, testified that the appellant had not made any payments during the four months between the guilty plea and the revocation hearing. When the victims began to complain he filed a petition, and stated that, although at that time he was not going to request imprisonment of the appellant, he felt the court should be informed and a hearing was held. On June 17 Mr. Choate discovered that the appellant had failed to appear in municipal court on a charge that he had been driving on a suspended driver's license. A bench warrant was issued for the appellant's arrest.

Bucky Thomas, a patrolman for the Harrison Police Department, had received information from Glenn Redding, a Harrison Police Lieutenant, that a warrant had been issued for the appellant's arrest. Redding also described the appellant's car and the license number. On July 16, 1988, Thomas was on patrol and had stopped another car when he noticed a car matching the description of the appellant's car. He flagged the appellant's car over, identified the driver as being the appellant and placed him under arrest. An inventory of the car revealed a Motorola radio, a plastic bag containing coins, a 12-gauge shotgun that appeared to have part of the barrel sawed off, a motorcycle helmet that had the strap cut, and a white bag of vegetable matter which Thomas believed to be marijuana. The radio was subsequently discovered to have been stolen from a county truck.

The appellant argues that the stop of his car was without probable cause because Thomas admitted that there were other cars which matched the description of the appellant's car in the area and, at the time of the stop, Thomas did not have reasonable

cause to believe that it was the appellant's car. He also argues that, because the stop was without reasonable cause, the evidence seized during the inventory should have been suppressed. We disagree.

First, the trial court had the authority to revoke the appellant's suspended sentence on a finding that the appellant had not made the required restitution payments. When considering revocation for failure to pay restitution, the court must consider whether the failure was willful or due to inability to pay. *Felix* v. *State*, 20 Ark. App. 44, 723 S.W.2d 839 (1987). During the four month suspended imposition of sentence period the appellant was employed for almost two and one-half months and he purchased a car. The appellant testified and did not deny that he had failed to pay and he did not testify that he could not pay; he only stated that his brother had attempted to pay for him one time and went to the wrong place. Therefore, the trial court was justified in revoking the appellant's suspended sentence on the failure to pay alone.

Second, it has long been the law in this state that the exclusionary rule does not apply in revocation hearings. *Dabney* v. *State*, 278 Ark. 375, 646 S.W.2d 4 (1983). The appellant, citing *McGhee* v. *State*, 25 Ark. App. 132, 752 S.W.2d 303 (1988), argues that an exception should be made when the arresting officer does not act in good faith. As we stated in *McGhee*:

> It is true that the Arkansas Supreme Court, as well as this Court, has suggested, by way of dicta, that there may be exceptions to the general rule that the exclusionary rule is inapplicable in probation revocation proceedings. In *Harris*, we said that the exclusionary rule would be inapplicable in revocation proceedings "at least where there has been a good-faith effort to comply with the law." 270 Ark. at 638, 606 S.W.2d at 95. In *Dabney, supra*, the court suggested that the exclusionary rule might be applicable if it appeared that the officers' primary purpose was to seek revocation of the defendant's probation. Other courts have suggested the possibility of a similar exception. *See e.g., Bazzano*, 212 F.2d at 832. Other suggested possible exceptions to the general principle that the exclusionary

> rule is inapplicable in probation revocation proceedings include cases involving harassment by the police, *United States v. Farmer*, 512 F.2d 160 (6th Cir. 1975), and official misconduct which shocks the conscience of the court. *People* v. *Williams*, 186 Colo. 72, 525 P.2d 463 (1974).

25 Ark. App. at 135. Even if we were to hold that the exclusionary rule is applicable in probation revocation proceedings where the officer has acted in bad faith, this record contains no evidence suggesting bad faith on the part of Officer Thomas. There is no indication that Officer Thomas's primary purpose was to seek revocation. He testified that he was attempting to arrest the appellant on the warrant and he was familiar with the appellant's car because it had previously belonged to someone else he knew. He stated that the car "has a broken lamp to the front and left hand side and broken turn signal." Although the officer admitted that he was not positive when he stopped the car that it was the appellant's car, he denied that he would have stopped all cars matching the general description of the appellant's car. We find no error and affirm the trial court's denial of the motion to suppress.

Affirmed.

MAYFIELD and ROGERS, JJ., agree.

Marvin L. WRIGHT *v.* Jane Alice WRIGHT

CA 89-67 779 S.W.2d 183

Court of Appeals of Arkansas
Division II
Opinion delivered September 13, 1989

Janice Williams Wheeler and *Charles A. Yeargan*, for appellant.

Bob Keeter, for appellee.

JAMES R. COOPER, Judge. The parties were divorced by a decree entered July 14, 1988. The chancellor found that a five-acre tract of real property was the separate, non-marital property of the appellee, and that the appellant had a $2,500.00 interest in that property. The real property was therefore awarded to the appellee subject to a $2,500.00 equitable lien in favor of the appellant. The chancellor also found that the furniture in the

home located on the five-acre tract was the separate, non-marital property of the appellee. From that decision, comes this appeal.

The appellant does not challenge the portion of the decree in which the chancellor, citing general indignities, granted a divorce to the appellee on her counterclaim. Instead, he contends that the chancellor erred in determining his interest in the five-acre tract, and in finding that the household furnishings were the appellee's separate, non-marital property. We reverse in part, affirm in part, and remand.

The parties were married on April 28, 1975. The appellee testified that her son died shortly before her marriage to the appellant, that she was the beneficiary of several of her son's life insurance policies and that, after the marriage, she received insurance proceeds of $20,000.00, $5,000.00, and $2,500.00. She stated that she deposited these funds in a joint account she held with her mother and a joint account she had held with her deceased son; neither account bore the appellant's name. She testified that she used the insurance proceeds to purchase the five-acre tract and the furniture.

The warranty deed reflects that the five-acre tract was conveyed to the appellee on January 2, 1976. The appellant's name does not appear on the deed. The appellee testified that the real property was purchased for $22,500.00. She was credited $2,500.00 in exchange for a mobile home she owned prior to the marriage. As to the remaining balance of $20,000.00, the appellee testified that she paid $10,000.00 out of the savings account she held with her mother, and $5,000.00 from the account she had held with her son. She stated that the funds used for these payments were solely derived from the insurance proceeds she received after her son's death. The $5,000.00 balance was financed, and the appellee admitted that this $5,000.00 promissory note was paid with marital funds. Finally, the appellee testified that she bought the furniture and paid for it with separate funds derived from the insurance proceeds.

The appellant disputed the appellee's testimony regarding the source of the funds used to purchase the land and the furniture. He admitted that the appellee had separate bank accounts, but testified that he thought that the initial payments of $10,000.00 and $5,000.00 on the real property were made from a

joint account which he and the appellee maintained. He also stated that, to the best of his knowledge, the furniture was also paid for out of the marital joint account.

We first address the appellant's contention that the chancellor erred in determining the value of his interest in the five acres of land and improvements. We agree. Property acquired for a consideration paid in part out of marital property and in part out of the separate funds of one of the spouses is in part marital property and in part separate property. *See Potter* v. *Potter*, 280 Ark. 38, 655 S.W.2d 382 (1983). We think that the chancellor correctly found the insurance proceeds to have been the appellee's separate property. The decisions of the Arkansas Supreme Court in comparable cases indicate that the time that a right to property is acquired, rather than the time the property is actually received, is the determinative factor in deciding whether or not that property had been acquired during the marriage. *See Bunt* v. *Bunt*, 294 Ark. 507, 744 S.W.2d 718 (1988); *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986). Although the insurance proceeds in the present case were not received by the appellee until after the marriage took place, it is undisputed that the death of the appellee's son, which gave rise to the appellee's right to the proceeds, occurred prior to the marriage. We hold that these insurance proceeds were the separate property of the appellee. *See* Ark. Code Ann. § 9-12-315 (1987).

Nevertheless, we agree that the chancellor erred in finding that the $10,000.00 payment was not marital property, even if it was, as the appellee testified, paid out of the account the appellee held with her mother. The account passbook, which was introduced at trial, shows that all the activity in the joint account with the appellee's mother took place during the marriage. Nine separate deposits ranging in amount from $312.26 to $5,409.73 were made between October 4, 1975, when the account was opened, and January 2, 1976, when the $10,000.00 withdrawal was recorded.

In *Boggs* v. *Boggs*, 26 Ark. App. 188, 761 S.W.2d 956 (1988), we reversed a chancellor's finding that certain stock was non-marital property on the ground that the evidence did not permit tracing of the funds used to purchase the stock, which had been drawn from an account that Mr. Boggs maintained with his

father. Although there was testimony that the funds in the account belonged solely to Mr. Boggs' father and were a gift to Mr. Boggs, we found that the source of the funds was untraceable in light of Mr. Boggs' testimony that he occasionally deposited marital funds into the joint account. *Boggs* v. *Boggs, supra.* Although the appellee in the case at bar testified that the funds in her joint account with her mother were derived from the insurance proceeds, she later testified that she had, at unspecified times, deposited money she had earned during the marriage into the account. Given this testimony, and the fact that the deposits made to the appellee's joint account do not correspond to the amounts of the insurance proceeds, we think that the evidence does not permit tracing of the funds from which the $10,000.00 payment was drawn, and that the $10,000.00 payment should therefore be regarded as marital property. *See Boggs* v. *Boggs, supra; see also Jackson* v. *Jackson*, 298 Ark. 60, 765 S.W.2d 561 (1989). We reverse and remand for the chancellor to divide the five-acre tract in light of our holding that the fund from which the $10,000.00 payment was drawn was marital property. Of course, we do not disturb the chancellor's ruling that the $5,000.00 note was paid with marital funds.

With respect to the furniture and the $5,000.00 payment on the land which, according to the appellee's testimony, was made out of a joint account which she had held with her deceased son, we find no error. Unlike the $10,000.00 payment previously discussed, no admission by the appellee or other evidence of commingling concerning the furniture purchase or $5,000.00 payment appears in the record. With respect to these items, the chancellor's finding that the payment and purchase were made out of the appellee's separate funds is based on the unambiguous testimony of the appellee. Although the appellant testified that he believed that the furniture purchase and the $5,000.00 payment were made out of marital funds, neither party produced documentary evidence in support of their testimony. The issue therefore hinged on the credibility of the witnesses and, giving due deference to the chancellor's superior position to resolve questions of credibility, we cannot say that he clearly erred in finding the $5,000.00 payment on the five-acre tract and the furniture purchase were made out of the appellee's separate funds. *See* Ark. R. Civ. Pro. 52(a).

Affirmed in part, reversed in part, and remanded.

MAYFIELD and ROGERS, JJ., agree.

CONTINENTAL OZARK, INC. *v.* Steven LAIR

CA 89-97 779 S.W.2d 187

Court of Appeals of Arkansas
Division II
Opinion delivered September 20, 1989

Adams & Nichols, by: *Johnny L. Nichols*, for appellant.

Walker, Campbell & Campbell, by: *Bradley C. Crawford*, for appellee.

JUDITH ROGERS, Judge. The appellant, Continental Ozark, Inc., appeals the decision of the trial court granting judgment in favor of appellee, Steven Lair. The only question on appeal concerns the propriety of the trial court's conclusion that the appellee, a guarantor on a corporate obligation, was discharged as a matter of law due to the subsequent sale of his interest in the obligor corporation. We reverse and remand.

The undisputed facts in this case reveal that the appellant sold petroleum products to Lair Oil Company, Inc. on an open account basis. In May of 1984, appellee, who owned an interest in Lair Oil, executed a personal guaranty as security for the indebtedness on the open account. Appellee later sold his interest in Lair Oil to Charles Luna, who in 1987 with his wife provided a personal guaranty on the open account.

The appellant filed suit in May of 1988 for an outstanding debt on this account in the amount of $231,779.79. Named as defendants in the lawsuit were Lair Oil, Charles and Judith Luna, and the appellee. As alleged in the complaint, appellee's liability on the open account was based on the 1984 personal guaranty. Appellee responded by filing a motion to dismiss, claiming that his liability had been discharged as a matter of law as a result of the sale of his stock in the company to the Luna's, who in turn gave their personal guaranty.

By order of November 17, 1988, the trial court granted appellee's motion, thereby dismissing him from the litigation. In its order, the trial court stated that it was treating the motion to

dismiss as one for summary judgment as permitted under Ark. R. Civ. P. 12(b)(6). We accept the trial court's view of this matter in this regard. While the motion to dismiss alleges the failure to *state* a claim, the motion for summary judgment in these circumstances, alleges the failure to *have* a claim. *Joey Brown Interest, Inc.* v. *Merchants Nat'l Bank of Ft. Smith*, 284 Ark. 418, 683 S.W.2d 601 (1985) (emphasis in original).

Summary judgment is an extreme remedy, and is only proper whenever the pleadings and proof show that no genuine issue exists as to a material fact and that the moving party is entitled to judgment as a matter of law. *Talley* v. *MFA Mutual Ins. Co.*, 273 Ark. 269, 620 S.W.2d 260 (1981). Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable men might differ. *Walker* v. *Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981). The object of summary judgment proceedings is not to try the issues, but to determine if there are issues to be tried, and if there is any doubt whatsoever, the motion should be denied. *Heritage Bay Property Regime* v. *Jenkins*, 27 Ark. App. 112, 766 S.W.2d 624 (1989).

The trial court concluded as a matter of law that the appellee was released from his obligation by the subsequent change in ownership of Lair Oil. In reliance on the decision of *Gazette Publishing Co.* v. *Cole*, 164 Ark. 542, 262 S.W. 985 (1924), the trial court reasoned:

> That there was a known material change in the ownership of Lair Oil Company, Inc. and a surety who become [sic] such does so because of his knowledge of and confidence in the integrity and abilities of existing ownership and cannot be presumed to have intended to become responsible for the debts of the succeeding owner.

This language used by the court can be found in *Gazette Publishing Co.* v. *Cole*, *supra*. There, the supreme court ruled that a guarantor of a partnership debt would have been entitled to a directed verdict where one of the partners left the partnership. The court determined that the withdrawal of the partner constituted a material alteration of the surety contract with the effect of discharging the guarantor from his obligation. The decision in

Cole is based heavily on the guarantor's presumed reliance on the individuals composing the firm at the time the guaranty was given.

Here, the appellant argues that *Cole* is distinguishable from the case at bar in that the decision rests upon a change in members of a partnership, as opposed to a change in ownership of a corporation. We agree. It is stated in Annot., 69 A.L.R. 3d 567 § 2(a) (1976), that it is only in the situation involving the addition or loss of partners or firm members, as was the case in *Cole*, that a significant number of cases are to be found supporting the release of a guarantor or surety's liability to an obligee as a matter of law. The annotation also points out other factors that are considered relevant in determining whether the guarantor has been released when there has been a change in corporate ownership.

There are several Arkansas cases from which it can be inferred that a guarantor of a corporate debt is not released simply by virtue of a change in ownership, particularly where the change is brought about by the sale of the guarantor's interest in the corporation. In *Meek* v. *U.S. Rubber Tire Co.*, 244 Ark. 359, 425 S.W.2d 323 (1968), the obligee prevailed against the guarantor of an open account who was held to remain liable even after he had sold his interest in the obligor corporation. On appeal, the guarantor argued that he had been discharged because, upon the sale, a release had been executed whereby the purchaser agreed to hold him harmless for the debt. The court rejected his argument because the obligee was not a party to the release. However, in *Spears* v. *El Dorado Foundry*, 242 Ark. 590, 414 S.W.2d 622 (1967), the court found that the guarantor on an open account was released, not because of his withdrawal from the corporation, but because promissory notes had been substituted securing payment on the open account. The court reasoned that the substitution constituted a material alteration of his obligation which discharged his liability. *See also*, *Inter-Sport, Inc.* v. *Wilson*, 281 Ark. 56, 661 S.W.2d 367 (1983).

These cases suggest that the sale of an interest or change in ownership of a corporation does not in and of itself operate to extinguish the guarantor's obligation, and thus it appears that a distinction can be made between the release of a guarantor of a partnership and a corporate obligation. Further-

more, the question of whether the guarantor has been discharged is dependent on the facts, and whether there has been a material alteration of the surety contract.

In Arkansas, it is settled law that a guarantor is not liable where his underlying agreement has been changed without his consent. *Vogel* v. *Simmons First Nat'l Bank*, 15 Ark. App. 69, 689 S.W.2d 576 (1985). Any material alteration of the obligation assumed, made without the consent of the guarantor, discharges him. *Moore* v. *First Nat'l Bank of Hot Springs*, 3 Ark. App. 146, 623 S.W.2d 530 (1981). An alteration is not material unless the guarantor is placed in the position of being required to do more than his original undertaking. *Vogel* v. *Simmons First Nat'l Bank, supra*. Furthermore, a guarantor who pleads release has the burden of proving that release. *Van Balen* v. *People's Bank & Trust Co.*, 3 Ark. App. 243, 626 S.W.2d 205 (1981).

Since the question of whether there has been a release depends on facts that remain to be developed, we hold that the trial court erred in granting judgment as a matter of law.

As a final point, the appellee has raised the question as to whether the court's order was a final, appealable judgment based on Ark. R. Civ. P. 54(b), and the case of *First Fed. Savings & Loan Ass'n* v. *Drake*, 298 Ark. 287, 766 S.W.2d 617 (1989). However, the record in this case has been supplemented to include an order dismissing Lair Oil and the Lunas from this action. Since appellee is now the only remaining defendant, we conclude that the judgment of the trial court is final for the purposes of this appeal.

REVERSED and REMANDED.

COOPER and MAYFIELD, JJ., agree.

GENERAL ELECTRIC CREDIT AUTO LEASE, INC.
v. Charles V. PATY

CA 89-156 776 S.W.2d 829

Court of Appeals of Arkansas
Division I
Opinion delivered September 27, 1989

Walker & Poff, by: *Frank A. Poff, Jr.*, for appellant.

Paul A. Schmidt, for appellee.

GEORGE K. CRACRAFT, Judge. General Electric Credit Auto Lease, Inc., appeals from an order of the Pulaski County Circuit Court denying it a deficiency judgment on the grounds that it did not follow the provisions of the Uniform Commercial Code in the disposition of a vehicle in which it had a security interest. Appellant contends that the trial court erred in finding that appellee was not sent proper notice of the intended sale of the vehicle. We find no error and affirm.

In February, 1985, appellee obtained possession of a vehicle from a local automobile dealer under an instrument styled "New Vehicle Lease Agreement (Closed-end With Fixed Purchase Option)." The terms of the agreement required appellee to make forty-eight monthly lease payments, and gave him an option to purchase the vehicle at the end of the period at a price and on conditions set forth in the instrument. The lessor subsequently assigned the agreement to appellant.

When appellee defaulted on his payments, appellant caused the vehicle to be repossessed. On August 25, 1986, appellant sent to appellee a notice informing him that, unless suitable arrangements were made with appellant within fifteen days, it would "offer said vehicle for sale at its established business address shown hereon." The address shown thereon was in Barrington, Illinois. The vehicle was thereafter sold at auction by Paragould Auto Auction, Inc., in Paragould, Arkansas, for the sum of $6,890.25.

At the time of the sale, the balance due under the agreement, together with costs of retaking, holding, and preparing the vehicle for sale, exceeded the proceeds of the sale by $6,422.12. Appellant sought a deficiency judgment in that amount. Appellee answered, contending that appellant was not entitled to a deficiency judgment because, among other things, appellee had not been sent reasonable notice of the time and place of sale. The trial court found that appellant had failed to give reasonable notice of the sale in the manner required by the Uniform Commercial

Code and denied the prayer for a deficiency judgment.

As a general rule, leases are not subject to the provisions of Article Nine of the Uniform Commercial Code. However, a lease can be a security interest within the meaning of the code if the transaction is in every respect a secured installment sale except that the parties clothe it in lease terminology. *See Bell* v. *Itek Leasing Corp.*, 262 Ark. 22, 555 S.W.2d 1 (1977). Here, neither party contends that the instrument involved was intended as anything other than a security agreement within the meaning of the code or that it was not a proper case for application of the provisions of Article Nine. Appellant contends only that the trial court erred in finding that the notice sent to appellee was insufficient under Ark. Code Ann. § 4-9-504(3) (1987). We find no merit in this contention.

Arkansas Code Annotated § 4-9-504(1) (1987) provides that after default a secured party may sell, lease, or otherwise dispose of collateral. Arkansas Code Annotated § 4-9-504(3) (1987) provides that disposition of collateral after default may be by public or private proceedings. Subject to certain exceptions not applicable here, the clear wording of that section requires that the debtor be sent reasonable notification of the time and place of any public sale. In the event of a private sale or other intended disposition of the property, the debtor must be sent reasonable notification of the date after which that disposition will be made. It is clear that, when a creditor repossesses chattels and sells them without sending proper notice to the debtor, the creditor is not entitled to a deficiency judgment. *First State Bank of Morrilton* v. *Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987).

Appellant argues that, as the auction in question here was restricted to automobile dealers only, it was a private sale, and hence the notice sent to appellee was sufficient. However, we find nothing in the record that suggests that the auction was restricted to dealers only or that it was not open to the general public. This court will not consider arguments based on matters not contained in the record or reverse a trial judge on facts outside the record. *Harvey* v. *Castleberry*, 258 Ark. 722, 529 S.W.2d 324 (1975); *Dillard* v. *State*, 20 Ark. App. 35, 723 S.W.2d 373 (1987).

Although the code does not define "public sale" or

"private sale," this court has adopted the definition of a public sale, generally, as one made at auction to the highest bidder. *Benton* v. *General Mobile Homes, Inc.*, 13 Ark. App. 8, 678 S.W.2d 774 (1984). Here, the automobile was sold at auction by a company engaged in that business, and we cannot conclude that the trial court's determination that the sale was a public one is clearly erroneous. As reasonable notice of the time and place of the sale was not sent, the trial court was correct in holding that appellant was not entitled to a deficiency judgment. *See First State Bank of Morrilton* v. *Hallett*, *supra*.

Affirmed.

COOPER and ROGERS, JJ., agree.

David Hugh MOSS and Phyllis Moss *v.* ALLSTATE INSURANCE COMPANY

CA 89-123 776 S.W.2d 831

Court of Appeals of Arkansas
Division I
Opinion delivered September 27, 1989

Mike Everett, for appellants.

Barrett, Wheatley, Smith & Deacon, for appellee.

GEORGE K. CRACRAFT, Judge. David and Phyllis Moss appeal from an order denying their motion for summary judgment and granting summary judgment in favor of Allstate Insurance Company. We find there exists a genuine issue of material fact and reverse that part of the order granting summary judgment in favor of appellee, and remand for further proceedings.

The record indicates that appellee issued an automobile insurance policy to David and Phyllis Moss, affording them liability, collision, and comprehensive coverage on two automobiles. The premium for the six-month policy was $303.50, payable in four installments of $78.38. On September 22, 1987, appellee mailed a notice to appellants informing them that

coverage would be cancelled on October 7, 1987, unless a past due installment in the amount of $78.38 was paid by that date. On October 7, 1987, appellant Phyllis Moss delivered a check in that amount to appellee's local agent, who had authority to accept premiums on behalf of appellee. Appellants' insurance policy was then reinstated. At that time, Mrs. Moss executed a form requesting that the collision and comprehensive coverage be deleted from their policy. The agent mailed the premium check and request for coverage reduction, signed by Mrs. Moss and the local agent, to appellee. On October 18, 1987, appellants sustained a collision loss. On October 19, 1987, appellee issued an endorsement removing the collision and comprehensive coverage, and mailed the endorsement to appellants. That endorsement also reduced the amount of the six-month premium.

Appellee denied appellants' demand for payment of the collision loss on the basis that the collision and comprehensive coverage in appellants' automobile insurance policy was cancelled on October 7, 1987, at the request of appellant Phyllis Moss. Appellants brought this action for payment under the policy, alleging that their collision and comprehensive coverage remained in full force and effect until appellee accepted appellants' request for modification on October 19, 1987. Both parties filed motions for summary judgment. The trial court granted appellee's motion, finding that the request became effective at 12:01 a.m. October 8, 1987, and that the collision loss sustained October 18, 1987, was not covered by appellants' insurance policy. Appellants' motion was denied and their complaint dismissed with prejudice.

Appellants contend that the trial court erred in granting summary judgment in favor of appellee. We agree. Summary judgment is an extreme remedy which is proper only when it is clear that there is no genuine issue of material fact. *Heritage Bay Property Regime* v. *Jenkins*, 27 Ark. App. 112, 766 S.W.2d 624 (1989). The fact that both parties have moved for summary judgment does not establish that there is no issue of material fact. If there is any doubt as to whether there are issues of fact to be tried, both motions for summary judgment should be denied. *Wood* v. *Lathrop*, 249 Ark. 376, 459 S.W.2d 808 (1970).

Relations of parties to an insurance policy are con-

tractual and modification of the terms of the policy is governed by the rules applicable to contracts. *See Christian* v. *Metropolitan Life Insurance Co.*, 566 P.2d 445 (Okla. 1977). The essential elements of a contract are: (a) competent parties; (b) subject matter; (c) legal consideration; (d) mutual agreement; and (e) mutual obligations. *Hunt* v. *McIlroy Bank and Trust*, 2 Ark. App. 87, 616 S.W.2d 759 (1981). It is well established that before an agreement becomes binding there must be a meeting of the minds of both parties as to all terms. *Id.* A meeting of the minds is defined as an agreement reached by the parties to the contract and expressed therein, or as the equivalent of mutual assent and mutual obligation. *Rice* v. *McKinley*, 267 Ark. 659, 590 S.W.2d 305 (1979). It is also well established that a contract is formed when the last act necessary is performed. *See Hunt* v. *McIlroy Bank and Trust, supra.* A contract may be modified, but it is essential that both parties agree to the modification and its terms. *Leonard* v. *Downing*, 246 Ark. 397, 438 S.W.2d 327 (1969); *Scottish Union and National Insurance Co.* v. *Wilson*, 183 Ark. 860, 39 S.W.2d 303 (1931).

[redacted] Here, while the original contract of insurance providing full coverage was in force with all premiums paid, appellants requested a modification of the policy. Until that request was accepted, the agreement for full coverage remained in effect. However, we cannot determine from the record when acceptance occurred. If appellee's local agent had the authority to bind appellee and make policy changes without appellee's approval, appellants' request may have been accepted on October 7, 1987. Absent such authority, acceptance could not have occurred until appellee's endorsement was placed in the mail on October 19, 1987. Thus, the question of whether appellee's agent had the authority to bind appellee is a genuine issue of material fact to be determined by the factfinder.

[redacted] Appellee argues that appellants' request for reduction of coverage was to be made retroactive, and, in accordance with their business practice, it became effective October 8, 1987, at 12:01 a.m. Appellee relies on *Government Employees Insurance Co.* v. *State Farm Mutual Insurance Co.*, 382 So.2d 876 (Fla. 1980), which, on strikingly similar facts, held that an insured's request for a change of policy terms may be processed retroactively, and if an accident occurs after the effective date, but prior

to the processing date, the policy applies as changed. We agree that an insured's request for change in policy terms may be applied retroactively if the parties so intend. *See Ruston Drilling Co.* v. *United States Fidelity & Guaranty Co.*, 81 F.2d 943 (8th Cir. 1936); 17 M. Rhodes, *Couch Cyclopedia of Insurance Law 2d* §65:12 (Rev. Ed. 1983). However, the Florida court made no such findings to support its conclusion in that case.

In interpreting contracts, the fundamental inquiry centers on determining the intent of the parties at the time of the agreement. We cannot determine whether it was the intent of the parties that appellants' request for modification be applied retroactively. In answers to interrogatories propounded by appellants, appellee stated that Phyllis Moss executed a form "dropping" the comprehensive and collision coverage. In their motion for summary judgment, appellants stated that Phyllis Moss "requested to amend" the insurance contract by deleting the provision for collision coverage. Nor can intent of the parties regarding retroactive application be ascertained from appellee's "Customer Service Request" form executed by appellants. On its face, the form is merely a "request" for a change in coverage. However, the request form as executed by Phyllis Moss indicates that it is "effective" October 7, 1987, at 10:15 a.m. Whether this is the effective date of the request or a term providing for retroactive application of the modification is unclear. However, neither party argues that October 7, 1987, at 10:15 a.m. is the time at which the modification became effective. Therefore, the intent of the parties at the time they entered into the agreement is another genuine issue of material fact to be determined by the factfinder.

Finding genuine issues of material fact for the jury or trier-of-fact to determine, we conclude that the trial court erred in granting appellee's motion for summary judgment and remand for further proceedings.

Reversed and remanded.

COOPER and ROGERS, JJ., agree.

Pamela FITZPATRICK *v.* John R. FITZPATRICK

CA 89-128 776 S.W.2d 836

Court of Appeals of Arkansas
Division I
Opinion delivered September 27, 1989

Tim R. Morris, for appellant.

JAMES R. COOPER, Judge. The parties were divorced on November 20, 1986, and the appellee, John R. Fitzpatrick, was awarded custody of the parties' minor daughter. On February 1, 1988, the chancery court entered an order which reflected an agreement between the parties and provided for primary custody to remain with the appellee. However, the agreement provided that the appellant was to have six continuous months of visitation. On June 6, 1988, the appellant filed a petition requesting a change of custody. After a hearing, the chancellor found no material change in the circumstances and denied the appellant's petition. On appeal she argues that the chancellor erred in that finding. The appellee has not filed a brief in this case. We find no error and affirm.

When modifying custodial orders, the primary consideration is the best interest and welfare of the child and all other considerations are secondary. Custody awards are not made or changed to gratify the desires of either parent, or to reward or punish either one of them. In determining matters of child custody, a chancellor has broad discretion, which will not be disturbed unless manifestly abused. *Anderson* v. *Anderson*, 18 Ark. App. 284, 715 S.W.2d 218 (1976). While the chancery court retains continuing jurisdiction over the matter of child custody which has been awarded to one of the parties in the original decree, it does not follow that changing that status should be

made without proof of a subsequent material change in circumstances affecting the welfare and best interest of the child. *Watts* v. *Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986). The burden of proving such a change is on the party seeking the modification. *Id.*

It is well-settled that although this Court reviews chancery cases *de novo* on the record, the chancellor's findings will not be disturbed unless clearly against the preponderance of the evidence. *Thigpen* v. *Carpenter*, 21 Ark. App. 194, 730 S.W.2d 510 (1987). Since the question of the preponderance of the evidence turns largely upon the credibility of the witnesses, we defer to the superior position of the chancellor. *Id.* This deference to the chancellor is even greater in cases involving child custody. In those cases a heavier burden is placed on the chancellor to utilize to the fullest extent all of his powers of perception in evaluating the witnesses, their testimony, and the child's best interest. *Calhoun* v. *Calhoun*, 3 Ark. App. 270, 625 S.W.2d 545 (1981). We have often stated that we know of no cases in which the superior position, ability, and opportunity of the chancellor to observe the parties carry as great a weight as those involving child custody. *Id.*

The record reveals that the appellant alleged as changes in circumstances facts that the chancellor had no knowledge of when he entered the agreed modification on February 1, 1988. She alleged that the appellee had been convicted of criminal offenses; that the appellee had moved to Chicago and did not visit the child often during the six-month period she had the child with her; that the appellee and his new wife, Nancy, had violent quarrels; that Nancy did not have custody of her own child; and that Nancy had been abusing drugs. The chancellor, basing his decision on the credibility of the witnesses, found no material change in circumstances. We agree.

At trial, the appellee testified that he and Nancy had married in October of 1987 and that they had lived with his brother, Jack, in October and November 1987. He admitted that he had been arrested for shoplifting in December 1987, but he stated that he had paid the fines and costs levied by the Rogers Municipal Court. He also admitted that he had been tried for writing hot checks in February 1988, but the checks were written

before he was divorced from the appellant. He also had a speeding ticket in Springdale that remained unpaid. However, there was also evidence that some of the fines were unpaid.

The appellee stated that he did not visit with the child during the time she was with the appellant because he was working and trying to pay off the fines. He admitted that he did not send a card or gift to the child for her birthday but explained that he was planning to celebrate her birthday with her when she returned to Chicago. He denied that he had violent quarrels with Nancy and denied that he or Nancy abused drugs. He explained that Nancy's parents had custody of her child, but that he and Nancy had unlimited and unrestricted visitation rights and saw the child frequently.

Several witnesses testified that at various times they had observed Nancy using cocaine, and Nancy admitted that she had used cocaine in the past but she had not used it since January 1986. Other witnesses testified that Nancy did not use drugs.

The chancellor had the opportunity, which we do not have, to view the appellant, the appellee, and the witnesses testifying. Furthermore, as the chancellor stated at the close of the hearing, he was familiar with the parties because they had been before him several times. For a court to choose, in a custody case, between the mother and the father, the respective personalities of the parents is vital. It is in this realm that personal observation is of inestimable value. The experience of having had the parties before him on prior hearings afforded the chancellor opportunities to reach wise conclusions respecting the moral fiber of the parties. We are certainly justified in assuming that the chancellor's knowledge, which he gained from the prior proceedings, supports his conclusions with respect to custody. *Holt* v. *Taylor*, 242 Ark. 292, 413 S.W.2d 52 (1967). The chancellor noted in this case there was a "lot of conflicting testimony" and where the testimony is conflicting the issue of credibility is a matter which we must defer to the trial court's judgment. *Durham* v. *Durham*, 289 Ark. 3, 708 S.W.2d 618 (1986). On this record, we cannot say that the chancellor erred in finding that the appellant had not met her burden of proving the alleged material changes in circumstances.

Obviously, the chancellor had some concerns about the

child's home environment because he restrained the parties from the excessive use of alcohol and from the use of any illegal drugs in the child's presence; enjoined the parties from making derogatory remarks about each other; ordered that "no other person's other than family members are to be in the family home with the minor child"; and ordered the appellee to keep the appellant advised of the child's activities, including church, school, and medical needs. The chancellor has the right to retain control of this case, and he is in a superior position to ensure that the child's welfare and best interests are protected. *Sweat* v. *Sweat*, 9 Ark. App. 326, 659 S.W.2d 516 (1983). Thus, if the parties fail to heed the chancellor's protective orders, he may choose a more drastic step to ensure that the child is provided a proper custodial environment. *Id.*

Affirmed.

CRACRAFT and ROGERS, JJ., agree.

Theodore JONES *v.* CITY OF NEWPORT

CA CR 89-65 780 S.W.2d 338

Court of Appeals of Arkansas
Division I
Opinion delivered September 27, 1989
[Rehearing denied October 25, 1989.]

Appellant, pro se.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was issued citations charging him with driving without a valid driver's license in violation of Ark. Code Ann. § 27-16-602(a) (1987), and with failure to pay vehicle registration and license fees in violation of Ark. Code Ann. § 27-14-601 (1987). After a jury trial, the appellant was convicted of those offenses and fined. From that decision, comes this appeal.

The appellant proceeded *pro se* both at trial and on appeal. He advances several points for reversal, many of which are similar to those presented in the recently-decided case of *Theodore Jones* v. *State of Arkansas*, CACR 89-28 (op. del. August 30, 1989) (not designated for publication). We affirm.

There was evidence at trial to show that the appellant did not have a valid driver's license, and that he was apprehended while driving a vehicle on which the registration and license fees had not been paid. The appellant does not dispute this evidence, but instead advances several arguments challenging the validity and applicability of the licensing statutes.

The appellant first contends that, by virtue of his status as "an individual freeman at common law," he possesses a natural right to travel the highway and is therefore expressly exempt from the licensing requirements of Ark. Code Ann. § 27-16-602 (1987). We do not agree. Arkansas Statutes Annotated § 27-16-603 lists several classes of persons exempt from licensing, but contains no exemption for "individual freemen at common law." Moreover, it has been generally held that the operation of a motor vehicle on the public highway is not a matter of right, but is instead a mere license or privilege. 7A Am. Jur. 2d *Automobiles and Highway Traffic* § 100 (1980). The Arkansas Supreme Court, in accord with the weight of authority, has held that driving a motor vehicle on a public highway is not a matter of natural right, but is instead a privilege which may be regulated by licensing requirements. *Satterlee* v. *State*, 289 Ark. 450, 711 S.W.2d 827 (1986). *Satterlee* is controlling, and the trial court did not err in denying the appellant's motion to dismiss on this basis.

The appellant next contends that the trial court erred in converting the exercise of his right to drive on the public highway into a crime. Because this argument is premised on the contention that driving is a right rather than a privilege, and because we have rejected that contention, we need not address this argument. For the same reason, we need not address the appellant's contention that his conviction abrogated his right to travel on a state highway as an individual.

Next, the appellant contends that he was denied due process of law by the trial court's refusal to hold an omnibus hearing under Ark. R. Crim. P. 20.2 and 20.3. The plain language of Ark. R. Crim. P. 20.1, 20.2, and 20.3 clearly indicates that an omnibus hearing is not mandatory in every case. Nevertheless, we need not address the merits of this issue because the record clearly shows that the appellant was not prejudiced by the trial court's

refusal to hold an omnibus hearing. Despite the appellant's assertion that his motions were not read by the trial judge, the record shows that the trial judge stated that he had reviewed the appellant's motions, noted the similarity of these motions to motions presented by the appellant in a previous case, and ruled on them prior to trial. We do not reverse in the absence of prejudicial error, *Hardcastle* v. *State*, 25 Ark. App. 157, 755 S.W.2d 228 (1988), and we find no prejudice in the trial court's refusal to hold an omnibus hearing in this case.

The appellant also argues that he was denied assistance of counsel at trial. The record reflects that the following exchange took place after the parties approached the bench for trial:

THE COURT: We'll try your case now. You ready to go?

. . .

THE COURT: Who is this man right here?

MR. JONES: That is my assistance of counsel.

THE COURT: You go out there on the front row out there. You go sit down on the front row out there. There is no assis—

MR. JONES: Am I being denied. . .

THE COURT: You are. There is no assistance of counsel going to come up here in a tee shirt with double swingers on it.

Now, what you need to do is get through those rails real quick and get on that front row or you're fixing to go to the jailhouse real quick. You hear me?

MR. JONES: Is this, a record being made of this?

THE COURT: You betcha.

MR. JONES: Then let the record reflect that I've been denied my assistance of counsel.

The appellant argues that the trial court erred in refusing to allow his unnamed "next friend" to take part in the proceedings, and

asserts that neither the Arkansas constitution nor the federal constitution require that an accused's counsel must be approved by the Bar or by the court.

The appellant does not assert that his "next friend" was a licensed attorney, and we find no error. The United States Supreme Court has noted that:

> The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court.

Wheat v. *United States*, 486 U.S. 153 (1988). Likewise, Arkansas courts have held that the right to choose counsel cannot be manipulated or subverted to obstruct the orderly procedures of court, or to interfere with the administration of justice. *See e.g.*, *Tyler* v. *State*, 265 Ark. 822, 581 S.W.2d 328 (1979). Here, the record shows that the appellant had represented himself in all pre-trial proceedings, and that the trial court was surprised at the appearance of the appellant's inappropriately-attired "next friend" on the day of trial. The appellant does not assert that his "next friend" was a licensed attorney. We find no error on this point.

The appellant next contends that the trial court erred in refusing to allow him to call the prosecuting attorney as a witness. The record shows that the appellant attempted to call Mr. Montgomery, who was prosecuting the case for the State, as an expert witness. The trial court denied the request on the ground that it would be a breach of ethics for Mr. Montgomery to testify in a case he was prosecuting, and that there was no indication that only Mr. Montgomery could provide the expert testimony the appellant desired.

An appellant must show that a witness's testimony would have been both material and favorable to his defense in order to establish a violation of his right to compulsory process. *United States* v. *Valenzuela-Bernal*, 458 U.S. 867 (1982). The appellant has failed to make such a showing in the case at bar. No mention is made in the appellant's brief regarding his purpose for calling Mr. Montgomery, and no proffer of testimony was made

at trial. On this record, we cannot say that the trial court erred in refusing to allow Mr. Montgomery to be called as a witness.

Next, the appellant contends that the trial court erred in proceeding criminally in a civil case. He notes that Ark. R. Crim. P. 1.5 requires that criminal prosecutions be brought in the name of the State of Arkansas, and concludes that the case at bar is a civil case because it was prosecuted in the name of the City of Newport. This argument was addressed and rejected in *Graham* v. *State*, 25 Ark. App. 234, 756 S.W.2d 921 (1988), which held that a court is not deprived of criminal jurisdiction when the style of a misdemeanor case lists a municipality as plaintiff.

The appellant next argues that the trial court erred in refusing to allow him to voir dire each prospective juror individually. We do not agree. Arkansas Code Annotated § 16-33-101 (1987) requires the court to examine prospective jurors regarding disqualifications, and permits further questions to be asked "by the court, or the attorneys in the case, in the discretion of the court." The record shows that the trial judge complied with Ark. R. Crim. P. 32.2 by identifying the parties and counsel, by revealing the names of the witnesses made known to the court, and by outlining the nature of the offense. It is well-settled that the trial judge has wide discretion to regulate the scope and extent of voir dire, and that his restriction of that examination will not be reversed on appeal unless his discretion is clearly abused. *Izzard* v. *State*, 10 Ark. App. 265, 663 S.W.2d 192 (1984). Here, the trial judge permitted the appellant to ask questions to individual jurors but limited voir dire by requiring the appellant to address his questions to the panel as a whole after noting that the appellant was asking each juror the same questions. We cannot say that the trial court clearly abused his discretion in so limiting voir dire.

The appellant also argues that the traffic tickets he received were defective in that they bore the caption "summons" rather than "citation." Although the appellant asserts that he was denied due process by the defective caption, he does not indicate the manner in which he was prejudiced by being charged by a ticket captioned as a summons. The record shows that the tickets comported with the form prescribed for citations in Ark. R. Crim. P. 5.3 in that they apprised the appellant of the charges

against him, the name of the issuing officer, the date of issuance, the location of the violation, and the place and time where he could appear to have a court date set. The appellant was thus informed of the nature of the offense charged and afforded an opportunity to be heard on that charge, *see Thompson* v. *City of Little Rock*, 264 Ark. 213, 570 S.W.2d 262 (1978), and we hold that the traffic tickets, despite their defective captions, were not so defective as to prejudice the appellant in this case. *See Gullett* v. *State*, 18 Ark. App. 97, 711 S.W.2d 836 (1986).

Finally, the appellant argues that the trial court erred in denying his proposed jury instructions. The record shows that the appellant submitted nineteen jury instructions based on his theory that he travelled the highway as a matter of natural right, and supporting the proposition that such rights cannot be denied by state government. We have reviewed these instructions and find them to be either incorrect or irrelevant. We hold that the trial court did not err in refusing the proffered instructions. *See Rayford* v. *State*, 284 Ark. 519, 683 S.W.2d 911 (1985).

Affirmed.

CRACRAFT and ROGERS, JJ., agree.

MICROSIZE, INC. *v.* ARKANSAS MICROFILM, INC.

CA 89-199 780 S.W.2d 574

Court of Appeals of Arkansas
Division II
Opinion delivered September 27, 1989

Eichenbaum, Scott, Miller, Liles & Heister, P.A., by: *Randel K. Miller*; and *Edwards, McCoy & Kennedy*, by: *J. Mark Ward*, for appellant.

David H. Williams, for appellee.

JAMES R. COOPER, Judge. The appellant, Microsize, Inc., sold the appellee, Arkansas Microfilm, Inc., some equipment referred to as Microsize equipment for a wholesale price of $33,850.00. The appellee paid $20,000.00 down on the equipment and agreed to pay the $13,850.00 balance at a later date. The appellee intended to sell the Microsize equipment to a third party, First National Bank of Conway, for approximately $40,000.00, from which the appellee expected to realize a profit of approximately $10,000.00. The equipment, however, failed to perform to the bank's satisfaction and was returned to the appellee. The appellee then demanded that the appellant take back its equipment and return its down payment of $20,000.00. The appellant refused, and the appellee filed suit. The appellant counterclaimed for the balance of the purchase price. The jury returned a verdict of $20,000.00 in favor of the appellee, but failed to specify whether or not the equipment was to be returned to the appellant. The appellant filed a motion to amend judgment or to grant a new trial to clarify the ownership of the equipment. After a hearing on October 5, 1988, the trial court denied the appellant's motion to amend the judgment or for a new trial. From that decision comes this appeal.

The appellant raises seven points on appeal that may be condensed to the argument of whether the trial court erred in failing to modify the jury verdict or, in the alternative, failing to grant the appellant a new trial. The appellant contends that the jury award of $20,000.00 for the appellee represented a finding by the jury that the appellee was entitled to revoke acceptance of the Microsize equipment it purchased from the appellee and return of its $20,000.00 down payment. The appellee argues the jury verdict represented damages for a finding of breach of contract and it is entitled to keep the equipment in addition to its

$20,000.00 judgment. The dispute arose as to the interpretation of the jury's verdict when the appellant sought the return of the equipment, and the appellee refused. The appellant then filed a motion requesting that the trial court clarify the jury verdict or grant a new trial, but the trial court refused. From our review, we find a new trial should be granted and reverse and remand.

In its complaint, filed August 13, 1986, the appellee pled revocation of acceptance and sought the return of its purchase price of $20,000.00. In an amendment to its complaint, filed February 12, 1987, the appellee pled rejection, revocation of acceptance, breach of warranty, and rescission, and prayed for judgment in excess of $10,000.00. Subsequent amendments filed by the appellee asserted the appellant's negligence as a claim for relief and requested damages of $50,000.00.

At trial, the parties strongly contested the alleged nonconformities of the equipment for the bank's purpose. Our review of the instructions submitted to the jury clearly shows that the jury was instructed under three alternative theories of recovery: revocation of acceptance, breach of warranty, and breach of contract. The jury returned the following verdict: "[w]e, the jury, find in favor of the plaintiff on his complaint against the defendant and assess damages in the sum of $20,000.00. We, the jury, find in favor of the plaintiff on the defendant's counterclaim."

On July 27, 1988, the appellant filed a Motion To Amend And Alter Judgment Or In The Alternative Grant A New Trial. In that motion, the appellant requested the court to "clarify the obvious result of law, which is that title to such equipment resorts back to [appellant] subject to a security interest therein in favor of [appellee] to secure payment of the judgment." On October 5, 1988, after a hearing on the appellant's motion, the court entered an order denying the appellant's request to amend the judgment or for a new trial.

The appellant argues that, since the jury awarded the appellee $20,000.00, which is the same amount that it had paid toward the purchase of the equipment, the only conclusion is that the jury found the appellee was entitled to revoke acceptance. Although we do not agree that this conclusion can be reached without resorting to speculation, we do agree that failure to

indicate whether the equipment was to be retained by the appellee or returned to the appellant rendered the jury verdict so ambiguous that the trial court erred in denying the appellant's motion for a new trial.

Arkansas Code Annotated Section 4-2-608 (1987) governs the remedy of revocation of acceptance under the Uniform Commercial Code. Although this section does not specifically state that the revoked goods are returned to the seller, the comments to this section (*see* Ark. Stat. Ann. Section 85-2-608 (Add. 1961)) assume the goods will be returned. Comment 6 states:

> Under subsection (2) the prior policy is continued of seeking substantial justice in regard to the condition of goods restored to the seller. Thus the buyer may not revoke his acceptance if the goods have materially deteriorated except by reason of their own defects. Worthless goods, however, need not be offered back and minor defects in the articles reoffered are to be disregarded.

Section 4-2-608 (1987) also states that a buyer who revokes acceptance has the same duties with regard to the goods as one who has rejected them. Section 4-2-602 (1987) states in part that, after rejection, any exercise of ownership by the buyer is wrongful as against the seller, and if the buyer has taken physical possession of the goods before rejection, he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them. Moreover, section 4-2-711(3) provides that:

> On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care, and custody and may hold such goods and resell them in a like manner as an aggrieved seller (section 4-2-706).

The comments to this section (*see* Ark. Stat. Ann. Section 85-2-711 (Add. 1961)) also provide:

> Despite the seller's breach, proper retender of delivery under the section on cure of improper tender or

replacement can effectively preclude the buyer's remedies under this section, except for any delay involved.

2. To make it clear in subsection (3) that the buyer may hold and resell rejected goods if he has paid a part of the price or incurred expenses of the type specified. "Paid" as used here includes acceptance of a draft or other time negotiable instrument or the signing of a negotiable note. His freedom of resale is coextensive with that of a seller under this Article except that the buyer may not keep any profit resulting from the resale and is limited to retaining only the amount of the price paid and the costs involved in the inspection and handling of the goods. The buyer's security interest in the goods is intended to be limited to the items listed in subsection (3), and the buyer is not permitted to retain such funds as he might believe adequate for his damages.

If it was the jury's intent to award the appellee damages for revocation of acceptance of the Microsize equipment, then the appellant correctly argues that it is entitled to return of the equipment subject to the appellee's security interest for its $20,000.00 down payment. The appellee asserts that, although it pursued alternative remedies in its pleadings, only breach of warranty and contract claims were submitted to the jury, and the jury was justified in awarding the $20,000.00 figure. This interpretation cannot be affirmed, however, because under either of the appellee's alternative theories, the appellee would not have been entitled to a damage award of the $20,000.00 plus the retention of the equipment.

Under a breach of warranty theory, the measure of damages is the difference in value of the goods received and the value as warranted. Ark. Code Ann. § 4-2-714(2) (1987); *Ozark Kenworth, Inc.* v. *Neidecker*, 283 Ark. 196, 204, 672 S.W.2d 899, 904 (1984). The only evidence presented as to the value of the equipment in the case at bar was a statement by Harold Parks, owner of the appellee, that he did not have any idea what the market value or market price of the Microsize equipment was at the time of trial but the value of it was pretty close to retail in 1985 when it was new. Since this was the only evidence presented, there was insufficient evidence to support a jury award of $20,000.00

for breach of warranty. A buyer cannot recover his down payment under a breach of warranty claim. *Ford Motor Credit Co.* v. *Harper*, 671 F.2d 1117 (8th Cir. 1982).

Although the $20,000.00 jury award could represent the buyer's incidental and consequential damages pursuant to section 4-2-715, the only evidence of these damages was testimony that the appellee could have realized a $10,954.00 profit on the sale of the equipment and that the appellee incurred expenses of $600.00 to $750.00 for its employees' traveling back and forth between Conway. These damages fall far short of the $20,000.000 awarded.

The appellee also pled breach of contract as a theory for relief, and the jury was instructed as follows:

Instruction No. 22

> If you decide for [appellee] on the question of liability against [appellant] for breach of contract, you must then fix the amount of money which will reasonably and fairly compensate [appellee] for the following three elements of damage:
>
> First: Any purchase price paid; plus
>
> Second: Any loss of profits; plus
>
> Third: Any other reasonably forseeable [sic] damages.
>
> Whether either of these three elements of damage has been proved by the evidence is for [the jury] to determine.

This instruction was given over the appellant's objection, who argued it was a common law remedy and the appellee's cause of action was controlled by the Uniform Commercial Code. Although the appellant is correct that this instruction was erroneously given, he has not argued this point on appeal, and therefore, this court must consider the verdict in light of the instructions given. *See Dickson* v. *Delhi Seed Co.*, 26 Ark. App. 83, 96, 760 S.W.2d 382, 290 (1988).

Arkansas Code Annotated § 4-2-714(1) (1987) provides: "[w]here the buyer has accepted goods and given notifica-

tion (Section 4-2-607(3)) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable." This section was formerly codified as Ark. Stat. Ann. Section 85-2-714(1) (Add. 1961). The comments to this section state in part:

> The section on deduction of damages from price provides an additional remedy for a buyer who still owes part of the purchase price, and frequently the two remedies will be available concurrently. The buyer's failure to notify of his claim under the section on effects of acceptance, however, operates to bar his remedies under either that section or the present section.
>
> 2. The "non-conformity" referred to in subsection (1) includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract. In the case of such non-conformity, the buyer is permitted to recover for his loss "in any manner which is reasonable."

The code does not describe what reasonable damages are, but in *Ford Motor Credit Co.* v. *Harper*, *supra*, the buyer was allowed to cancel the contract and recover his down payment because of the failure of the seller to perform according to his obligations under the contract. The court stated:

> The concept of nonconformity "includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract." Ark. Stat. Ann. Section 85-2-714, Comment 2. It is thus apparent that breach of warranty and nonconformity are not entirely congruent concepts; the former being a subset of the latter.

671 F.2d at 1122. *Ford Motor Credit*, however, can be distinguished from the case at bar because, in *Ford Motor Credit*, the seller had possession of the equipment at the time the buyer brought suit, whereas here, the appellee buyer has retained possession of the equipment.

The total amount of damages to which the appellee testified was anticipated lost profits of approximately $10,000.00

and $750.00 in travel expenses. Not only was the appellee awarded the return of his $20,000.00 down payment, but it has also been allowed to keep equipment with a wholesale value of $33,850.00.

> In speaking of the rights of a buyer to recover damages for breach in regard to accepted goods, the *American Law Institute* pamphlet on *Sales and Bulk Sales* by *Williams D. Hawkland*, contains this language:
>
> . . . .
>
> > "We have seen that a buyer who has accepted nonconforming goods does not have an absolute defense to the seller's action for the price if the acceptance has barred his right to revoke his acceptance. His redress, assuming he is not completely barred by lack of proper notice or by agreement, is an action or counterclaim for damages or a recoupment from the price. The recoupment remedy is set out in section 2-717. Under this section, a buyer on notifying the seller of his intention so to do may deduct all or any part of the damages resulting from any breach from any part of the price still due.

Jones v. *Atkins*, 254 Ark. at 475-77, 494 S.W.2d at 450-51. The appellee argues that breach of contract and warranty claims were submitted to the jury and the $20,000.00 award could easily represent the difference between the price the appellee paid and the value of the equipment. However, if the jury intended to award the difference in the value of the equipment and the amount the appellee paid for the equipment, the award should have gone to the appellant. Instead, it went to the appellee, who kept the equipment, for which the appellant has not been fully paid, and, in addition, received a damage award of $20,000.00, when the undisputed evidence of its damages could at best total only $11,704.00. Under a breach of contract remedy, these damages would have to be offset against the remaining purchase price of the equipment. "[I]f the buyer does not reject the goods or timely revokes acceptance, he will be obligated to pay the balance due on the contract price and will be limited to the recovery of damages for breach of warranty." H. Brill, *Arkansas Law of*

Damages Section 30-10 at 447 (1984), relying on Ark. Stat. Ann. Section 85-2-714, *Jones* v. *Atkins*, 254 Ark. 472, 476, 494 S.W.2d 448, 450 (1973).

The appellant correctly argues that, although the appellee submitted its case on different theories of relief under the Uniform Commercial Code, the appellee may only recover under one theory. For this proposition, it cites *Ford Motor Credit Co* v. *Harper*, *supra*. In *Ford Motor Credit*, the appellee, Harper, sought cancellation of his contract to purchase a tractor, return of his down payment, and consequential damages. At the conclusion of the trial, the trial court found there had been a material breach of warranty by the appellant, the contract was declared cancelled, and judgment was entered for Harper for the full amount of his down payment. On appeal, the 8th Circuit Court of Appeals stated:

> At the outset we shall attempt to separate two distinct strands of buyer's remedies under the Code-revocation of acceptance and recovery of damages for breach of warranty—that have been erroneously intertwined by the district court. Under the Code, once goods are accepted buyer is entitled to cancel the contract and recover so much as has been paid only upon establishing that he has justifiably revoked his acceptance. Ark. Stat. Ann. Section 85-2-711. The Code also provides that buyer may recover damages in a suit for breach of warranty in regard to accepted goods. Ark. Stat. Ann. Section 85-2-714. The two options are nonalternative in character and buyer may pursue either remedy or both. Ark. Stat. Ann. Section 85-2-608, Comment 1. They are, however, separate remedies treated in entirely different sections of the Code and they offer separate forms of relief. Accordingly, it does not follow from the district court's legal conclusion of breach of warranty that Harper was entitled to cancellation of the contract and recovery of his down payment.

671 F.2d at 1121 (citations omitted).

In *Ozark Kenworth, Inc.* v. *Neidecker*, *supra*, the appellee, Neidecker, purchased a truck which was represented as a 1978 model from the appellant. Neidecker later discovered the truck was composed of a 1975 or 1976 engine, a 1971 frame, and a 1978

cab. Neidecker had paid $10,500.00 toward the purchase of the truck but, after discovery of the misrepresentation, made all future payments to an escrow account. He also continued to use the truck and incurred $13,388.00 in repair bills. The appellant repossessed the truck, and Neidecker brought suit for fraud and breach of warranty. The jury awarded Neidecker $10,500.00 for breach of express warranty and $13,888.00 for fraud and misrepresentation. On appeal, the Supreme Court held it was proper to refuse to direct a verdict for the appellant under revocation of acceptance where the jury could have found that Neidecker's use of the truck after discovering it had been misrepresented was reasonable. The Court went on to state:

> A problem remains, however, on the issue of revocation, the result of a purely mechanical error, but one which prevented all of Neidecker's damages from being properly presented to the jury. The jury was instructed on what was required to revoke acceptance and that if such revocation were found the buyer could recover so much of the purchase price as had been paid. However, there was no verdict form supplied on which the jury could record such a finding and make an award for recovery of money paid. The $10,500 awarded for breach of warranty suggests that the jury did find revocation as that was the exact amount Neidecker prayed for in his complaint that had been paid to Kenworth. But we can neither make that assumption nor can we correctly hold, as was discussed above, that *any* award was proper under the breach of warranty claim for want of proof. We therefore remand the case for a determination on the issue of revocation and what damages are recoverable if justifiable revocation is found.

Ozark, 283 Ark. at 205, 672 S.W.2d at 905.

In *Thomas Auto Co.* v. *Craft*, 297 Ark. 492, 763 S.W.2d 651 (1989), the appellees attempted to use the *Ozark* case for the proposition that they were entitled to damages for revocation of acceptance and damages for fraud. The Supreme Court stated:

> The Crafts cite *Ozark Kenworth, Inc.* v. *Neidecker*, 283 Ark. 196, 672 S.W.2d 899 (1984), for the proposition that one may recover both restitution of the purchase price and damages for deceit. In that case, there was evidence

> that the purchaser of a defective truck had attempted to revoke acceptance, however, no verdict form which would have permitted recovery on that theory was presented to the jury. The jury awarded damages for breach of warranty and fraud. We reversed the judgment because the court instructed only on "incidental" damages and did not tell the jury the measure of recovery for breach of warranty or for deceit. Clearly, it was not a case in which we approved a restitutionary award of return of the purchase price in addition to a damages award for the difference between the value of the truck as received and its value had it been as represented.
>
> We need not discuss the cases from other jurisdictions cited by the Crafts except to say that in none of them was there a recovery of both the purchase price, based on revocation of acceptance, and compensatory damages for deceit, thus giving the claimant both the benefit of the bargain and the benefit of rescission. Under no circumstances would we permit, over proper objection, both recoveries. Such a double recovery would be unconscionable.

Thomas, 297 Ark. at 497-98, 763 S.W.2d 654.

Thus, in the case at bar, the appellee would not have been allowed the return of its purchase price in addition to retaining the equipment under a breach of contract or breach of warranty theory. Furthermore, despite the appellee's argument that its claim for damages was only submitted on breach of contract and warranty theories, the jury instructions given show that the case was also submitted to the jury on a revocation theory.

In sum, because the verdict rendered by the jury in the case at bar was a general verdict form, it is impossible to positively ascertain the jury's intention in awarding the appellee $20,000.00. It seems reasonable to conclude that the jury was trying to return each party to status quo, especially in light of the speculative nature of the appellee's evidence relative to its entitlement to anticipated lost profits; however, this would be mere speculation on our part, and this Court cannot speculate on how the jury arrived at its award. *Hubbard* v. *Jackson*, 298 Ark.

93, 97, 766 S.W.2d 2, 4 (1989). The jury's award of $20,000.00 added to the appellee's retention of the equipment, which it admits in its brief has a market value of $40,000.00, far exceeds any damages suffered by the appellee and is not supported by the evidence. On review of a trial court's denial of a motion for a new trial, the appellate court determines only if the verdict is supported by substantial evidence. *Barham* v. *Rupert Crafton Comm'n Co.*, 290 Ark. 211, 213, 718 S.W.2d 432, 433 (1986); *Ferrell* v. *Whittington*, 271 Ark. 750, 751, 610 S.W.2d 572, 573 (1981). Because the verdict is not supported by the evidence, this case is reversed and remanded for new trial.

Reversed and remanded.

MAYFIELD and ROGERS, JJ., agree.

Roger WILLIAMS *v.* STATE of Arkansas

CA CR 89-47 781 S.W.2d 37

Court of Appeals of Arkansas
Division I
Opinion delivered September 27, 1989

John Logan Burrow, for appellant.

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

JAMES R. COOPER, Judge. The appellant was charged with theft of property valued in excess of $200.00. He was convicted by a jury of that charge and was found to be an habitual offender. He was sentenced to thirty years in the Arkansas Department of Correction and fined $10,000.00. On appeal he argues that the trial court erred in denying his motion for a directed verdict because the evidence of the value of the property was not given by a qualified expert, but by an employee who testified only as to the marked prices. We affirm.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. Where the sufficiency of the evidence is challenged on appeal of a criminal conviction, we review the evidence, including any inadmissible evidence, prior to consider-

ing 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 of property 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)(2)(A) (1987). According to the record, Ron Carroll, a Fayetteville police officer, was working off-duty as a security agent for Sears on April 18, 1988. He testified that he was watching the monitors for video cameras set up in the store when he noticed the appellant looking around and acting in a manner he deemed suspicious. After taping the appellant's actions, he and another employee, David Bean, entered the menswear department to apprehend the appellant. He saw the appellant get into a waiting car and drive off quickly. He stated that the appellant had taken nine pairs of jeans. The videotape he made, which is not a part of this record, was played for the jury and it purportedly depicts the appellant taking the jeans. Jim Holland, an operating superintendent for Sears, testified that the value of the jeans was $270.94.

At trial, the appellant objected to Jim Holland's testimony, arguing that it was hearsay. At the close of the State's case the appellant moved for a directed verdict because Jim Holland's testimony was based upon "unsubstantial guesses." On appeal it is the appellant's contention that Jim Holland's testimony is inadmissible because it is based on hearsay and because Mr. Holland is not an expert witness. We recently decided the case of *Doby* v. *State*, 28 Ark. App. 23, 770 S.W.2d 666 (1989), and we found that the price tags of stolen clothes were hearsay and were not admissible. In reversing and remanding that case we noted that the price tags were the only evidence of the value. The store manager admitted that he had no knowledge of the value of the items except for the price reflected on the tags. In the present case, Jim Holland testified that he knew the value of the items, that it was part of his job to be familiar with prices of items sold in the store, and that the jeans were sold every day at those prices. His testimony was supported by invoices which the appellant intro-

duced into evidence.

It is not necessary that evidence of value be given by an expert witness. Arkansas Rules of Evidence 701 permits a nonexpert witness to give his opinion when it is rationally based on the perception of the witness and is helpful to a clear understanding of his testimony or an issue of fact. Mr. Holland clearly established a rational basis for his opinion and the value of the stolen items was a central factual issue in the case.

Mr. Holland's testimony regarding the value of the jeans was admissible and the evidence is clearly sufficient to support the appellant's conviction.

Affirmed.

CRACRAFT and ROGERS, JJ., agree.

Farrell ROSS *v.* Karen Annette ROSS (now Reed)

CA 89-142 776 S.W.2d 834

Court of Appeals of Arkansas
Division I
Opinion delivered September 27, 1989

Lohnes T. Tiner, for appellant.

JUDITH ROGERS, Judge. Farrell Ross appeals an order of the Cross County Chancery Court ordering an increase in his child support obligation to appellee, Karen Ross Reed, for the parties' minor child. Appellant argues that the chancellor improperly modified his child support obligation without evidence of changed circumstances. We agree.

The parties were divorced in July of 1985, and the divorce

decree incorporated a property, child support, and child custody agreement, in which appellant agreed to pay $25.00 per week as child support. On November 9, 1988, appellee filed a petition for appellant to be held in contempt for failure to pay $3,150.00 in child support and for an increase in child support according to appellant's present income. The petition also stated:

> That the [Appellant] failed to properly report his Federal Income Tax at the time the parties were husband and wife and the [Appellee] has been required to pay $938.00 by payroll garnishment to the IRS and [Appellant] should be ordered and directed to reimburse the [Appellee] for said tax money; that [Appellee] was totally unaware that the [Appellant] has failed to properly report his income as a used car salesman.

At the hearing on appellee's petition, much evidence was taken as to whether appellant had actually made the child support payments. Appellee attempted to introduce evidence regarding the problem with the Internal Revenue Service but, upon objection by appellant, was not allowed to do so. Appellant testified that his net take-home pay is approximately $159.00 per week but that he does not receive that amount every week. No other evidence was taken regarding the financial circumstances of the parties or the needs of the child.

At the conclusion of the hearing, the court credited appellee's testimony that appellant owed the child support arrearages; found appellant to be in contempt of court and sentenced him to sixty days in jail, with bond set in the amount of the delinquent support; ordered appellant to pay costs and appellee's attorney's fees, and stated:

> The Court can take judicial notice that the fact that the child support is not based on his present income. He has testified that he makes around $160.00 per week and that would call for a child support payment by our Family Support Chart of $40.00 per week. The Court finds that $25.00 is a minimal amount of child support and based on the testimony the child support should be increased in accordance with the chart to $40.00 per week.

Appellant has not appealed the chancellor's findings that he

is in arrears in child support payments or in contempt of court; instead, he argues on appeal that the chancellor erred in increasing his child support obligation without a showing of a change in circumstances. Although appellee attempted to introduce evidence regarding her problems with the Internal Revenue Service which resulted from appellant's alleged failure to report income, she was prevented from doing so because the divorce decree did not deal with that issue. It is true that the child is now several years older than when the original decree was entered. Additionally, we take judicial notice of the fact that, since the parties' 1985 divorce, the Family Support Chart published by the Family Law Section of the Arkansas Bar Association was revised in 1987. Although appellant testified that his net take-home pay is $159.00 per week, there is nothing in the record to suggest that this has changed since the entry of the divorce decree. The evidence also shows that appellee has remarried since the entry of the divorce decree.

Ordinarily, the amount of child support lies within the sound discretion of the chancellor. *Meeks* v. *Meeks*, 290 Ark. 563, 565, 721 S.W.2d 653, 654 (1986). Child support may be reviewed by the trial court at any time, and the chancellor may modify a provision of child support to serve the best interests of the child when there are changed circumstances. *Id.* The assumption, however, is that the chancellor correctly fixed the proper amount in the original divorce decree; one seeking modification has the burden of showing a change in circumstances. *Reynolds* v. *Reynolds*, 299 Ark. 200, 201, 771 S.W.2d 764, 765 (1989); *Meeks*, 290 Ark. at 565, 721 S.W.2d at 655. In *Reynolds*, 299 Ark. at 202, 771 S.W.2d at 765, the supreme court stated:

> In determining whether there has been a change in circumstances warranting adjustment in support, the court should consider remarriage of the parties, a minor reaching majority, change in the income and financial conditions of the parties, relocation, change in custody, debts of the parties, financial conditions of the parties and families, ability to meet current and future obligations, and the child support chart. *Thurston* v. *Pinkstaff*, 292 Ark. 385, 730 S.W.2d 239 (1987). However, there is no hard and fast rule concerning the specific nature of the changed circumstances. *Eubanks* v. *Eubanks*, 5 Ark. App.

50, 632 S.W.2d 242 (1982).

In the case bar, the chancellor relied upon the Family Support Chart in relation to appellant's net take-home pay to determine the increased child support obligation. The chancellor did not, however, have any evidence before him demonstrating a change in circumstances since the entry of the divorce decree. Although the courts are required to refer to the family support chart, "[t]here are numerous other matters which have a strong bearing in determining the amount of support. It is error to change the amount of support where there is no evidence submitted to show a change in circumstances." *Thurston* v. *Pinkstaff*, 292 Ark. 385, 388-89, 730 S.W.2d 239, 240-41 (1987).

We note that, in keeping with the requirements of the federal Family Support Act of 1988, the Arkansas General Assembly recently amended Ark. Code Ann. Section 9-12-312(a) (Supp. 1987) in Act 948 of 1989 by requiring the chancellor to refer to the family support chart in reviewing the amount of support and stating:

> It shall be a rebuttable presumption for the award of child support, that the amount contained in the family support chart is the correct amount of child support to be awarded. Only upon a written finding *or specific finding on the record* that the application of the support chart would be unjust or inappropriate as determined under established criteria set forth in the support chart, shall the presumption be rebutted.

In the case at bar, however, appellee failed to prove a change in circumstances since the original decree. When support has been previously set in a decree, a change of circumstances must be found before the above statute is applicable. In this case, however, a change was not found by the chancellor, and we therefore hold that he had insufficient evidence upon which to base the increase in appellant's child support obligation and abused his discretion in modifying it. This decision is, of course, without prejudice as to appellee's right to seek increased child support in the future.

Reversed.

CRACRAFT and COOPER, JJ., agree.

Raymond Randy GREEN *v.* STATE of Arkansas

CA CR 89-5 777 S.W.2d 225

Court of Appeals of Arkansas
Division I
Opinion delivered October 4, 1989

Davis H. Loftin, Public Defender, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case received a suspended imposition of sentence on July 1, 1981. On August 4, 1986, he was convicted on a separate charge and

sentenced to eight years in the Arkansas Department of Correction. On the same day, a revocation hearing based on the latter conviction was held, and a ten-year sentence was imposed. In *Green* v. *State*, 21 Ark. App. 80, 729 S.W.2d 17 (1987), we affirmed the appellant's conviction which resulted in the eight-year sentence but we reversed the revocation of the suspended imposition of sentence on the ground that the trial judge should have recused, and we remanded for a new revocation hearing. After a hearing held on February 24, 1988, the suspended imposition of sentence was again revoked and the appellant was sentenced to ten years in the Arkansas Department of Correction. From that decision, comes this appeal. We affirm.

The appellant first contends that the petition to revoke was untimely. He asserts that under Ark. Code Ann. § 5-4-310 (1987), the State's petition to revoke should have been heard within sixty days of the mandate issued by this Court on May 13, 1987, reflecting that his revocation had been reversed. Although the record shows that the revocation hearing was not held until February 24, 1988, more than sixty days after our mandate was issued, we find no error. First, § 5-4-310 makes no mention of an appellate court mandate, but instead provides that the sixty-day period begins on the date of the defendant's arrest. Second, the purpose of the sixty-day limitation period is to prevent a defendant from being detained in jail for an unreasonable time while awaiting a revocation hearing. *Phillips* v. *State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986). In cases such as the case at bar, where the appellant was already incarcerated on another charge while awaiting the revocation hearing, the limitation loses its meaning. *Id.* We hold that the appellant was not prejudiced by the revocation hearing held more than sixty days after the issuance of the appellate mandate.

Next, the appellant asserts error based on the State's failure to serve him with notice of the revocation hearing as required by Ark. Code Ann. § 5-4-310(b)(3) (1987), which provides that:

> The defendant shall be given prior written notice of the time and place of the revocation hearing, the purpose of the hearing, and the condition of suspension or probation he is alleged to have violated.

The record shows that the appellant was given proper notice of the

revocation hearing of August 4, 1986, but there is no evidence that he was given written notice of the revocation hearing of February 24, 1988, from which he brings this appeal. However, we find that the evidence is sufficient to support a finding that the appellant had received actual notice of the time at which the revocation hearing was to be held, and that the notice of the prior hearing adequately apprised him of the purpose of the hearing and the condition of suspension he was charged with violating. The appellant was transported to Crittenden County on February 4, 1988, twenty days before the revocation hearing took place. At the hearing the appellant's attorneys both stated that they had spoken with the appellant on the telephone and that they were familiar with the case. Neither attorney claimed surprise, and we note that the sole basis for the 1988 revocation hearing was identical to the allegations heard by the court in 1986, i.e., the new eight-year sentence in the 1986 charge. The appellant, however, indicated that he required three or four days to confer with his attorneys and to research the law relating to his case, and asked for a continuance. The trial court denied the request and proceeded with the revocation hearing.

In *Reynolds* v. *State*, 282 Ark. 98, 666 S.W.2d 396 (1984), the Supreme Court found no error in the failure to provide statutory written notice of the time and place of a revocation hearing where the appellant had received actual notice and did not move for a continuance. We think that the evidence in the case at bar is sufficient to show that the appellant had actual notice. Moreover, in *Jared* v. *State*, 17 Ark. App. 223, 707 S.W.2d 325 (1986), we held that the trial judge in a revocation proceeding did not abuse his discretion in denying a motion for continuance on the ground that the appellant's attorney was appointed only one day before the hearing where Jared's counsel was familiar with the facts of the case. The case at bar presents similar circumstances in that the appellant's attorney stated at the hearing that he was not unfamiliar with the facts of the case, and that his office had proceeded on this matter once before. We hold that the trial judge did not abuse his discretion in denying the request for continuance, *see Jared, supra*, and that the appellant was not prejudiced by the State's failure to provide written notice of the revocation hearing. *Reynolds* v. *State, supra.*

We next address the appellant's contention that the

suspended sentence he received in 1981 was a suspended execution of a ten-year sentence, rather than a suspended imposition of sentence for a period of ten years. He argues that the trial court lacked authority to sentence him to a "new" ten-year sentence at the revocation hearing. We do not agree. The appellant's argument is based on a conflict between two documents: an "order of suspension, suspending imposition of sentence, or of probation," dated July 1, 1981, which provides that "[d]efendant is sentenced to a term of 10 years . . . of which 10 years is suspended," and a judgment, filed July 9, 1981, stating that the appellant's guilty plea had been accepted "and that the imposition of sentence is suspended for a period of ten (10) years. . . ." The judgment clearly indicates that it was imposition of sentence which was suspended. The "order of suspension" dated July 1, 1988, is a multi-purpose form on which the type and duration of sentence is indicated by filled-in blanks, and which includes a statement of the conditions of suspension. We think this "order of suspension" is analogous to the statement of conditions discussed in *Smith* v. *State*, 18 Ark. App. 152, 713 S.W.2d 241 (1986), and we hold that, between these conflicting indications of the sentence imposed, the judgment is controlling. *Id.; see Hunter* v. *State*, 278 Ark. 428, 645 S.W.2d 954 (1983). Because the judgment merely suspends imposition of sentence for a ten-year period, the trial judge was authorized upon revocation to sentence the appellant to ten years imprisonment, a term within the range of sentences which could have been imposed originally for aggravated robbery, the offense on which the suspended imposition was based. Ark. Code Ann. § 5-4-309 (1987); Ark. Stat. Ann. § 41-901 (Repl. 1977).

Finally, the appellant contends that the trial court erred in failing to grant credit for time he spent in custody awaiting trial on the aggravated robbery charge that resulted in the suspension. We do not reach this issue because, although the appellant states in his brief that he spent 236 days in jail awaiting trial on the aggravated robbery charge, no such evidence appears in the record of the hearing, and the argument now advanced on appeal was not made to the trial judge. We do not consider issues raised for the first time on appeal, and we do not reverse the trial judge on facts outside the record. *Dillard* v. *State*, 20 Ark. App. 35, 723 S.W.2d 373 (1987).

Affirmed.

CRACRAFT and ROGERS, JJ., agree.

Christi MARLER *v.* Darrell BINKLEY

CA 89-71 776 S.W.2d 839

Court of Appeals of Arkansas
Division I
Opinion delivered October 4, 1989

David R. Goodson, for appellant.

JAMES R. COOPER, Judge. The parties were divorced on November 9, 1978 and the appellant, Christi Marler, was awarded custody of their ten-year-old daughter, Jennifer. The appellee was awarded visitation with Jennifer on alternate weekends, as well as three weeks in the summer and on alternate holidays. On May 7, 1988, the appellant filed a petition alleging that the appellee had been physically abusing the child during visitation and she requested that visitation be suspended until a hearing could be held. The trial court entered a temporary order which reduced the appellee's visitation to two hours on alternate

weekends and further ordered that visitation take place at the appellant's home. After a hearing on September 25, 1988, the trial court reinstated the appellee's visitation rights and found insufficient evidence to justify modifying the decree. While the order specifically stated that there was no evidence of excessive force, it did restrain the appellee from using corporal punishment. On appeal, the appellant argues that the trial court erred in finding insufficient evidence to justify modification of visitation. We affirm.

The polestar consideration for making judicial determinations concerning custody and visitation is the best interest of the child. *Welch* v. *Welch*, 5 Ark. App. 289, 635 S.W.2d 303 (1982). Important factors to be considered in determining reasonable visitation are the wishes of the child, the capacity of the party desiring visitation to supervise and care for the child, problems of transportation and prior conduct in abusing visitation, the work schedule or stability of the parties and the relationship with siblings and other relatives. *Id.*

While chancery cases are tried *de novo* on appeal, the chancellor's decision will not be reversed unless it is shown that his decision is clearly against the preponderance of the evidence. *Carter* v. *Carter*, 19 Ark. App. 242, 719 S.W.2d 704 (1986). Because there are no cases in which the superior position, ability, and opportunity of the chancellor to observe the parties and their witnesses carry as great a weight as one involving the custody of children, we defer to the chancellor's determination as to the credibility of the witnesses. *Id.* While a child's preference is certainly to be considered, it is not binding on the court. *Anderson* v. *Anderson*, 18 Ark. App. 284, 715 S.W.2d 218 (1986). The burden is on the party seeking a change in custodial orders to prove a subsequent material change in circumstances justifying the change. *Id.*

The records reveals that when Jennifer was in the fourth grade her grades began to fluctuate widely and on one occasion she began crying uncontrollably in school. Jennifer testified that she began crying because the guidance counselor was talking to her class about child abuse and she believed that the appellee was abusing her. She stated that the appellee had whipped her "every weekend since Christmas" that she was with him. Jennifer said

that she did not want to go and visit her father anymore.

The appellee admitted that he had spanked Jennifer three or four times and that he used a paddle, with the exception of one time, when he spanked her with a stick she had just broken after being told not to break it. The appellee explained that she was spanked twice because she did the opposite of what she had been told to do and once when she left her coat at church. The appellee also stated that he believed the appellant had interfered with his relationship with his daughter. Jennifer began calling him Darrell instead of Dad and had become defiant and would not obey him. The appellant's husband, Randy Marler, told the appellee that Jennifer was his child, not the appellee's, and that he was going to adopt her.

The appellant admitted that she wanted Randy to adopt Jennifer, that Jennifer knew her feelings about it, that Jennifer used the surname Marler, and that she considered Randy to be more of a father to Jennifer than the appellee. She stated that Jennifer was afraid of the appellee and since the temporary order restricting visitation, Jennifer's grades and behavior had improved.

Several other witnesses testified on the behalf of both parties. The essence of that testimony was that both the appellant and the appellee love Jennifer, take good care of her, and provide her with good homes.

On this evidence we simply cannot say that the chancellor erred in finding that there was no material change in circumstances justifying a modification of visitation. Clearly both parties were involved in behavior that was not in Jennifer's best interest, but none of that behavior amounted to abuse. Further, the chancellor's order gave explicit directions to the parties concerning such behavior. Although the chancellor specifically found no evidence that the appellee had used excessive force on the child, he enjoined him from using corporal punishment on her in the belief that it would help Jennifer change her negative feelings about the appellee. He also ordered the appellant to instruct Jennifer to address the appellee as her father, and to refrain from referring to her step-father as father. Finally, he ordered the appellant not to discuss the subject of adoption either with Jennifer or in her presence. These orders were clearly

appropriate to deal with the allegations presented to the chancellor.

Undoubtedly, there are cases in which circumstances warrant the termination of a parent's visitation rights. However, such action is a drastic one which our trial courts have cautiously employed and which our appellate courts have critically reviewed. *Hawn* v. *Hawn*, 8 Ark. App. 69, 648 S.W.2d 819 (1983). We find no error in the chancellor's decision and affirm.

Affirmed.

CRACRAFT and ROGERS, JJ., agree.

FIRST STATE BANK & TRUST CO., Executor of the Estate of Kay Carroll, Deceased *v.* Dewayne SLEDGE

CA 89-146 777 S.W.2d 227

Court of Appeals of Arkansas
Division I
Opinion delivered October 4, 1989

[redacted]

Phil Stratton and *Casey Jones*, by: *Phil Stratton*, for appellant.

Brazil, Clawson & Adlong, by: *William Clay Brazil*, for appellee.

MELVIN MAYFIELD, Judge. Appellant brings this appeal from the Faulkner County Circuit Court's dismissal of its complaint against appellee to collect $2,500.00 alleged to be owed the estate of Kay Carroll.

The evidence is not in dispute. An officer of appellant bank, testified that the bank was appointed guardian of Kay Carroll in February of 1987. After this suit was filed, Ms. Carroll died. The bank was then appointed executor of her estate and timely revived the suit against the appellee. The bank officer testified that a check dated June 30, 1986, was found among Ms. Carroll's papers. The check is signed by Kay Carroll, is made payable to appellee for $2,500.00, has the word "loan" written on the memo line on the front of the check, and has stamped information on the back which indicates it was paid by the bank. The bank officer also testified that, prior to the bank's assuming guardianship, he did not know Ms. Carroll and had no knowledge of her business affairs. He testified that he did not have any knowledge about the circumstances surrounding the check and did not know whether she loaned appellee any money. Appellant then rested its case, appellee moved to dismiss for failure to present a *prima facie* case, and the court granted the motion.

[redacted] Appellant urges that the dismissal was erroneous because the introduction of the check into evidence constituted *prima facie* evidence of debt and shifted to appellee the burden of going forward with evidence to avoid the *prima facie* case made by appellant. We do not agree. In order for the check to be actionable, as appellant contends, it had to be in the nature of a note. However, "[a]n instrument cannot be a note unless it contains an absolute and unconditional promise to pay money." *Pack* v. *Hill*, 18 Ark. App. 104, 106, 710 S.W.2d 847, 849 (1986), citing *Parker* v. *Pledger*, 269 Ark. 925, 930-31, 601 S.W.2d 897, 900 (Ark. App. 1980). Also, under our Uniform Commercial Code a "promise" is "an undertaking to pay" but it "must be

more than an acknowledgment of an obligation." *See* Ark. Code Ann. § 4-3-102(1)(c) (1987).

The appellant relies upon *Carpenter* v. *Schneider*, 22 Ark. App. 184, 737 S.W.2d 656 (1987), but we think this case differs considerably from *Carpenter*. In *Carpenter*, there was a check signed by Schneider, made payable to Carpenter, and it was admitted by Carpenter that he had cashed the check. However, Carpenter also testified that the check was a portion of a sum to be advanced by Schneider for them to go into business together, and he said he had repaid Schneider the amount of the check. We held that the trial court was correct in holding that Carpenter had the burden of proving his affirmative defense of payment, and the trial court's finding that this burden had not been met was not clearly against a preponderance of the evidence. In the case at bar, the cancelled check, with the word "loan" thereon, is simply not enough to make a *prima facie* case against the appellee.

In *Green* v. *Gowen*, 279 Ark. 382, 652 S.W.2d 624 (1983), the Supreme Court of Arkansas said:

> In determining on appeal the correctness of the trial court's action concerning a motion for a directed verdict by either party, we view the evidence that is most favorable to the party against whom the verdict is sought and give it the highest probative value, taking into account all the reasonable inferences deducible from it. The motion should be granted only if the evidence so viewed would be so insubstantial as to require a jury verdict for the party to be set aside. *Pritchard* v. *Times Southwest Broadcasting, Inc.*, 277 Ark. 458, 642 S.W.2d 877 (1982).

The case at bar was tried by the judge without a jury. The sufficiency of the evidence was raised by a motion to dismiss made at the conclusion of the appellant's evidence. This was in keeping with Ark. R. Civ. P. 50(a) and should have been granted if the appellant's evidence was so insubstantial that a jury verdict for appellant would have to be set aside. *Suzuki of Russellville, Inc.* v. *Mid-Century Ins. Co.*, 14 Ark. App. 304, 688 S.W.2d 305 (1985). Under the law and evidence as above discussed, we agree that the trial court was correct in granting appellee's motion to dismiss the appellant's complaint.

Affirmed.

COOPER and ROGERS, JJ., agree.

BALDOR ELECTRIC COMPANY and Northbrook Indemnity Company *v.* James JONES

CA 89-104 777 S.W.2d 586

Court of Appeals of Arkansas
Division I
Opinion delivered October 11, 1989
[Supplemental Opinion on Denial of Rehearing
November 15, 1989.]

Hardin, Jesson & Dawson, by: *Robert M. Honea*, for appellants.

Hixson, Cleveland & Rush, by: *R.H. "Buddy" Hixson*, for appellee.

JAMES R. COOPER, Judge. Subsequent to three separate surgical incisions, the appellee suffered a hernia along the incision line located immediately above his abdomen. Alleging that the hernia was caused by heavy lifting associated with his employment, the appellee filed a claim for workers' compensation. The administrative law judge found that the appellee's incisional hernia was subject to the provisions of Ark. Code Ann. § 11-9-523 (1987), and because the appellee had not met the conditions outlined in that section, he was not eligible for compensation. The appellee appealed to the full Commission. The Commission found that the appellee's hernia was not a hernia within the meaning of § 11-9-523 and also found that the appellee had shown a causal connection between the injury and his employment. The Commission then remanded the matter to the administrative law judge with instructions to take such additional evidence that may be necessary in order to determine the full extent of any benefits to which the appellee is entitled. The appellants appeal, arguing that the Commission erred in finding that the appellee's injury was not subject to § 11-9-523.

We dismiss because the order appealed from is not 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. *Samuels Hide & Metal Co.* v. *Griffin*, 23 Ark. App. 3, 739 S.W.2d 698 (1987); *Lloyd* v. *Potlatch Corp.*, 19 Ark. App. 335, 721 S.W.2d 670 (1986). It is a general rule that orders of remand are not final and that workers' compensation orders are ordinarily reviewable only at the point where they award or deny compensation. *Gina Marie Farms* v. *Jones*, 28 Ark. App. 90, 770 S.W.2d 680 (1989); *Hope Brick Works* v. *Welch*, 27 Ark. App. 90, 768 S.W.2d 37 (1989).

In the present case, the administrative law judge has been ordered to take additional evidence and determine benefits. Addressing some of the issues at this point would constitute piecemeal litigation. As we noted in *Gina Marie Farms, supra*,

we follow the better practice of reviewing only Commission orders that are final and we will dismiss on our own motion those cases lacking a final appealable order.

During oral argument of this case, it was pointed out to us that under Ark. Code Ann. § 11-9-711 (1987) a compensation order or award becomes final unless it is appealed from within thirty days. It was argued that failing to file an appeal in a case where there is some doubt as to the appealability of the order could lead to malpractice. It was also argued that there is some confusion as to what is and what is not an appealable order.

An order which is remanded to the administrative law judge for the taking of additional evidence and which does not award compensation or any monetary benefits, as in this case, is not a final appealable order. There are some situations where the Commission retains jurisdiction, yet the order entered may be a final order. For example, in *Luker* v. *Reynolds Metals Company*, 244 Ark. 1088, 428 S.W.2d 45 (1968), the Commission retained jurisdiction to determine the healing period and the amount of permanent disability and that order was held to be a final order. The Court stated that the determinations made by the Commission 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. Although in the present case the Commission found a causal connection between the employment and the injury, the extent of liability has not been determined. There has been no determination of healing period, disability, or reasonable medical expenses. In other words, in order to be a final order, the order must either deny or award some compensation, and until that occurs an order is not appealable.

Dismissed.

CRACRAFT and ROGERS, JJ., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
NOVEMBER 15, 1989

782 S.W.2d 373

Hardin, Jesson & Dawson, by: *Rex M. Terry*, for appellant.

Hixson, Cleveland & Rush, by: *R.H. "Buddy" Hixson*, for appellee.

JAMES R. COOPER, Judge. We dismissed this Workers' Compensation case because the order appealed from was not a final order in accordance with Ark. R. App. P. 2. *See Baldor Electric Co.* v. *Jones*, 29 Ark. App. 80, 777 S.W.2d 586 (1989). The appellants have filed a petition for rehearing arguing that appeals from the Commission are not governed by the Arkansas Rules of Appellate Procedure, but instead are governed by Ark. Code Ann. § 11-9-711(b) (1987). The appellants argue that, because Rule 2 of the Rules of Appellate Procedure states that an appeal "may be taken from a circuit, chancery, or probate court," the rule is not binding in appeals from the Commission. The appellants also argue that under § 11-9-711(b), finality of the order is not prerequisite to appeals from the Commission.

However, that same statute also states in part, "Appeals from the Commission to the Court of Appeals *shall be allowed as in other civil cases* . . . ." Ark. Code Ann. § 11-9-711(b)(2) (1987) (emphasis added). Clearly, this statute indicates that appeals from the Commission are to be taken in the

same manner as appeals in civil cases, and Rule 2 clearly applies to appeals from the Commission.

Because this court is an appellate court, in order to invoke jurisdiction the order appealed from must be final. *Samuels Hide and Metal Co.* v. *Griffin*, 23 Ark. App. 3, 739 S.W.2d 698 (1987). We simply do not have jurisdiction to hear the merits of the appellants' appeal in the absence of a final order.

The appellants also contend that there would be substantial judicial economy in deciding the merits of this case because our ruling "guarantees another appeal." However, it is precisely because of judicial economy that we do not hear piecemeal litigation.

Rehearing denied.

Randall MIDDLETON *v.* STATE of Arkansas

CA CR 89-41 780 S.W.2d 581

Court of Appeals of Arkansas
Division I
Opinion delivered October 11, 1989

Martin Law Firm, P.A., by: *Thomas A. Martin*, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was convicted of DWI, second offense, in the Municipal Court of Newton County. After a *de novo* jury trial in the Newton County Circuit Court, the appellant was again convicted of that offense, fined $3,000.00, and sentenced to seven days in the Newton County jail. From that decision, comes this appeal.

No breathalyzer or blood test was performed on the appellant, but the arresting officer did perform various field sobriety tests. The field tests included a gaze nystagmus test, which is intended to determine impairment based on the reaction of the subject's eyes to certain stimuli. At trial, the State qualified the arresting officer as an expert and elicited testimony from him based on the gaze nystagmus test to show that the appellant's alcohol level was .15 or .16. The appellant objected to the officer's qualifications as an expert, to the validity and accuracy of the test, and to testimony assigning an alcohol level based on the test results. After the latter testimony was admitted, the appellant moved for a mistrial. His motion was denied. On appeal, he argues that the trial court erred in denying his motion for a mistrial, and erred in giving an expert witness instruction to the jury. We reverse.

We first note that the appellant failed to preserve for appeal any error which may have resulted from the expert witness instruction being given to the jury. An argument for reversal will not be considered in the absence of an appropriate objection in the trial court; to be considered appropriate, an objection must be made at the first opportunity. *Dillard* v. *State*, 20 Ark. App. 35, 723 S.W.2d 373 (1987). The record shows that the appellant made no objection to the jury instruction until after the jury had returned a guilty verdict. The objection was untimely and, therefore, this issue has not been preserved for appeal.

The only remaining issue is whether the trial court erred in denying the appellant's motion for a mistrial. The appellant

argues that the gaze nystagmus test results were improperly admitted because they compelled a finding of guilt by the jury, and that the test results were inadmissible for any purpose because there was no foundation laid to establish the reliability, accuracy, and validity of the gaze nystagmus test. We need address only the latter contention, because we find it to be both meritorious and dispositive.

The traditional standard for determining the admissibility of novel scientific evidence derives from the seminal case of *Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923), which required a showing that the scientific principle or discovery had been generally accepted in the particular field to which it relates. However, this "general acceptance" standard is not found in the Arkansas Rules of Evidence, and the Arkansas Supreme Court has cited the *Frye* case only recently. In *Rock* v. *State*, 288 Ark. 566, 708 S.W.2d 78 (1986), *vacated on other grounds* 483 U.S. ___, 107 S. Ct. 2704 (1987), the Court declined to decide whether to employ the *Frye* test or an analysis based entirely on the Arkansas Rules of Evidence because the Court found the hypnotically-induced testimony at issue in *Rock* to be inadmissible under either approach. *Rock* v. *State*, 288 Ark. at 570. Although it is unclear whether some form of the *Frye* test may be applicable in Arkansas, *see Dumond* v. *State*, 294 Ark. 379, 743 S.W.2d 779 (1988), we need not decide this issue because, like the Supreme Court in *Rock*, we conclude that the foundation for the scientific evidence in the case at bar was inadequate under either the *Frye* test or the Arkansas Rules of Evidence.

The appellant does not argue on appeal that the arresting officer had insufficient training or experience to administer the gaze nystagmus test, but instead contends only that the test itself is invalid. We need not decide whether or not gaze nystagmus tests are *per se* inadmissible, however, because the record shows that the arresting officer's testimony was insufficient to provide an evidentiary foundation for admission of the test results. The officer, Jerry Watts, testified that he had training and experience in the administration of various field sobriety tests, including the gaze nystagmus test. After Officer Watts described the procedure involved in administering the gaze nystagmus test, the following exchange took place:

Q. Where did you learn about this test?

MR. MARTIN: Your Honor, again, I object, same objection. It is not a scientific test and it's being put on as such.

THE COURT: Objection will be overruled.

A. First from my field training officer, when I was riding with him, and later on at basic police school. Then we brushed on it at state police school, but we didn't get into much depth there.

Q. Now, is this a test, then, that they provided you training in?

A. Yes.

Q. Was it a test that they recommended or asked that you use?

A. Yes, sir.

Q. Any why is — what is significant about that test over some other tests?

MR. MARTIN: Objection, your Honor. He can testify as to the results of the test.

THE COURT: Objection will be overruled.

A. The test is designed to be able to detect DWI whether they're on alcohol or on drugs. It's a test that's used basically nationwide now. It's a test that don't [sic] fail after you learn how to —

MR. MARTIN: Your Honor, I object, that's totally uncalled for. That's exactly the kind of testimony I was trying to keep out, a test that does not fail.

THE COURT: You'll have an opportunity to cross examine, Mr. Martin. The objection will be overruled.

Q. *Why is it the test is considered so reliable and so useful?*

A. *It was scientifically devised. I'm not sure about all the expert testimony.*

> MR. MARTIN: Judge, He's obviously not an expert. He's just trying to bolster his own testimony with self-serving nonsense.
>
> THE COURT: Objection will be overruled.

(Emphasis supplied).

Subsequently, Officer Watts testified over objection that the appellant's performance on the gaze nystagmus test indicated an alcohol rating of .15 or .16. The appellant's motion for mistrial was denied. On cross-examination regarding the scientific basis for the gaze nystagmus test, Officer Watts was able to add only that it had been scientifically validated by "one of the universities out in California," but he was unable to name the institution which had performed the study or to otherwise offer support for his testimony that the test had been scientifically validated.

On this record, we think it apparent that Officer Watts' testimony was insufficient to establish that gaze nystagmus testing is reliable and generally accepted in the scientific community. Moreover, we find that any probative value that the gaze nystagmus test results may have had to show an alcohol level in excess of .10 was substantially outweighed by the potential for unfair prejudice under the facts of this case. *See* Ark. R. Evid. 403; *see also Rock* v. *State, supra.* The jury was given an instruction defining the offense of DWI as being in control of a vehicle with an alcohol level of .10 or above, and the only evidence of the appellant's alcohol level was Officer Watts' testimony based on the gaze nystagmus test. Moreover, we think it noteworthy that Ark. Code Ann. § 5-65-103(b) (1987) defines the offense as operating or being in actual, physical control of a motor vehicle:

> if at that time there was one-tenth of one percent (0.10%) or more by weight of alcohol in the person's blood as determined by a chemical test of the person's blood, urine, breath, or other bodily substance.

The gaze nystagmus test which formed the basis for the officer's testimony was performed by moving a pen across the appellant's field of vision to gauge the reaction of his eyes to this stimulus, and was therefore not a "chemical" test of a bodily substance. Under these circumstances, the admission of testimony fixing the

appellant's alcohol level at .15 or .16 was manifestly prejudicial, and we hold that the trial court erred in denying the appellant's motion for mistrial. *See Dillard* v. *State*, 20 Ark. App. 35, 727 S.W.2d 373 (1987). We reverse and remand.

Reversed and remanded.

CRACRAFT and ROGERS, JJ., agree.

Willie Kent GRIMMETT *v.* ESTATE OF Ruby G. BEASLEY

CA 89-59 777 S.W.2d 588

Court of Appeals of Arkansas
Division II
Opinion delivered October 11, 1989

Matt Keil, for appellant.

Edward F. Cochran, for appellee.

JOHN E. JENNINGS, Judge. This case is a dispute, in probate court, over the ownership of a 120 acre farm in Lafayette County, Arkansas. Appellant, W.K. Grimmett, Jr., is one of the nephews of Ruby G. Beasley. The issues presented are the legal effect of a deed executed by Mrs. Beasley to W.K. Grimmett, Sr., and his wife, Violet, and whether that deed had been delivered. The chancellor found that the deed, by its own terms, conveyed nothing until Mrs. Beasley's death and also found that there was no delivery. We reverse and remand.

W.K. Grimmett, Sr., was the brother of Ruby Beasley and the father of the appellant here. Sometime during the mid-1970's W.K. Grimmett, Sr., began working his sister's 120 acre farm. In July of 1974, Mrs. Beasley paid approximately $5,000.00 for a John Deere tractor. The purchase order lists both W.K. Grimmett, Sr., and Ruby Beasley as purchasers but was signed by Mr. Grimmett only. The tractor was delivered to Mr. Grimmett at the farm.

The appellant testified that in mid-March of 1975, Mrs. Beasley came to his parents' house. At this point it is necessary to explain that three versions of the deed in question appear in the transcript. The typewritten language of each deed is identical. Each purports to convey the 120 acre farm and the John Deere tractor to W.K. Grimmett, Sr., and his wife, Violet. Each contains the clause: "This deed is to become effective upon the death of the grantor herein." The copy of the deed referred to at trial as the "original" is signed by Mrs. Beasley, dated March 12, 1975, and notarized. It apparently has never been filed for record in the county deed records. This deed was found by Mr. Kelley, Mrs. Beasley's lawyer, after her death in her personal effects.

The deed introduced as Plaintiff's Exhibit 3 bears Mrs. Beasley's original signature, but is not notarized or dated, except for the year, 1975. This deed was found in Violet Grimmett's safety deposit box at the Bank of Bodcaw after her death in 1985. (W.K. Grimmett, Sr., died in 1984.)

The deed introduced into evidence as Plaintiff's Exhibit 4 also appears to bear Mrs. Beasley's original signature, is dated March 12, 1975, but again is not notarized. This deed was found in a lock box in a closet at the W.K. Grimmett, Sr., home after Violet Grimmett's death.

The appellant testified that in mid-March of 1975, Mrs. Beasley came to his parents' house with the "original" deed. He testified that his parents had that deed in their possession on that day and that Mrs. Beasley took it with her when she left, saying she would put it in her lock box at the Bodcaw Bank, and left them with a "copy." Appellant also testified that it was common knowledge that Mrs. Beasley intended for the farm to eventually pass to him and then on to his own son, Vince Grimmett. He testified that she encouraged him and his wife to build a house on the farm. Lelia Boulware, Wilma Wilbanks, and Alma Hairr all testified that Mrs. Beasley wanted the farm to go, eventually, to W.K. Grimmett, Jr.

Mr. William Kelly, an attorney, testified that he drafted Mrs. Beasley's last will, which was dated June 10, 1983. The will contained a provision leaving the 120 acre farm in question to W.K. Grimmett, Sr., and his wife and made the two of them the residuary beneficiaries for her estate. When Mrs. Beasley died in 1987, W.K. Grimmett, Sr., and his wife had predeceased her; therefore, the devise lapsed. *See Eckert Heirs* v. *Harlow, Ex'r.*, 251 Ark. 1018, 476 S.W.2d 244 (1972).

Mr. Kelly testified that he advised Mrs. Beasley that she still owned the farm and he said that she wanted to maintain ownership of it in case she ever needed money for medical expenses. Mrs. Beasley paid property taxes and the insurance on the farm, and Mr. Kelly testified that she collected $600.00 a year as rent on the farm. He also said that she paid personal property taxes on the tractor and took its depreciation as a tax deduction. He testified that he found the notarized deed in Mrs. Beasley's effects after her death. Kelly testified that Mrs. Beasley told him

she had not "delivered" the deed, but he also testified that he assumed it had not been delivered because it had been found in her belongings after her death. He was unaware of any other versions of the deed. He also testified that by the deed she was attempting to reserve a life estate.

Billy Grimmett, another of Mrs. Beasley's nephews, testified that Mrs. Beasley once said, "y'all will own the farm." Bobby Grimmett, another nephew, testified that Mrs. Beasley gave him the impression that she still owned the farm.

After having heard this evidence, the chancellor held that the deeds, "by their own terms, do not convey anything until [Mrs. Beasley's] death." It appears from the judge's comments from the bench that he believed W.K. Grimmett, Jr.'s testimony that Mrs. Beasley had passed the "original" deed around to Mr. Grimmett, Sr., and his wife before Mrs. Beasley left with it in her possession. But it is also apparent that the court relied on the fact that the notarized deed was found in Mrs. Beasley's possession after her death and that she had continued to pay taxes and insurance on the property during her lifetime in arriving at his conclusion that there had been no delivery.

We are persuaded that the chancellor was mistaken in his view of the law applicable to the facts in the case at bar. The chancellor's statement that the language of the deed in question conveys nothing until the grantor's death runs afoul of the holdings of the Arkansas Supreme Court. *See, e.g., Lindsey* v. *Christian*, 222 Ark. 169, 257 S.W.2d 935 (1953); *Smith* v. *Smith*, 218 Ark. 228, 235 S.W.2d 886 (1951); *Owen* v. *Owen*, 185 Ark. 1069, 51 S.W.2d 524 (1932). The effect of the provision in the deed here, that "this deed is to become effective upon the death of the grantor herein," which is virtually identical to the language in the deed in *Smith, supra*, is to convey the fee simple title subject only to the reservation of a life estate in the grantor.

As to the issue of delivery, if we concern ourselves for the moment only with the question of the delivery of the notarized deed (referred to as "the original" in the proceedings below), we are persuaded that the chancellor followed the general rule applicable to the delivery of a deed instead of the rules applicable when the grantor reserves a life estate. In order to establish delivery it ordinarily must be shown that the grantor relinquished

his dominion and control over the instrument. *See Adams* v. *Dopieralla*, 272 Ark. 30, 611 S.W.2d 750 (1981); *Ransom* v. *Ransom*, 202 Ark. 123, 149 S.W.2d 937 (1941). Ordinarily the grantor's continued use of the property and the payment of taxes on it are evidence that would tend to rebut a claim of delivery. *See Adams, supra; Broomfield* v. *Broomfield*, 242 Ark. 355, 413 S.W.2d 657 (1967). In addition, when the deed is found in the possession of the grantor at his death, normally there is a presumption of non-delivery. *See Van Huss* v. *Wooten*, 208 Ark. 332, 186 S.W.2d 174 (1945).

[redacted] However, when the deed reserves a life estate in the grantor (as it does here by operation of law), different rules apply. There is no longer a requirement that it must be shown that the instrument has passed beyond the grantor's control and dominion. *See Broomfield, supra* at 360. The fact that the deed is found among the effects of the grantor at his death raises no presumption against delivery when a life estate is reserved, *see Johnson* v. *Young Men's Building & Loan Association*, 187 Ark. 430, 60 S.W.2d 925 (1933), and under these circumstances the grantor's retention of possession and control over the property conveyed and his failure to record the deed are not inconsistent with delivery. *See Cribbs* v. *Walker*, 74 Ark. 104, 85 S.W. 244 (1905); *Johnson, supra*. The facts in *Cribbs* bear a marked similarity to those in the case at bar. There the husband had executed a deed in favor of his wife, reserving a life estate. Her testimony was that he showed her the deed, let her read it, and then took it back and put it in his safe where it remained until his death. The supreme court reversed the chancellor's decision and held, on *de novo* review, that there had been an effective delivery. The court's decision in *Broomfield, supra*, indicates that the distinction made in *Cribbs* is still a valid one.

[redacted] Finally, because of the court's characterization of plaintiff's exhibits numbered three and four as "copies," we are uncertain that the court gave adequate consideration to the fact that both instruments appear to bear original signatures, or that the court gave consideration to the question of whether those instruments were delivered, and, if so, the effect of that delivery. Even a deed that is undated and unacknowledged effectively passes title, as between the parties, from the date of delivery. *Harvey* v. *Ledbetter*, 219 Ark. 27, 240 S.W.2d 18 (1951).

In sum, we are persuaded that the chancellor was mistaken in his view of the law. Under all the circumstances of this case, and particularly because issues of credibility may enter into the decision here, we think it best to remand the case to the chancellor for further proceedings consistent with this opinion, rather than to decide the factual issues *de novo.*

Reversed and Remanded.

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

Carroll ROSE *v.* Crystal Paulette MAHAN

CA 89-69 777 S.W.2d 864

Court of Appeals of Arkansas
Division II
Opinion delivered October 11, 1989

Herby Branscum, Jr., for appellant.

William R. Bullock, for appellee.

JOHN E. JENNINGS, Judge. On November 3, 1972, the county judge of Yell County entered an order finding that the appellant, Carroll Rose, was the father of Douglas Rose, and directing appellant to pay to the child's mother, Crystal Mahan, the appellee here, the sum of $15.00 per week as child support until the child reached age sixteen.

In 1984, Ms. Mahan filed a petition in the county court of Yell County, seeking an increase in child support. The county court increased the amount of support to $27.50 per week and an appeal was taken to the Yell County Circuit Court. On July 17, 1985, the circuit judge entered an order setting child support at $22.00 per week.

On July 30, 1988, Douglas Rose reached the age of sixteen and the appellant stopped paying child support. On September 21, 1988, the appellee filed a petition for citation for contempt and for an increase in child support in the Yell County Circuit Court. The circuit judge held a hearing on October 17, 1988. The court declined to find Mr. Rose in contempt, rejected the request for an increase in child support, but modified its previous order by requiring Mr. Rose to pay child support until Douglas reached the age of eighteen.

Although appellant lists three points on appeal, there is, in reality, only one argument: that the circuit court lacked jurisdiction to enter the order of October 17, 1988.

Appellant is, of course, correct in his argument that the county court has exclusive original jurisdiction in matters relating to a determination of paternity. Ark. Const. Art. 7, § 28; *Jarman* v. *Brown*, 286 Ark. 455, 692 S.W.2d 618 (1985). Here, however, an order of the county court was appealed to the Yell County Circuit Court, which entered its order in 1985. The appeal from county court to circuit court in a paternity proceeding is a trial *de novo*. Ark. Code Ann. § 9-10-118 (1987); *Winston* v. *Robinson & State*, 270 Ark. 996, 606 S.W.2d 757 (1980). After an order is entered in the circuit court, the earlier order of the county court is superseded. *See Winston, supra.*

Arkansas Code Annotated Section 9-10-115 (1987) provides that "the court may, at any time, enlarge, diminish, or vacate any such order or judgment in the proceedings under this section [and other code sections relating to paternity proceedings] as justice may require and on such notice to the defendant as the court may prescribe." Undoubtedly, the reference to "the court" means whatever court entered the order which is sought to be modified. In the case at bar it was the order of the circuit court which Ms. Mahan sought to modify. As a general rule a judgment may be modified only by the court which rendered it and not by

any other court, especially not by a court of inferior jurisdiction. *See* 21 C.J.S. *Courts* § 501 (1940). Clearly, the county court of Yell County would be powerless to modify an order issued by the circuit judge of that county. Therefore, the petition to modify was properly filed in circuit court.

Affirmed.

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

Larry NOTTINGHAM *v.* STATE of Arkansas

CA CR 89-55 778 S.W.2d 629

Court of Appeals of Arkansas
Division I
Opinion delivered October 11, 1989

Pruitt & Hodnett, by: *Ray Hodnett*, for appellant.

Steve Clark, Att'y Gen., by: *J. Brent Standridge*, Ass't Att'y Gen., for appellee.

JUDITH ROGERS, Judge. The appellant, Larry Nottingham, appeals his conviction of DWI, a violation of Ark. Code Ann. § 5-65-103 (1987). Upon conviction, his driver's license was suspended for a period of ninety days, and he was fined $500, plus costs. On appeal, the appellant contends that it was error for the trial court to have allowed the admission of certain testimony on grounds of hearsay; that the evidence used against him should have been suppressed based on the arresting officer's lack of reasonable suspicion; and further, that there was no probable cause for his arrest. We find no error and affirm.

The appellant was arrested on the afternoon of December 30, 1987, by Officer Tom Bruce of the Mulberry Police Department. Officer Bruce testified that he received a phone call from the owner of the local Travel Mart alerting him of a possible DWI suspect who was seen driving in the parking lot in a vehicle described as a red Ford pick-up truck. Bruce testified that he immediately went to that location where he observed a vehicle, matching the description he had been given, as it was being parked at a neighboring gas station in a place not normally used by the public. He related that when he approached the vehicle, the motor was still running, but that upon looking in the window, the appellant appeared to be asleep. He stated that he also saw a beer can positioned between the appellant's legs. Bruce said he then attempted to rouse the appellant by tapping on the window, but when that effort proved to be unsuccessful, he opened the door of the vehicle and shook the appellant in order to awaken him. Bruce stated that he detected the strong odor of intoxicants, and that when talking with the appellant, he was somewhat incoherent and his speech was slurred.

Bruce then arrested the appellant and took him to the police department in Ozark where a breathalyzer test was administered by the senior operator, Gerald Rinke. Rinke testified that the test result showed a blood alcohol content of .23%.

As his first issue on appeal, the appellant argues that the trial court erred in allowing the admission of hearsay testimony to

establish reasonable suspicion. Specifically, he contends that the testimony of Officer Bruce concerning the phone call he received from the owner of the store was inadmissible as hearsay.

Officer Bruce's testimony was that he was called "to check a subject that was driving while intoxicated." In order to find the testimony of a witness was hearsay, it must be shown that the statement was offered to prove the truth of the matter asserted therein. *Robinson* v. *State*, 3 Ark. App. 153, 623 S.W.2d 534 (1981); Ark. R. Evid. 801(c). An out of court statement is not hearsay if it is offered to show a course of conduct or basis of action. *See Dandridge* v. *State*, 292 Ark. 40, 727 S.W.2d 851 (1987); *Bliss* v. *State*, 282 Ark. 315, 668 S.W.2d 936 (1984). At the time this testimony was presented, it was offered to explain what prompted his investigation, and not for the truth of the matter asserted. Since it was introduced for the purpose of showing the basis for his actions, and was relevant to the issue of reasonable cause, which was challenged by the appellant, this testimony was not excludable on grounds of hearsay. Therefore, the trial court did not err in allowing its introduction.

For his second point, the appellant argues that the stop and his arrest were illegal based upon the lack of reasonable suspicion that he was involved in criminal activity, and thus the trial court erred by not suppressing the evidence resulting therefrom. We disagree, as we find that the officer's actions were authorized under Ark. R. Crim. P. 3.1.

The Fourth Amendment proscribes only *unreasonable* searches and seizures. *Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986) (emphasis in original). Consistent with the Fourth Amendment, the police may stop persons on the street or in their vehicles in the absence of either a warrant or probable cause under limited circumstances, which include the investigatory stop. *Reeves* v. *State*, 20 Ark. App. 17, 722 S.W.2d 880 (1987). The test to be applied in determining whether an investigatory stop has been made consistent with the Fourth Amendment is a balancing of the nature and quality of the intrusion against the importance of the governmental interests alleged to justify that intrusion. *Miller* v. *State*, 21 Ark. App. 10, 727 S.W.2d 393 (1987). Where felonies or crimes involving a threat to public safety are concerned, the government's interest in

solving the crime and promptly detaining the suspect outweighs the individual's right to be free from a brief stop and detention. *Reeves* v. *State, supra.* As we pointed out in *Reeves*, this policy has been codified as Ark. R. Crim. P. 3.1. Rule 3.1 provides in pertinent part:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct.

Rule 2.1 of the Arkansas Rules of Criminal Procedure defines reasonable suspicion, and states:

> "Reasonable suspicion" means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

Reasonable suspicion is more than an imaginary or purely conjectural suspicion, but less than probable cause. *Tillman* v. *State*, 275 Ark. 275, 630 S.W.2d 5 (1982). In *Tillman*, the supreme court discussed the distinctions between these standards, and said:

> Hence, these considerations are relative, and can be compared to a ladder with four rungs: at the highest level is certain knowledge, as in the case of an eyewitness to a crime; next is probable cause, less than a certainty, but enough to satisfy a prudent man; lower yet is a reasonable suspicion; and at the lowest level, a bare or imaginary suspicion, founded on nothing more than a hunch. Applying that standard to this case, we regard the requirements of reasonable suspicion as having been fully satisfied.

Id. at 279, 630 S.W.2d at 7. Still, the justification for an investigatory stop depends on whether under the totality of the

circumstances the police have a particularized, specific, and articulable reason indicating that the person or vehicle may be involved in criminal activity. *Adams* v. *State*, 26 Ark. App. 15, 758 S.W.2d 709 (1988).

It is the appellant's contention that the officer had no reason to suspect that he was involved in criminal activity other than the report of the store owner, which he alleges is not sufficient to establish reasonable suspicion.

The appellant's contention has some merit, inasmuch as such information standing alone may not constitute reasonable suspicion. It can, however, be used as a "catapult to launch" an investigation, and when coupled with other information revealed upon this investigation, may form the basis for reasonable suspicion. *See Willett* v. *State*, 298 Ark. 588, 769 S.W.2d 744 (1989).

The Commentary to Ark. R. Crim. P. 2.1 provides a list of factors that may be considered in determining if reasonable suspicion exists. Subsection (i) specifically includes "any information received from a third person, whether he is known or unknown." As pointed out in *Willett* v. *State, supra*, nothing prevents an officer from investigating the information furnished to him by even an anonymous phone call. In *Willett*, the court further stated:

> Although anonymous tips standing alone do not constitute reasonable or probable cause, information verified as a result of such tips may support reasonable cause and may be acted upon as though the tips had never been received. In the present case the investigating officers obtained objective evidence in support of their belief that reasonable cause to stop the vehicle existed. The stop and search in this case were not based upon mere conjecture and speculation nor mere suspicion. The search was based upon evidence which confirmed the information furnished by the confidential informants. The reliability of the informants was not an issue under the facts in this case. The arrest may have resulted, at least in part, from the anonymous tips, but it was based upon the observations and information established by the police during their investigation of the facts.

Id. at 595, 769 S.W.2d at 744-45.

The reasoning applied by the court in *Willett* is applicable to the case at bar. Here, reasonable suspicion did not arise entirely on the information communicated by the owner of the store; it merely acted as the catalyst for further investigation. This information prompted Officer Bruce to go to the Travel Mart parking lot for investigation, which he had a right, if not a duty, to undertake. There, he discovered the appellant parking his vehicle, which matched the description given, in an out-of-the-way location. When he approached the truck, he found the appellant asleep with a beer between his legs, the truck's motor was still running, and he was unable to awaken him by tapping on the window. Based on the totality of the circumstances, we regard this evidence, which tended to confirm the information conveyed in the phone call, sufficient to justify the officer's reasonable suspicion, and his subsequent act of opening the door to awaken the appellant. It was not until after those objective observations were made that the intrusion occurred. The one factor involving the report of the store owner, combined with independent observations made by the officer, clearly constituted reasonable suspicion. These facts, in addition to what was discovered after the officer spoke with the appellant, in turn provided probable cause for his arrest.

The decision in *Van Patten* v. *State*, 16 Ark. App. 83, 697 S.W.2d 919 (1985), relied upon by the appellant, does not compel a contrary result. In that case, the police officer was responding to a complaint based on two radio broadcasts reporting a disturbance, and that the responsible party may have left the scene in a brown jeep. Arkansas Rule of Criminal Procedure 3.1 was found to be inapplicable because there was no indication that the disturbance rose to the level of a felony or the kind of misdemeanor contemplated by the rule.

The opposite is true of the situation presented here. In this case, the information received by Officer Bruce was that of a possible DWI. The officer was not obligated to ignore the phone call in light of the danger accompanying this offense. It is without question that this offense carries with it the danger of forcible injury to persons as required by Rule 3.1. *See Reeves* v. *State, supra*. This is evident from the very definition of "intoxicated,"

which provides in part that it means influenced or affected by the ingestion of alcohol, to such a degree that the driver's reactions, motor skills and judgment are substantially altered and the driver, therefore, *constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians*. Ark. Code Ann. § 5-65-102(1) (Supp. 1987) (emphasis supplied). Also absent in *Van Patten* were the independent observations and the progression of events establishing reasonable suspicion, as are evident in the instant case.

In sum, we hold that the officer's actions were justified as based upon reasonable suspicion pursuant to Ark. R. Crim. P. 3.1. It follows that the evidence obtained was properly admitted into evidence.

AFFIRMED.

CRACRAFT and COOPER, JJ., agree.

Francis BLEVINS *v.* UIS

CA 89-382 780 S.W.2d 584

Court of Appeals of Arkansas
En Banc
Opinion delivered October 11, 1989

John R. Henry, for appellant.

David Shelton, for appellee.

PER CURIAM. On September 9, 1989, the appellant sought to lodge a transcript of the record on her appeal from an opinion of the Workers' Compensation Commission filed on May 25, 1989. The clerk declined to accept the transcript because the notice of appeal, filed July 10, 1989, was not filed within thirty days of entry of the opinion. *See* Ark. R. App. P. 4(a). The appellant has now filed a motion for Rule on the Clerk to require our clerk to accept the transcript. As authority for this Court to grant the motion, the appellant cites Ark. Sup. Ct. R. 5, which allows an appellant to file a motion for Rule on the Clerk when he believes the clerk is in error in refusing to file a record. In the motion the appellant concedes that the notice of appeal was not timely filed.

We find no error on the part of our clerk because the timely filing of a notice of appeal is essential to our jurisdiction. *LaRue* v. *LaRue*, 268 Ark. 86, 593 S.W.2d 185 (1980). This is not a procedural rule, and although a person can consent to jurisdiction over his person, jurisdiction cannot otherwise be conferred by consent. *Id.* The timely filing of a notice of appeal is, and always has been, jurisdictional. *LaRue*, 268 Ark. at 88, 593 S.W.2d at 186. This applies to appeals from the Workers' Compensation Commission. *Lloyd* v. *Potlatch Corp.*, 19 Ark. App. 335, 721 S.W.2d 670 (1986). Therefore, because the appellant did not file a timely notice of appeal within thirty days of the opinion of the Commission, we do not have jurisdiction to hear the appeal. Motion denied.

Harvey Norman BEASLEY *v.* STATE of Arkansas

CA CR 89-56 777 S.W.2d 865

Court of Appeals of Arkansas
Division II
Opinion delivered October 18, 1989

Bill W. Bristow, P.A., 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 Greene County Circuit Court. Appellant, Harvey Norman Beasley, appeals from a judgment entered upon a jury verdict finding him guilty of being a felon in possession of a firearm, a violation of Arkansas Code Annotated Section 5-73-103 (Supp. 1987) and the sentence and fine imposed therefor. We reverse and remand.

Appellant was charged by information on February 19, 1988, with rape, theft by receiving, two counts of battery, and

with being a felon in possession of a firearm. The information was amended on November 21, 1988, charging appellant as per the original information, and alleging in addition thereto, that the defendant is a habitual criminal, this being his third or subsequent offense under the Arkansas Habitual Offender Law. Prior to trial, all charges except the latter were nolle prossed. The felon in possession of a firearm charge was tried to a jury which found appellant guilty and sentenced him to two and one-half years imprisonment and a $5,000.00 fine. From the judgment comes this appeal.

For reversal, appellant raises the following two points: 1) The circuit court erred in failing to suppress the evidence obtained in the search because the search exceeded the scope of any consent; 2) the circuit court erred in instructing the jury by going beyond the AMCI definition and commenting on the evidence.

We find that appellant's second argument warrants reversal. Because we find error on this point which requires that the case be remanded for a new trial, we will not address appellant's first point for reversal. The following standard AMCI instruction 3103 was given to the jury regarding the offense with which appellant was charged:

> Harvey Norman Beasley is charged with the offense of possession of a firearm. To sustain this charge, the State must prove the following things beyond a reasonable doubt:
>
> First: that Harvey Norman Beasley has been convicted of a felony; and,
>
> Second: that he possessed or owned a firearm.

The court added to this standard AMCI instruction the state's proffered modification which included the addition of two definitions. In issue is the following definition:

> "Possess" means to exercise actual dominion, control or management over a tangible object. Neither actual physical possession nor ownership is necessary for a conviction of possession of a firearm. Possession may be imputed when the contraband is found in a place which is immediately

and exclusively subject to his dominion and control.

Appellant argues that all language following the first sentence in the above definition is improper and exceeds the bounds of the AMCI instruction and essentially amounts to a comment on the evidence. Appellant testified in pertinent part that the guns confiscated in the search of his home and vehicle were not his property. He testified that the guns were the property of various friends who used his dogs and hunted on his land. Appellant presented the testimony of four individuals who collectively corroborated his testimony and identified the various guns seized in the search as being their property.

It is well settled that the trial court is not to modify an AMCI instruction unless it is clear that, in a given case, the instruction incorrectly applies the law to the facts. *Meador* v. *State*, 10 Ark. App. 325, 664 S.W.2d 878 (1984). Furthermore, a trial judge must ordinarily state his reasons when he modifies an AMCI instruction; however, when he does modify he is to use simple, brief, and impartial language which is free from argument. *Morgan* v. *State*, 273 Ark. 252, 618 S.W.2d 161 (1981).

In view of the above testimony, we find that the modified portion of the instruction telling the jury that actual ownership was not necessary to convict appellant on the possession of firearm charge was prejudicial and warrants reversal. Therefore, we cannot say with confidence that the jury was not influenced by the erroneous instruction. Furthermore, it is not clear that the standard instruction set out above incorrectly applied the law to the facts, which would be the necessary prerequisite for allowing the modification. The judge did not state his reasons for allowing the modification and the instruction, as modified, did not contain simple and impartial language. For the foregoing reasons, we find the modification was prejudicial to appellant and the court erred in accepting the state's proffer over appellant's objections.

Reversed and remanded.

JENNINGS and MAYFIELD, JJ., agree.

GOLDEN HOST WESTCHASE, INC. and Carl D. Morris
v. FIRST SERVICE CORPORATION, Flake & Co., Inc.,
First Service Corp. and Flake & Co., Inc., an Arkansas
Joint Venture

CA 89-82 778 S.W.2d 633

Court of Appeals of Arkansas
Division II
Opinion delivered October 18, 1989

Law Offices of Thomas A. Adams III, by: *Thomas A. Adams III* and *John W. Mara*; and *Harlan A. Webber*, for appellants.

Arnold, Grobmyer & Haley, A Professional Association, by: *Robert R. Ross*, for appellees.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Pulaski County Circuit Court, Second Division. Appellants, Golden Host Westchase, Inc., and Carl D. Morris, appeal an order dismissing an amended complaint regarding the lease of premises at Westchase Plaza against appellees, First Service Corporation, Flake and Co., Inc., and First Service Corp. and Flake and Co., Inc., an Arkansas Joint Venture.

This lawsuit is one of several actions resulting from problems encountered in the construction and operation of a Golden Host cafeteria at the Westchase Plaza Shopping Center. Appellant Golden Host Westchase, Inc., encountered problems in paying its debts, and liens were filed by the contractor and the equipment supplier. Golden Host also defaulted in its lease payments and promissory note to appellees.

On the morning of December 5, 1985, Flake and Company and First Service Corporation filed an unlawful detainer action against Golden Host in Third Division Circuit Court. On January 22, 1986, a first amended complaint was filed in that action, in which appellees added appellant Carl Morris as a defendant. The allegations for unlawful detainer contained within their original complaint were retained, and Morris was sued on his guaranty of the lease and promissory note signed by Golden Host. In their first amended complaint, appellees alleged that Golden Host had made no payments on the lease or the note.

At 4:18 p.m., December 5, 1985, Golden Host filed a complaint in chancery court against First Service and Flake regarding the lease of the premises at Westchase Plaza. Golden Host stated that appellees had made false representations of fact

regarding the property and that these false representations induced Golden Host to enter into the lease. Golden Host requested $150,000.00 in damages and also a reduction of rent due to the extent of its injury because of appellees' failure to comply with the lease agreement. On December 26, 1985, appellees filed their answer in chancery court and affirmatively pled that the court was without subject matter jurisdiction of the action, as it was simply a claim for money damages with no equitable remedies requested.

On January 16, 1986, appellees filed a motion to dismiss or, in the alternative, a motion to transfer and consolidate the action to Third Division Circuit Court. In that motion, it was stated that an action for unlawful detainer, which was filed on the morning of December 5, 1985, was currently pending in Third Division Circuit Court. In the motion, it was stated that both actions arose out of the same transaction and that the claims contained within the complaint filed in chancery court should be pursued as compulsory counterclaims pursuant to Ark. R. Civ. P. 13 in Third Division Circuit Court.

Ruling on this motion, the chancellor issued an order in which he stated:

> Now on this *28* day of *February*, 1986 comes on for hearing the Motion to Dismiss or in the Alternative Motion to Transfer and Consolidate filed herein by the Defendant, Flake & Company, Inc., et al. From all matters presented, including argument of counsel, the Court finds that the Motion to Transfer (per Rule 78(c)) should be granted.
>
> THEREFORE, it is by the Court ORDERED that the action filed herein should be transferred to the Circuit Court of Pulaski County.

The apparent effect of this order was to transfer the chancery court case to Second Division Circuit Court, but not to consolidate the two actions. The chancery court file was not actually delivered to Second Division Circuit Court until 1988.

On September 7, 1988, Golden Host and Morris filed a first amended complaint against First Service, Flake, and First Service Corp. and Flake and Co., an Arkansas Joint Venture. Carl Morris was added as a plaintiff in this action at that time.

This first amended complaint contained over twenty counts; all dealt with issues arising from the lease, promissory note, and guaranty, as well as the allegedly false representations made by appellees to Golden Host and Morris in regard to the lease and loan.

In Count I, it was alleged that appellees, in leasing the premises, made false representations upon which appellants relied and were induced thereby to enter into the lease with resulting financial damage. In Count II, appellants alleged that appellees' acts, omissions, and representations caused appellants "commercial frustration" in the amount of $1,500,000. In Count III, appellants alleged that appellees had committed to loan funds to Golden Host to complete the construction of the restaurant and to purchase equipment but that, before its completion, appellants refused to advance all sums as agreed. Appellants alleged that this caused them to default on their obligations for the equipment and construction, as well as the lease and loan payments to appellees. In Count III, they also alleged that appellees had breached the loan agreement and that appellants were entitled to an offset against appellees for all amounts due under the loan agreement and lease, as well as damages sustained from a judgment entered against appellants in the amount of $182,019.00.

In Count IV of their first amended complaint, appellants alleged that appellees had made fraudulent representations regarding the contents of the note and guaranty, which induced appellants to enter into the loan and caused damage to their financial standing, credit, and reputation in the industry and the community. In Count V, appellants stated that appellees' conduct with regard to the note, guaranty, and loan, and their refusal to properly fund the loan were acts of gross negligence. In Count VI, it was alleged that appellees' breach of their duty of good faith performance implied in these agreements caused appellants' damages. In Count VII, appellants alleged that appellees' breach of their agreement to loan money to appellants interfered with appellants' contractual relationships with the suppliers and installers. Appellants asserted damages in the amount of $182,019.00 from the judgment entered against appellants and also claimed that appellants were entitled to judgment against appellees for their tortious interference with appellants' contrac-

tual relationships. In Count VIII, appellants requested punitive damages for the tortious interference with appellants' contractual relationships and false representations in the amount of $1,500,000,00. In Count IX, appellants stated that appellees had breached their fiduciary duty and their duty of good faith and fair dealing in failing to loan all of the money to appellants. In Count X, appellants stated that, because of this breach, they had sustained damages in the amount of $182,019.00.

Count XI included a claim that appellees had engaged in a scheme to defraud appellants regarding the agreements; Count XII included a civil conspiracy charge; and Count XIII included an allegation that appellees had engaged in a course of conduct amounting to common law fraud. In Count XIV, appellants alleged that appellees had engaged in "malicious and tortious breach of conduct." Count XV asserted a breach of contract by appellees. In Count XVI, Morris included a claim that appellees had engaged in a course of action which resulted in the infliction of emotional and mental distress, as well as physical stress; Count XVII similarly alleged that this course of conduct constituted intentional infliction of emotional distress. Morris asserted in Count XVIII that appellees' course of action diminished his earning ability and resulted in financial damage to him; in Count XIX, Morris asserted that he sustained diminished standing in the community and in the restaurant business community. In Count XX, appellants requested attorney's fees. In their prayer for relief, appellants requested judgment for $1,682,019.00, with punitive damages of $1,500,000.00.

On September 30, 1988, appellees moved to dismiss in Second Division Circuit Court. In that motion, appellees stated that the issues in the first amended complaint in Second Division Circuit Court were tried in Third Division Circuit Court in January 1987 and resulted in a judgment on April 10, 1987. Appellees stated in the motion that, on April 14, 1987, the Third Division Circuit Court had dismissed the counterclaim of appellants. Appellees also stated that appellants' first amended complaint in Second Division Circuit Court merely restated the basic transaction which was the basis of the counterclaim which was tried in Third Division Circuit Court.

Attached to this motion was appellants' counterclaim which

was filed in November of 1986 in Third Division Circuit Court. In Count I of that counterclaim, appellants asserted that appellees breached their agreement to loan funds to appellants in connection with the construction and lease of the premises and that this breach caused appellants to default on their obligations for the equipment, lease payments, and repayments of the loan. Appellants asserted that they were entitled to an offset of all amounts due under the loan agreement and lease and that they were entitled to damages in the amount of $182,019.00. In Count II of the counterclaim, appellants asserted that appellees breached the loan agreement and thereby intentionally and tortiously interfered with appellants' ability to perform their contractual relationships with the equipment suppliers and installers and that this caused appellants damages because of the judgment entered against them in the amount of $182,019.00. Punitive damages of $500,000.00 were requested. In Count III of the counterclaim, appellants asserted that appellees had breached a fiduciary duty and duty of good faith and fair dealing with regard to the loan agreement by failing to loan all of the money agreed; that appellants had sustained damages in the amount of $182,019.00; and that appellants were entitled to an offset against all amounts due under the loan agreement, note, guaranty and lease.

Also attached to appellees' motion to dismiss was the Third Division's order of dismissal of appellants' counterclaim on April 14, 1987. In that order, the circuit judge stated:

> On the 10th day of April, 1987, Judgment having been entered in the referenced matter on behalf of the Plaintiffs comes on now for hearing the Counter-Claim of the Defendants, Golden Host Westchase, Inc. and Carl Morris.
>
> From all matter presented the court finds that the Counter-Claim should be denied and;
>
> THEREFORE IT IS BY THE COURT ORDERED that the Counter-Claim instituted herein by Golden Host Westchase, Inc. and Carl Morris is dismissed at cost to the Defendants.

Also attached to the motion to dismiss was the judgment entered on April 10, 1987, by the Third Division Circuit Court, in

which appellees were awarded judgment on the promissory note and which reflected the jury's finding of betterments and improvements to the property in the amount of $67,000.00. The judgment stated:

> At the conclusion of all of the evidence upon Motion of the Plaintiff the court removed the case from the jury as to all issues except any right of set off and granted a directed verdict to Plaintiff on all issues and awarded damages as follows:
>
> Money due and owing on the promissory note is $259,438.69; interest from the date of disbursement through January 28, 1987 is $37,776.85; and rent from October 1, 1985 through August 31, 1986 is $53,735.00.
>
> Upon proper instruction by the court and after argument of counsel the jury retired to consider its verdict, and after deliberating thereon returned the following verdict:
>
> We, the jury, find that the Plaintiffs received the value of betterments and improvements in the sum of *$67,000.*
>
> Signed: *Timothy Lawton /s/*
> Foreman
>
> IT IS, THEREFORE, BY THE COURT, CONSIDERED, ORDERED AND ADJUDGED that Flake and Co., Inc., and First Service Corp., an Arkansas Joint Venture and Flake & Co., Inc., Plaintiffs, have and recover of and from Golden Host Westchase, Inc. and Carl Morris, Individually, Defendants the sum of $283,950.54, with interest thereon from this date until paid at the rate of ten percent (10%) per annum, together with all their costs herein expended, for all of which execution may issue.

In the response to the motion to dismiss, appellants argued that the issues raised in the Second Division Circuit Court action were not *res judicata.* To their brief in support of their response, they attached a copy of appellees' first amended complaint, dated January 22, 1986, in the Third Division Circuit Court action, which added Carl Morris as a party defendant. Appellants also attached one page from the transcript of the trial in Third

Division Circuit Court. In that case, the circuit judge granted a directed verdict to appellees and stated:

> THE COURT: In response to the plaintiff's motion for a directed verdict, the Court has concluded that there are no issues of fact remaining regarding liability, that the defendants have breached the agreement, that the rentals due, the principal and interest is not controverted, and the only remaining issue to be resolved by the jury is the value of the improvements and betterments that were constructed under these agreements between the parties that issued to the benefit of the plaintiffs.
>
> MR. McCLAIN: For the record, I object to the directed verdict.

Also attached to the appellants' response to the motion to dismiss was the affidavit of Carl Morris; in this affidavit, Morris admitted that a counterclaim was filed in the Third Division Circuit Court action and that he did not present evidence regarding the counterclaim. In this affidavit, Morris stated:

> 10. "That I had my attorney, Thomas H. McClain, Jr. file a counterclaim in Cause Number 85-011053 filed in the Circuit Court and described in paragraph 5 above.
>
> 11. "That neither myself nor my attorney filed or presented any evidence or tried any cause of action or issue contained in the counterclaim filed in Cause Number 85-011053.
>
> 12. "That the previously described counterclaim was dismissed on April 10, 1987, nearly three months after the trial of Cause Number 85-011053 without a trial on the merits as to any issue or cause of action alleged in said counterclaim.
>
> 13. "That none of the causes of action and/or issues raised in the Amended Answer filed in the instant action have been tried, determined or litigated by any court in the State of Arkansas.

In November 1988, the Second Division Circuit Court made findings of fact and conclusions of law in the case at bar, and an

order of dismissal consistent with those findings was entered on December 6, 1988. In his findings, the circuit judge stated that Golden Host erroneously made no attempt to prove its counterclaim in the case tried in Third Division Circuit Court, and that Morris should have presented his claims at that trial:

> 5. Morris was not a party to the Chancery Court case (this case). By an Amendment to this action, a claim against Flake of an intentional tort has been asserted by Morris. If that claim has arisen since April 14, 1987, he should assert the claim in an independent action, not an Amendment here. Otherwise, our Rules clearly require Morris to assert all claims he had against Flake in the trial heard by Judge Digby.
>
> 6. Golden Host stands in a different position. It brought a cause of action against Flake. That cause has been in limbo for two years; however, it was alive and well on January 28, 1987. There is no issue, Golden Host made no attempt to prove its Cross-Complaint in the case heard by Judge Digby. It chose instead to await its trial on its own Complaint, which was then pending in a Court having concurrent jurisdiction with that Court hearing the case on January 28, 1987.
>
> 7. While this Court can find no precedent it would appear to the Court that our Rules required Golden Host to go forward with all claims it had on January 28, 1987. It could not choose to remain silent and then assert those claims even though those claims were set forth in another action then pending.

Appellant raises the following points for reversal:

I.

THE CIRCUIT COURT JUDGE'S DECISION GRANTING THE APPELLEE'S MOTION TO DISMISS THE APPELLANT'S LAWSUIT NAMING THE APPELLEES AS DEFENDANTS WHICH CONTAINED CAUSES OF ACTION AND CLAIMS NOT PREVIOUSLY ADJUDICATED IN A LAWSUIT FILED BY THE APPELLEES NAMING THE AP-

PELLANTS AS DEFENDANTS WAS CLEARLY ERRONEOUS FOR THE REASON THAT THE APPELLANT'S LAWSUIT WAS COMMENCED AT THE SAME TIME OF AS THE APPELLEE'S LAWSUIT, WAS NOT CONSOLIDATED WITH APPELLEE'S LAWSUIT, AND BECAUSE APPELLEES WERE AWARE THE APPELLANT'S LAWSUIT WAS PENDING AT TIME OF THE TRIAL OF THE APPELLEE'S LAWSUIT.

II.

THE CIRCUIT COURT JUDGE'S DECISION GRANTING THE APPELLEE'S MOTION TO DISMISS THE APPELLANT'S LAWSUIT WAS CLEARLY ERRONEOUS FOR THE REASON HE RELIED ON INCORRECT, FALSE, ERRONEOUS, AND/OR INACCURATE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

III.

THE CIRCUIT COURT JUDGE'S DECISION GRANTING THE APPELLEE'S MOTION TO DISMISS THE APPELLANT'S LAWSUIT ON THE BASIS OF *RES JUDICATA* WAS CLEARLY ERRONEOUS.

IV.

THE CIRCUIT JUDGE'S DECISION GRANTING THE APPELLEE'S MOTION TO DISMISS THE APPELLANT'S LAWSUIT WAS CLEARLY ERRONEOUS AS IT VIOLATED THE APPELLANT'S RIGHT TO TRIAL BY JURY AND DEPRIVED APPELLANTS OF THEIR DAY IN COURT.

With regard to Point I, it should first be noted that appellants offered no proof as to the order in which the lawsuits were filed. The record clearly demonstrates that Golden Host's original complaint against appellees was filed in chancery court at 4:18 p.m. on December 5, 1985. Although appellees' original complaint against Golden Host is not in the record, it is described in

appellees' motion to dismiss or transfer and consolidate, dated January 16, 1986, and filed in chancery court. In that motion, appellees stated that the Third Division Circuit Court action in unlawful detainer was filed the *morning* of December 5, 1985.

Although it is difficult to discuss appellants' first point on appeal without getting into the claim preclusion aspect of *res judicata*, that will be specifically discussed in Point III below. The considerations inherent in the doctrine of *res judicata* are definitely relevant to the construction and application of Ark. R. Civ. P. 13(a), however. That rule provides in pertinent part:

> A pleading shall state as a counterclaim any claim which, at the time of filing the pleading, the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action . . . .

Because appellees' lawsuit was filed in Third Division Circuit Court several hours before the chancery court action was filed by Golden Host, the chancery court action cannot be considered to have been "pending" within the terms of Ark. R. Civ. P. 13(a)(1).

"The reason for Rule 13 is to require parties to present all existing claims simultaneously to the court or be forever barred, thus preventing a multiplicity of suits arising from one set of circumstances." *Bankston* v. *McKenzie*, 288 Ark. 65, 67, 702 S.W.2d 14, 15 (1986).

In the case at bar, appellants argue that they were not given an opportunity to present the issues raised in their counterclaim at the trial in Third Division Circuit Court. The wording of the order dismissing the counterclaim, the judgment rendered in the action, the statements made by the Third Division Circuit Court, and appellant Morris' affidavit support appellees' argument that the directed verdict was granted at the conclusion of *all* of the evidence, and that appellants did have the opportunity to present evidence on their counterclaim if they so desired. Appellants have

brought forth nothing in the record to demonstrate that they were not given an opportunity to present their claims at trial in Third Division Circuit Court.

Appellants also argue that the April 14, 1987, order entered by the Third Division Circuit Court does not indicate whether it was with or without prejudice in dismissing appellants' counterclaim. The wording of the April 10, 1987, judgment, as well as that of the April 14, 1987, order, and the ambiguity of the only page of that transcript included in this record (Tr. 142), indicate that appellants' counterclaim was indeed dismissed with prejudice.

Appellants also assert that, if appellees had desired that all claims among the parties be tried in Third Division Circuit Court, appellees had the burden of making sure that appellants' chancery court lawsuit was consolidated with the Third Division Circuit Court lawsuit; appellants also assert that appellees failed to meet this burden. Appellants, however, give no citation to authority for this argument. An assignment of error unsupported by convincing argument or authority will not be considered on appeal, unless it is apparent, without further research, that the assignment of error is well taken. *Gen. Elec. Supply Co.* v. *Downtown Church of Christ*, 24 Ark. App. 1, 746 S.W.2d 386 (1988).

With regard to Point II, that the Second Division Circuit Court made erroneous findings in its order of dismissal, appellants are partially correct. Appellants assert that, in paragraph 2 of the findings of fact and conclusions of law in the order of dismissal, the circuit court erroneously stated that, in appellants' counterclaim in Third Division Circuit Court, they pled four affirmative allegations: "(1) failure of Flake to loan money as promised; (2) unlawful interference with a third-party contract; (3) fraud in securing the lease agreement; and (4) breach of fiduciary relationship." Appellants are correct in asserting that they did not state a cause of action for fraud in securing the lease agreement in that counterclaim. We agree with the circuit court's findings that appellants' claims in this lawsuit should have been included and tried as compulsory counterclaims in the Third Division Circuit Court action and are barred by the claim preclusion aspect of *res judicata*; therefore, this error does not

warrant reversal. *See Ark. Dep't of Human Services* v. *Shipman*, 25 Ark. App. 247, 756 S.W.2d 930 (1988).

[redacted] For their third point on appeal, appellants assert that the circuit court erred in dismissing the claims in the case at bar on the basis of *res judicata*. The cases dealing with this issue do not draw a distinct line beyond which the principle of *res judicata* invariably applies and within which it does not; this court has noted that the very nature of litigation makes that impossible. *McDaniel Bros. Constr. Co.* v. *Simmons First Bank of Jonesboro*, 24 Ark. App. 106, 108, 749 S.W.2d 348, 349 (1988). If claims that were made or could have been made grew out of the same transaction, and if the forum has jurisdiction of the person and subject matter and the parties are the same, the doctrine of *res judicata* may be applied. *McDaniel Bros.*, 24 Ark. App. at 108-09, 749 S.W.2d at 349. The doctrine of *res judicata* applies not only to those issues which have actually been tried, but also to those which could have and therefore should have been determined in the one action. *McDaniel Bros.*, 24 Ark. App. at 109, 749 S.W.2d at 349.

[redacted] In *Swofford* v. *Stafford*, 295 Ark. 433, 434, 748 S.W.2d 660, 661 (1988), the supreme court stated:

> The claim preclusion part of the doctrine of res judicata bars relitigation of a subsequent suit when (1) the first suit resulted in a judgment on the merits; (2) the first suit was based upon proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action which was litigated or could have been litigated but was not; and (5) both suits involve the same parties or their privies.

In *Swofford*, 295 Ark. at 435, 748 S.W.2d at 662, the court noted that, where a case is based on the same events as the subject matter of a previous lawsuit, *res judicata* will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies:

> Issues and remedies raised in the subsequent suit do not have to be identical to those raised in the initial suit in order for the claim preclusion part of res judicata to apply. In *Benedict* v. *Arbor Acres Farm,*

Inc., 265 Ark. 574, 577, 579 S.W.2d 605, 607 (1979), we wrote:

> The law of *res judicata* provides that a prior decree bars a subsequent suit when the subsequent cause involves the same subject matters as that determined or which could have been determined in the former suit between the same parties; the bar extends to those questions of law and fact which "might [well] have been but were not presented."

In *Taggart* v. *Moore*, 292 Ark. 168, 171, 729 S.W.2d 7, 9 (1987) (citations omitted), we wrote:

> One of the main purposes of the doctrine of res judicata is to put an end to litigation by precluding a party who has had the opportunity for one fair trial from drawing the same controversy into issue a second time before the same or a different court. . . . Res judicata applies even if the issue was not litigated in the first trial if it should have been included in the former trial.

Accordingly, we affirm the ruling of the trial court that the case at bar is barred by the claim preclusion part of the doctrine of res judicata.

In order for the doctrine of *res judicata* to apply, it must appear that the particular matter was raised and determined or was necessarily within the issues and might have been litigated in the previous action. *See Talbot* v. *Jansen*, 294 Ark. 537, 540, 744 S.W.2d 723, 724 (1988), where the court stated:

> In this case, the point of controversy has at all times been the misstatement of liabilities. In the previous suit, appellants elected to sue for breach of contract. The receiver knew about the fraud issue, but did not raise it. The complaint was dismissed. Appellants appealed, but did not follow through. In the case at bar, they allege the same facts, but rename their action "fraud," and seek punitive damages. The facts are identical. *Res judicata* applies.

294 Ark. at 540, 744 S.W.2d at 725. *See also Ward* v. *Davis*, 298

Ark. 48, 765 S.W.2d 5 (1989); *Martin* v. *Citizens Bank of Beebe*, 283 Ark. 145, 671 S.W.2d 754 (1984). Appellants are, therefore, incorrect in asserting that *res judicata* does not apply if the causes of action in the two lawsuits are different.

Appellees argue that the claims that appellants assert in the case at bar arose out of the same set of facts that gave rise to appellants' counterclaim in the Third Division Circuit Court lawsuit. Although, in the case at bar, appellants have asserted additional claims, such as fraud and intentional infliction of emotional distress, all of the claims arise out of the same set of facts that served as the basis for the Third Division Circuit Court lawsuit.

Carl Morris should have brought his claims against appellees in the Third Division Circuit Court action, because he was not even a party to the Second Division Circuit Court action until appellants' first amended complaint was filed in 1988, long after the trial in Third Division Circuit Court.

In their final point for reversal, appellants argue that the circuit court's dismissal of this action violated their constitutional right to trial by jury. Appellants argue that the doctrine of *res judicata* presumes that a litigant has already had his day in court and that they were denied that day; consequently, their constitutional rights to due process and trial by jury were violated. Here, however, appellants *did* have their day in court with regard to the claims set forth in their counterclaim in Third Division Circuit Court, even though they elected not to pursue those claims. In *Arkansas State Highway Commission* v. *Munson*, 295 Ark. 447, 449, 749 S.W.2d 317, 318 (1988), the supreme court stated that constitutional issues may be precluded by the doctrine of *res judicata*. It is not necessary that we hold that appellants' constitutional rights have been violated because we agree that appellants should have presented all their claims as compulsory counterclaims in the previous action and that the issues in the case at bar are *res judicata*.

We cannot say that the trial court erred in dismissing the amended complaint and, therefore, affirm.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

Rudolph J. HUTTER and Helen Hutter *v.* L. M. MEDLOCK and Marcelene Medlock

CA 89-151 777 S.W.2d 869

Court of Appeals of Arkansas
En Banc
Opinion delivered October 18, 1989

Stripling & Morgan, by: *Dan Stripling*, for appellant.

Joe Cambiano, for appellee.

GEORGE K. CRACRAFT, Judge. Rudolph and Helen Hutter appeal from an order of the chancery court of Van Buren County enjoining appellants from interfering with appellees' free use of a prescriptive easement over a roadway across appellants' land. It is not controverted on appeal that a prescriptive easement in the

road existed. The only issue presented is whether the easement had been lost by acquiescence for more than seven years after appellants installed a gate at one end of the road. We find no error and affirm.

Appellant Rudolph Hutter testified that in 1981 he and appellees' predecessor in title, who used the road for access to his property, had a conversation about closing the road. Mr. Hutter offered to spend $3000.00 to provide an alternate route of access. When appellees' predecessor refused, Mr. Hutter consulted his attorney, who "suggested I put up a gate, and said if the gate was up for seven years we [could] close it permanently." He stated that he then put up the gate and placed a "no trespassing" sign at the entrance to the road. He stated that he closed the gate occasionally but "it was open most of the time." He did not lock the gate until shortly before this action was brought.

Appellee L. M. Medlock testified that he acquired his property in 1981, but was familiar with the roadway prior to that as he often visited while his predecessor owned the property. He testified that this was the only road leading into that property. He stated that, although he went in and out of the property with some degree of frequency, he had never seen a gate, open or closed, or a "no trespassing" sign prior to the fall of 1987. In November, 1987, he first discovered the gate, which was closed. In January, 1988, he found the gate locked. Appellees then filed this action to enjoin interference with their use of the road.

Kenneth Ward, appellees' predecessor, testified that he lived on the property now owned by appellees for fifteen years prior to November, 1987. Access to his property was by the roadway in question. He testified that during the time he lived in the area the road was maintained primarily by him. He stated that Mr. Hutter put the gate on the roadway "four, five, or six years ago," but it was not locked or closed and did not obstruct his use of the roadway. Ward stated that he had talked with Mr. Hutter about the use of the road on different occasions and that Hutter "didn't want me to go in, but that was the only way I had to get in. So I went in."

A number of other witnesses offered testimony similar to that of Mr. Ward. Mary Goins testified that she used the road to visit relatives in that area every year, as she had no other access to

the property. She was never interfered with until the spring of 1988, when she found the gate closed and locked. She testified that there had been a gate there for some time, but that she never saw it closed "until this year." Robert Bramlett testified that he had cut timber in that area and hauled logs down the roadway during the latter part of 1986, all of 1987, and early 1988. He said that, although he saw a gate, it was never closed. David Tester testified that he also owned land in the area that gained its access along this road. Although he went to the property only infrequently, he did not recall ever seeing a gate, and no one ever attempted to interfere with his use of the road.

At the close of the case, the chancellor ruled as follows:

> While the court recognizes that the establishment—a construction of a gate is evidence of the assertion of ownership, . . . the fact that the gate was left opened over that period of time brings the Court to believe that Mr. Hutter did not bring to the attention of the prescriptive owners such notice to them that would require them to take some action. . . . By his own testimony, he didn't lock the gate until January of this year. Prior to that time, the gate, as well as I recall the evidence, had been there but it had been open.

The chancellor entered an order finding that appellants had failed to establish notice, actual or constructive, that they were closing the road, and ordered the gate removed and enjoined further interference with the use of the road. Appellants appeal contending that the chancellor's finding is clearly erroneous. We do not agree.

In *Porter* v. *Huff*, 162 Ark. 52, 257 S.W. 392 (1924), the appellee owned lands through which lay what the supreme court assumed, for the purposes of the opinion, to be a public easement. He then built a fence on the line dividing his property and that of neighbors, and placed a gate at the point where the road crossed the dividing line. He also placed two more gates along the road as it passed through his land. For ten or twelve years thereafter, although the appellants and others made use of the road, they were required to open and close the gates, and did so without protest. The supreme court held:

> [The public] lost any [prescriptive] right it may have acquired by *acquiescing* in a permissive use thereof for a period of more than seven years after the road was *closed* by gates. When appellee inclosed his land and placed gates *across* the road, it was notice to the public that thereafter they were passing through the land by permission, and not by right. The undisputed evidence shows that these gates were maintained by appellee *across* the road for ten or eleven years, without objection on the part of the public.

Id. at 54, 257 S.W. at 392 (emphasis added).

In *Mount* v. *Dillon*, 200 Ark. 153, 138 S.W.2d 59 (1940), a similar situation was before the court. There, a landowner placed wire gates across a road in which the public had acquired a prescriptive easement. The installation and maintenance of the gaps required that people travelling the road open and close the gates when passing through it for over fifteen years. There, although the trial court held that the prescriptive easement had been lost, it further held that "the public should be permitted to travel it as a matter of prescription, and not as a legal right, and that the gaps should be restored, and appellants should permit passage through them." *Mount*, 200 Ark. at 156, 138 S.W.2d at 60. Citing and applying the rules announced in *Porter* v. *Huff, supra*, the supreme court reversed, holding that, when the trial court found that the right to use the road was lost or abandoned, it became the duty of the court to restrain the appellees from cutting the fences and using the road.

In *Brooks* v. *Reedy*, 241 Ark. 271, 407 S.W.2d 378 (1966), the landowner placed gates across a road in which the public had acquired a prescriptive easement. Although the gates remained for a period in excess of seven years, the evidence established that during certain seasons of each year the gates were not closed. The trial court found that:

> The gates . . . have not been maintained with such continuity and intent for any definite seven-year period as would destroy the rights of the public to travel and maintain the road. . . . Any interruption of the maintenance of the gates, such as leaving the gates down in the winter so that the cattle could use the open range or the use of the road at a time when the gates were down, would be

> such as to make maintenance of the gate for a new period necessary.

Id. at 273, 407 S.W.2d at 379 n. 1. The supreme court reversed the trial court's holding that the period of limitations did not run because the gates were "not always up, i.e., closed" in the following language:

> It may well be that those using the roadway did not always put up the gaps; however, be that as it may, the important fact is that the fence and gates were in place for the statutory period, and, under the language in *Mount* v. *Dillon, supra*, the fact that the gates were not *always* closed does not make any difference.

Brooks, 241 at 277, 407 S.W.2d at 381 (emphasis added).

In subsequent cases where the issues were similar, the court has continuously applied the rule announced in *Brooks* v. *Reedy*; that it is the existence of the gate and obstruction of the passageway, and not how continuously the road is closed, that constitutes the notice. *See Weir* v. *Trucks*, 255 Ark. 494, 500 S.W.2d 923 (1973). From *Mount, Brooks, Weir*, and cases cited therein, it is clear that a prescriptive easement can be lost by a reassertion of dominion by the landowner, manifested by acts of interference sufficiently calculated to bring that assertion home to the public. If the public, during the statutory period thereafter, does not protest or take action to preserve its prescriptive rights, it will be deemed to have submitted to the landowner's reassertion of control, and at the end of the statutory period lose the prescriptive right due to its acquiescence. It is the submission to and failure to protest the acts of interference and dominion, that sets the period of permissive use in motion.

In each of the cases cited above, there was not only the installation of a gate for the purpose of reasserting dominion but a manifestation of that intent by interference with the public's continued use of the road. The interference was sufficient to warrant a finding that the public had been placed on notice of the landowner's intent to reclaim his interest and tolerate only permissive use of the roadway in the future. The failure of the public to protest or take any action to protect its rights was found sufficient to support the conclusion that they had acquiesced in

and submitted to the landowner's assertions, and thereafter used the roadway permissively rather than under claim of right.

Here, on conflicting evidence, the trial court found that, although appellants had installed a gate at the entrance to the roadway, they had not closed it or otherwise interfered with the use of the road until shortly before this action was filed. It found that appellants' actions prior to closing the gate were not such as would bring to the attention of the public such notice of appellants' intent as would require the public to take any action to protect its prescriptive rights. As there was no action taken that would interfere with anyone's use of the road, the public had no reason to protest and no cause of action to assert.

Although we review chancery cases *de novo*, we will not reverse a chancellor's findings unless they are clearly against the preponderance of the evidence, or clearly erroneous. *Carver* v. *Jones*, 28 Ark. App. 288, 773 S.W.2d 842 (1989). From our review of the record, we cannot conclude that the chancellor's finding in this case is clearly erroneous. Nor can we conclude, in light of that finding, that the chancellor erred in holding that the doctrine set forth in the cases discussed above has no application to the facts of this case.

Affirmed.

ROGERS, J., concurs.

COOPER, J., dissents.

JUDITH ROGERS, Judge, concurring. At the conclusion of trial, the chancellor stated that he had decided a similar case a few years ago which was appealed and affirmed by this court, and he was deciding the case at bar the same way. In the earlier case, which we affirmed by unpublished memorandum opinion, the chancellor found that the maintenance of gates on a road for seven years did not terminate the public's right to a prescriptive easement in the road. Although at first blush the two cases appear similar, the case at bar is factually distinguishable from the earlier case that we affirmed, and the chancellor's reliance upon it in this case appears misplaced. Perhaps when the chancellor stated he was relying on the earlier case, he realized that whether the gate is open or closed is not dispositive, but this was not clearly expressed. Therefore, I write this concurrence only to emphasize

to the reader that the closing of the gates is only evidence of intent to establish control.

On trial *de novo* in chancery cases, the decree will be affirmed if it appears to be correct upon the record as a whole, even though the chancellor may have in part or in whole given the wrong reason for his result. *Frawley* v. *Smith*, 3 Ark. App. 74, 79, 622 S.W.2d 194, 197 (1981).

JAMES R. COOPER, Judge, dissenting. I respectfully dissent from the majority decision in this case, as I believe the majority decision here is contrary to the prior holdings of the Arkansas Supreme Court.

The majority here has held in effect that, when a gate is erected and maintained for seven years for the purpose of reasserting the owner's dominion over a roadway, the gate must also sufficiently interfere with the public's use of the roadway so that it brings to the attention of the public such notice of the owner's intent as would require the public to take action to protect its prescriptive right in order to terminate the easement. While I do not argue whether this is the better rule of law, it is not the law followed previously in this state.

The chancellor found that, because the gates in the case at bar were left open, the appellants did not give the appellees sufficient notice that they were terminating the appellees' easement to cause the appellees to take some affirmative action. In *Porter* v. *Huff*, 162 Ark. 52, 54, 257 S.W. 393 (1924), the Supreme Court held that, when the appellee enclosed his land and placed gates across the road, it was notice to the public that, thereafter, they were passing through the land by permission, and not by right, and the public lost any right it may have acquired by acquiescing in a permissive use thereof for a period of more than seven years after the road was closed by the gates.

> The rule is well established that when a gate is maintained for more than 7 years across a road in which the public has a prescriptive easement, then it is deemed that the public has abandoned the road and the landowner has the right to close it permanently and restrict the road to permissive use.

Munn v. *Rateliff*, 247 Ark. 609, 613, 446 S.W.2d 664, 667 (1969). Relying on its opinions in *Martin* v. *Terrell*, 229 Ark.

787, 789, 318 S.W.2d 607, 608 (1958), and *Hockersmith* v. *Glidewell*, 153 S.W. 252, 253 (Ark. 1913), the Supreme Court further clarified this rule in *Hoover* v. *Smith*, 248 Ark. 443, 445, 451 S.W.2d 877, 879 (1970), when it stated that "erection and maintenance of a gate by an owner does not give notice that subsequent use of a way across his lands is permissive and not as a matter of right, unless it was maintained as a means of asserting the owner's dominion over the road." *See also Johnston* v. *Verboon*, 269 Ark. 126, 128, 598 S.W.2d 752, 754 (1980); *Wallace* v. *Toliver*, 265 Ark. 816, 580 S.W.2d 939 (1979); *accord Hall* v. *Clayton*, 270 Ark. 626, 606 S.W.2d 102 (Ark. App. 1980). The Supreme Court has further held that it is the existence of the gate and not how continuously it is closed that constitutes notice. *Weir* v. *Trucks*, 255 Ark. 494, 498-99, 500 S.W.2d 923, 926-27 (1973); *Munn*, 247 Ark. at 613, 446 S.W.2d at 667; *Brooks* v. *Reedy*, 241 Ark. 271, 278, 407 S.W.2d 378, 381 (1966); and *Mount* v. *Dillon*, 200 Ark. 153, 156, 138 S.W.2d 59, 60 (1940).

I believe the majority's decision is contrary to the existing case law; therefore, I dissent.

Shirley A. WEAVER *v.* CITY OF FORT SMITH

CA CR 89-77 777 S.W.2d 867

Court of Appeals of Arkansas
Division I
Opinion delivered October 18, 1989

John Joplin, for appellant.

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

GEORGE K. CRACRAFT, Judge. Shirley Weaver appeals her conviction of driving a motor vehicle while intoxicated, for which she was fined and her driver's license was suspended for ninety days. Her license was suspended for an additional six months based on a finding that she had refused to submit to a chemical test as provided in Ark. Code Ann. §§ 5-65-202, 205 (1987). We find no error and affirm.

The record indicates that two police officers arrived at the scene of an accident and found a vehicle that had run off the road, rolled over, and caught on fire. The officers testified that appellant was standing by the vehicle and that she stated that the vehicle was hers and that she had been driving it at the time of the accident. The officers further testified that her speech was slurred, her gait was staggered, and she smelled of alcohol. Based on their observations, they opined that appellant was intoxicated. She was taken to the police station where she was advised of the provisions of the implied consent law, Ark. Code Ann. § 5-65-202 (1987), and that refusal to submit to a chemical test could result in suspension of her driver's license. Ark. Code Ann. § 5-65-205 (1987). One officer testified that, when he asked appellant to submit to a blood alcohol test, she refused and stated that she was too drunk to pass it. Appellant was then charged with driving while intoxicated and refusing to take the chemical test.

The trial court denied appellant's motion in limine to prohibit evidence of her refusal to take the blood alcohol test from being admitted at trial. Appellant was found guilty by a jury on both counts and brings this appeal.

For her sole point for reversal, appellant contends that the trial court erred in denying her motion in limine. Appellant

argues that the admission of evidence that she refused to take a blood alcohol test violated her fifth amendment right against self-incrimination, because she had been compelled either to sign the "rights form" and submit to the test, thereby effectively admitting one element of the offense of driving while intoxicated, operating the vehicle, or face a penalty for refusing to take the test. We do not agree.

In *Schmerber* v. *California*, 384 U.S. 757 (1966), the Supreme Court of the United States held that neither the right of due process nor the privilege against self-incrimination was violated by admitting into evidence the results of a blood alcohol test administered under state law, even when administered over the accused's objection. The Court reasoned that the fifth amendment privilege against self-incrimination extends only to "testimonial" or "communicative" acts of a person and that, since results of a blood test were "physical" evidence rather than testimonial evidence, the privilege does not attach. This rule was followed by our supreme court in *Steele* v. *State*, 284 Ark. 340, 681 S.W.2d 354 (1984).

As it was not properly before it, the Supreme Court in *Schmerber* expressly reserved the issue of whether evidence of refusal to take a chemical test violated the privilege against self-incrimination. In *Roberts* v. *State*, 287 Ark. 451, 701 S.W.2d 112 (1986), our supreme court also declined to address this issue because the court reached its decision on different grounds. In *South Dakota* v. *Neville*, 459 U.S. 553 (1983), the Supreme Court of the United States squarely faced this issue. The Court stated:

> *Schmerber* v. *California*, held that a State could force a defendant to submit to a blood-alcohol test without violating the defendant's Fifth Amendment right against self-incrimination. We now address a question left open in *Schmerber*, *supra*, and hold that the admission into evidence of a defendant's refusal to submit to such a test likewise does not offend the right against self-incrimination.

459 U.S. at 554 (citations omitted).

The facts in *Neville* are similar to those before us. There, the

suspect was arrested for driving while intoxicated and refused to submit to a blood alcohol test, stating that he was too drunk to pass it. South Dakota's implied consent law was similar to our own, with an additional provision that refusal to submit to the test "may be admissible into evidence at the trial." S.D. Comp. Laws Ann. § 32-23-10.1 (Supp. 1982). The South Dakota Supreme Court held that evidence of refusal to take the test should have been suppressed as it violated the suspect's privilege against self-incrimination. On review, the Supreme Court of the United States reversed, holding that implied consent laws are permissible and a provision for revoking one's license to drive for refusal to take the test is "unquestionably legitimate, assuming appropriate procedural protections." 459 U.S. at 560.[1]

The Supreme Court then addressed the issue of whether the statutory provision of the South Dakota law that admits into evidence the refusal to take the test was violative of the privilege against self-incrimination. Unlike in *Schmerber*, the Court did not decide the issue on a distinction between "physical" evidence and "testimony" or "communications." The Court recognized that the fifth amendment does not protect all self-incriminating communications, but rather only those that are compelled. The Court concluded that the state did not directly compel the defendant to refuse the test because it gave him a choice of submitting to the test or refusing to take it. Although the giving of a choice does not always resolve the compulsory issue, the Court concluded that the values of the fifth amendment are not hindered when the State offers a suspect a choice of submitting to a blood alcohol test or having his refusal used against him. The Court stated:

> [R]espondent concedes, as he must, that the State could legitimately compel the suspect, against his will, to accede to the test. Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no less legitimate when the State offers a second option of refusing the test, with the attendant penalties for the making of that choice. Nor is this a case where the State has subtly

[1] Both the South Dakota statute and that of Arkansas provide for hearings on the issue before sanctions are applied.

> coerced the respondent into choosing the option it had no right to compel, rather than offering a true choice.
>
> To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test.

459 U.S. at 563-64. The Court therefore held that a refusal to take a blood alcohol test after an officer had lawfully requested it is not an act coerced by the officer and thus is not protected by the privilege against self-incrimination.

Based on the Supreme Court's decision in *Neville*, we conclude that the admission into evidence of appellant's refusal to submit to a chemical test did not violate her fifth amendment right against self-incrimination.

Affirmed.

COOPER and ROGERS, JJ., agree.

Donna JONES *v.* Wayne JONES

CA 89-126 777 S.W.2d 873

Court of Appeals of Arkansas
Division II
Opinion delivered October 18, 1989
[Rehearing denied November 8, 1989.]

Peel & Eddy, by: *Richard L. Peel*, for appellant.

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

JUDITH ROGERS, Judge. This is appellant's second appeal in this court concerning the chancellor's division of the parties' marital property upon their divorce. Appellee, Wayne Jones, is a certified public accountant and owns one-third of the stock in the accounting firm of Jones, Rose & Lawton, P.A. The stockholders have a buy-sell agreement which values each stockholder's one-third interest at $30,000.00. At the first trial, appellee valued his one-third interest in the accounting firm at $30,000.00 based on his buy-sell agreement, and the chancellor accepted this valuation and awarded appellant $15,000.00 as her marital interest. Appellant appealed the chancellor's determination, *Jones* v. *Jones*, 22 Ark. App. 267, 739 S.W.2d 171 (1987), and this court reversed and remanded the chancellor's decision because he did not allow appellant to proffer evidence relevant to the firm's value. The only issue upon retrial was the value of appellee's interest in the accounting firm, and after hearing disputed testimony that appellee's interest in the firm ranged from $30,000.00 to $227,535.00, the chancellor again found appellee's interest to be worth $30,000.00 and awarded appellant half of this amount. In this appeal, appellant asserts that the chancellor's determination that the value of appellee's interest in his accounting firm is $30,000.00 is clearly erroneous. We affirm the decision as hereinafter modified.

Cases on appeal from the chancery court are tried *de novo*, but this court will not reverse the findings of the chancellor unless the findings of the chancellor are clearly erroneous or clearly against the preponderance of the evidence, giving due deference to the chancellor's superior position to determine the credibility of the witnesses and the weight to be given their testimony. *Shoptaw* v. *Shoptaw*, 27 Ark. App. 140, 143, 767 S.W.2d 534, 537 (1987).

The testimony was sharply controverted at trial. Appellee and his witnesses testified that $30,000.00 was a fair valuation for appellee's interest in his firm. Appellant's expert testified as to several different methods which he felt were proper for evaluating an accounting practice and, depending on the methods he used, valued appellee's practice at amounts ranging from $141,247.00 to $227,535.00. Appellant's other witnesses both testified that the standard method used for evaluating an accounting practice was to use a percentage, usually between 75% to 125%, of gross fees. Appellee admitted his firm has used this method twice in the past when acquiring other accounting practices but maintained neither of these other acquisitions represented the purchase of a minority interest. The firm's gross fees for the fiscal year ending January 31, 1986, were $409,767.00, and at the time appellee filed for divorce, he owned one-third of the stock in the firm.

It is the province of the trier of fact to determine the credibility of witnesses and resolve conflicting testimony. *Shoptaw*, 27 Ark. App. at 142, 767 S.W.2d at 537. Here, the chancellor obviously placed greater weight upon the testimony of appellee and his witnesses in determining the value of appellee's interest, and we do not find that his decision was clearly erroneous. Nevertheless, we do find two of the reductions about which appellee testified and which were listed on a worksheet that the firm used to compute a stockholder's interest for purposes of the buy-sell agreement were irrelevant for purposes of determining appellee's interest here and should be deleted.

At trial, appellee introduced into evidence a worksheet that described how the firm arrived at the $30,000.00 valuation for a partner's stock.

Gross fees	$ 409,767.
Reductions:	
Revocation of purchase of John Barnards practice	(50,000.)
Non-recurring services (estates, special projects, etc.)	(40,000.)
Balance	$ 319,767.
Factor for accounts lost on sale of business 32%	(102,325.)
Balance	$ 217,422.
Debt (excluding equipment debt)	(58,898.)
Balance	$ 158,544.
Minority interest discount (lack of salability) 30%	(47,563.)
Balance	$ 110,981.
Value of one third interest	$ 36,993.
Rounded down for purposes of Buy-Sell agreement to	$ 30,000.

In describing this exhibit, appellee stated that the firm began with a gross fee figure of $409,767.00 for the fiscal year ending January 31, 1986, and reduced this figure by $50,000.00 representing the revocation of a purchase agreement to buy the accounting practice of John Barnard, and $40,000.00, representing some large fees, such as estates and special projects, which would not be recurring. He testified the 32% reduction, $102,325.00, represents accounts the firm would lose if a partner leaves the firm; and the 30% reduction represents the limited marketability a minority stockholder's interest is worth.

[redacted] We find the chancellor erred in accepting the 32% reduction ($102,325.00) which appellee alleged represented accounts the firm would lose upon the sale of a one-third interest. While this may be a valid reduction for appellee to use for purposes of a buy-sell agreement, we do not find it applicable to the situation here. At trial, there was no evidence that appellee was in the process of selling his interest in the firm or was contemplating doing so. Moreover, the 30% minority interest discount, listed on the worksheet as $47,563.00, which the sellor

also accepted included a discount for lack of salability. We also find the chancellor erred in ignoring the $36,993.00 which appears on the worksheet as the value of a one-sided interest in appellee's firm and accepting the lower 30,000.00 figure as the value. The $30,000.00 figure resulted from rounding down the true $36,993.00 figure to $30,000.00 for purposes of the buy-sell agreement. No evidence was offered to justify this $6,993.00 reduction here, which operated to reduce appellant's marital share, and we hold it was error to accept this reduction.

Accordingly, we delete the 32% reduction for accounts lost on the sale of business and therefore modify the decree to increase the value of appellee's one-third interest to $60,869.00 and to award appellant $30,434.50 as her marital interest in appellee's accounting practice.

Affirmed as modified.

MAYFIELD and COOPER, JJ., agree.

Robert F. FREEMAN *v.* Sheila FREEMAN

CA 89-40 778 S.W.2d 222

Court of Appeals of Arkansas
Division I
Opinion delivered October 25, 1989

Joel W. Price, for appellant.

Robert S. Blatt and *Mark E. Ford*, for appellee.

JOHN E. JENNINGS, Judge. Robert and Sheila Freeman were divorced by decree of the Sebastian County Chancery Court in 1978. Mrs. Freeman was awarded primary custody of the parties' two children and child support was set at $270.00 per month. The decree of divorce incorporated an agreement entered into by the parties entitled "Separation Agreement, Property Settlement, and Support Recommendation." That agreement contained the following provision:

> INCOME TAX EXEMPTIONS: The Husband and Wife mutually agree that the Husband will be entitled to claim the two minor children as income tax exemptions on Federal and State Income Tax Returns for [so] long as the Husband pays his child support to the Wife on a regular and prompt basis.

In the early 1980's, Mrs. Freeman sought and obtained increases in child support. By 1983, child support had been established at $460.00 per month. In 1987, she filed a petition again seeking an increase in support. She also asked that the decree be modified to permit her to claim the children as dependents for tax purposes.

The chancellor conducted a hearing and increased child support to $775.00 per month. He also modified the decree to provide that Mrs. Freeman would be permitted to claim the youngest child as a dependent for tax purposes. On appeal, Mr. Freeman argues that there was not a sufficient change in circumstances to support the chancellor's decision to increase child support and that court lacked authority to modify the tax exemption provision of the decree. We affirm.

Appellant is correct that it would be error for the chancellor to modify child support absent any change in circumstances. *Thurston* v. *Pinkstaff*, 292 Ark. 385, 389, 730 S.W.2d 239, 241 (1989). Here, however, there was ample evidence that the circumstances had in fact changed since 1983. There was testimony that both parties had substantial increases in income and that both now have increased expenses. Although we find it unnecessary to recite the testimony in detail, it is clear that the chancellor's award was very near the amount recommended by the family support chart contained in the domestic relations handbook published by the Arkansas Bar Association. Arkansas Code Annotated § 9-12-312(a)(2) (Supp. 1987) requires the court to refer to the chart in setting child support. The code requirement is applicable in a modification setting. *See Thurston*, 292 Ark. at 388, 730 S.W.2d at 240. Although the chart is not binding on the chancellor, *see Borden* v. *Borden*, 20 Ark. App. 52, 54, 724 S.W.2d 181, 182 (1987), the fact that the order of support is in conformity with the chart is certainly an indication that it is not clearly erroneous. In sum, we conclude that the chancellor's determination that there were sufficient changed circumstances to warrant an increase in child support is not clearly erroneous and that the court did not abuse its discretion in setting the amount of support to be paid.

We also think that the chancellor had the authority to modify the tax exemption provision contained in the parties'

agreement and incorporated into the original decree of divorce. Appellant acknowledges that, regardless of any agreement between the parties, the chancery court always retains jurisdiction over child support, as a matter of public policy. *See Crow* v. *Crow*, 26 Ark. App. 37, 38, 759 S.W.2d 570, 571 (1988). He argues, however, that the right to claim the children as a tax exemption was bargained for and is more in the nature of a property right. He also contends that since the provision states that he may claim the children for so long as he pays his child support, there must be a failure of that condition before the chancellor has any authority to modify the parties' agreement.

In our view the issue is whether a provision contained in a separation agreement between divorce litigants, which is subsequently incorporated into the decree, governing the right to claim the parties' children as tax exemptions, is more fairly and accurately characterized as a matter of property rights between the parties or, on the other hand, as a matter of child support. We think that such a provision is more closely related in nature to an award of child support than it is to a settlement of property rights, and therefore, such an agreement should be governed by the same rules applicable to awards of child support, i.e., that the chancellor continues to retain authority to modify such a provision on a proper showing.

Although the issue was not precisely the same in *In re Marriage of Lovetinsky*, 418 N.W.2d 88, 90 (Iowa Ct. App. 1987), the court's reasoning is pertinent and we agree with it:

> [Appellant] contends in the pretrial stipulation they agreed the tax exemption for their son was to be given to each in alternate years. She argues the trial court was bound to follow that agreement but incorrectly allocated the entire exemption to [appellee]. The trial court is not bound by the parties' agreement. The provisions of a dissolution decree dealing with dependency deductions are connected directly with the requirements of a noncustodial parent to provide support and allocation of the allowance has a direct effect on the financial resources available to the child. The trial court was asked to decide child support and the exemption was part of the child support issue. [Citations omitted.]

In *Niederkorn* v. *Niederkorn*, 616 S.W.2d 529, 533 (Mo. Ct. App. 1981), the court said, "[a]n award of the tax exemption to one party is nearly identical in nature to an order that the other party pay as child support a sum equal to the value of the exemption." *See also Calia* v. *Calia*, 624 S.W.2d 870, 874 (Mo. Ct. App. 1981).

Finally, in the alternative, appellant argues that even if the chancellor had authority to modify the tax exemption provision, the evidence was insufficient to support his decision to modify it. Because such a provision is, as we have held, in the nature of an award of child support, it was subject to modification on the same grounds and evidence that the court relied upon in modifying the child support proper. We find no error.

Affirmed.

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

Jo Ann SHIELDS *v.* STATE of Arkansas

CA CR 88-295 778 S.W.2d 647

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

Smith & Drake, by: *Mark D. Drake*, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant, Jo Ann Shields, was convicted of delivery of cocaine and sentenced to serve twenty years in the Arkansas Department of Correction and pay a fine of $11,000.00. On appeal she argues that the state's use of peremptory challenges to exclude blacks from the jury violated the equal protection clause of the United States Constitution and denied her a fair trial.

In *Ward* v. *State*, 293 Ark. 88, 733 S.W.2d 728 (1987), the Arkansas Supreme Court followed the United States Supreme Court's decision in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), by holding that when a prima facie case of purposeful discrimination in the selection of a jury occurs, the trial judge must conduct a "sensitive inquiry" into the reasons the prosecution has excluded the black jurors. In order to make a prima facie case, the defendant must show (1) the totality of the relevant facts gives rise to an inference of discriminatory purpose; (2) a total or seriously disproportionate exclusion of blacks from the jury; or (3) a discriminatory pattern of strikes, or questions and statements by the prosecutor during voir dire. 293 Ark. at 92-93.

Once a prima facie case is shown, the burden shifts to the prosecution to offer some explanation other than race. The state must "articulate a neutral explanation related to the particular case to be tried." Mere general assertions that the jurors were not excluded for racial reasons are inadequate. *See* 293 Ark. at 93. It is then the duty of the trial court to decide whether the prosecution's explanations for its strikes successfully rebut the defendant's prima facie case of purposeful discrimination. As that decision is based on a finding of fact, on appellate review we will not reverse the decision of the trial court unless it is clearly erroneous. *See Kidd* v. *State*, 24 Ark. App. 55, 748 S.W.2d 38 (1988).

The record shows that when the jury was seated the prosecutor had used three of his peremptory challenges to strike black panel members; that he had three peremptory challenges left; and that three black panel members had been selected to serve on the jury. Counsel for the defense then made a motion to strike the jury panel and the trial court shifted the burden to the prosecution to explain the reason for the strikes. According to the prosecutor, one potential juror was excused because the prosecutor had information that this person was involved in activities adverse to the state and during voir dire she exhibited animosity toward the prosecutor. The second one was excused because she was a business associate of the defendant, and the third one was excused because she was a young, black female, approximately the same age as the defendant and from a small town in which a number of people with her last name had been arrested and had caused trouble. Appellant argues that she made a prima facie showing that the prosecutor was using his peremptory challenges to strike potential black jurors solely for racial reasons and that the trial court's finding that the prosecutor gave racially neutral explanations for his strikes is clearly erroneous.

Appellant cites *Mitchell* v. *State*, 295 Ark. 341, 750 S.W.2d 936 (1988), in which the Arkansas Supreme Court reversed the trial court because of error in the selection of the jury. In that case, the prosecutor closely questioned the only black prospective juror about whether his race would affect his vote, and then utilized a peremptory challenge to excuse him. Although the prosecutor stated his reasons for the strike, the judge failed to conduct any further inquiry into those reasons, and the appellate court held that because the trial court accepted the prosecutor's explanation at face value and made no sensitive inquiry, reversal was required.

In *White* v. *State*, 298 Ark. 55, 764 S.W.2d 613 (1989), the court held that the appellant had not made a prima facie case of purposeful discrimination. In that case one black juror was seated, the prosecution used peremptory challenges to excuse three more, and at the close of voir dire the prosecution had peremptory challenges left. The court said:

> As was true in *Ford* v. *State*, 296 Ark. 8, 753 S.W.2d 258 (1988), the record here reflects that after the jury was

> seated—including the one juror of appellant's race—the state had peremptory challenges remaining. No discriminatory purpose can be attributed inferentially or directly to the state because of its actions in striking the two jurors in this cause. Neither does the appellant show a disproportionate exclusion of blacks from the venire from which the state and appellant were required to select a jury. Accordingly, we hold the appellant failed to establish a prima facie case of discriminatory purpose as is required in *Batson.*

298 Ark. at 58-59. *See also Smith* v. *State*, 294 Ark. 357, 742 S.W.2d 936 (1988).

We do not believe the *Ward* and *Mitchell* cases require reversal in this case because in those cases an all-white jury was seated to pass judgment on black defendants, the trial judge failed to conduct a "sensitive inquiry" into the matter, and in *Ward* the state had used all its peremptory challenges to strike black prospective jurors. We think the instant case is more analogous to *White, supra*, where the state had peremptory challenges it did not use, the court conducted a "sensitive inquiry" into the prosecutor's reasons for excluding the black jurors, and there were blacks on the jury. As the Court said in *Batson*:

> In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in Strauder [*Strauder* v. *West Virginia*, 100 U.S. 303 (1879)] recognized, however, that a defendant has no right to a "petit jury composed in whole or in part of persons of his own race." *Id.*, at 305. "The number of our races and nationalities stands in the way of evolution of such a conception" of the demand of equal protection. But the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria. The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race or on the false assumption that members of his race as a group are not qualified to serve as jurors.

476 U.S. at 85-86 (citations omitted).

We cannot find the trial court was clearly erroneous in holding that the jury in this case was selected pursuant to nondiscriminatory criteria.

Affirmed.

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

Domingo LOPEZ *v.* STATE of Arkansas

CA CR 89-37 778 S.W.2d 641

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

John Wesley Hall, Jr. and *Craig Lambert*, for appellant.

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

JUDITH ROGERS, Judge. The appellant, Domingo Lopez, was tried by jury in the Pulaski County Circuit Court, Fifth Division, along with a codefendant, Juan Murillo, on the charge of possession of a controlled substance (marijuana) with intent to deliver. The appellant was convicted as charged, and he received a fifteen year term of imprisonment. The codefendant, Murillo, was acquitted.

Appellant raises three points for reversal: (1) the trial court

abused its discretion in denying the appellant's motion to sever, since (A) an inadmissible out-of-court-statement of the codefendant was used against him, and (B) the joint trial denied the appellant the right to a fair determination of his guilt; (2) the trial court's denial of appellant's motion for a mistrial, and the introduction of the inadmissible statement of the codefendant violated his right of confrontation pursuant to the sixth amendment; and (3) the trial court erred in denying the appellant's motion to suppress, since (A) probable cause for the search was lacking, and (B) whatever probable cause did exist was a product of an unlawful detention and interrogation without the benefit of *Miranda* warnings. We find no prejudicial error, and affirm. We will address the appellant's arguments beginning with the third issue raised.

Before trial, the appellant filed a motion to suppress. This matter was addressed at an omnibus hearing, and the trial court denied the motion. On appeal, the appellant argues that no probable cause for a warrantless search existed, and any probable cause that did exist was formed after and resulted from an unlawful detention and interrogation which was conducted without the benefit of *Miranda* warnings. We disagree.

The record discloses that on November 10, 1987, Trooper John Scarborough stopped the appellant in his pick-up truck for speeding on Interstate 440 over Faulkner Lake. Scarborough testified that he suspected that the appellant was an illegal alien. Scarborough also stated that the appellant told him that he was traveling to Memphis to visit family.

Scarborough related that he then approached the passenger, Murillo, and asked him for identification. When Murillo, who was also of Hispanic descent, was unable to produce any identification, Scarborough asked him to come back to the patrol car to try to locate his identification. Scarborough also testified that at that time, Murillo told him that they were going to Chicago.

Scarborough stated that he asked if either of them had previously been arrested, to which Murillo replied that he had been involved in transporting illegal aliens, and had been arrested on weapons charges. This information was confirmed, and Scarborough said he then asked if there were any weapons in the

vehicle. Appellant told him that there was a gun in the glove compartment. Scarborough, accompained by Murillo, located and secured a weapon found there, a .22 Derringer. Scarborough testified that upon returning to the patrol car, he detected the strong odor of marijuana emanating from the truck. He said he looked with his flashlight in the camper, and then in the cab of the truck and saw nothing, but when he opened the door to the camper, the smell of marijuana was very strong. He testified that he then called Trooper Keith Eremea for assistance. Scarborough stated that he stopped the vehicle at around 11:35 p.m. Eremea testified that he received the call at 11:45, and arrived at the scene between 11:55 and midnight.

Scarborough testified that after Eremea arrived, they searched the camper finding an opened bucket of detergent, but no luggage. Scarborough stated that he noticed that the ceiling of the camper inside was a foot lower than it appeared to be from the outside, and that they pried open the plywood ceiling inside, and discovered a large quantity of marijuana, which was later weighed at 400 pounds.

In denying the motion to suppress, the trial court found that the stop and subsequent detention were authorized and brief, as it was no longer than essential under the circumstances. The court further found that Scarborough had reasonable cause to believe that the vehicle contained marijuana.

[redacted] An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is on a public way or waters, or other area open to the public. *Cook* v. *State*, 293 Ark. 103, 732 S.W.2d 462 (1987); Ark. R. Crim. P. 14.1. Reasonable cause exists when the facts and circumstances within the officer's knowledge, or of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Munguia* v. *State*, 22 Ark. App. 187, 737 S.W.2d 658 (1987). *See also Tillman* v. *State*, 271 Ark. 552, 609 S.W.2d 340 (1980). It has been recognized that the odor of marijuana is sufficient to arouse suspicion and provide probable cause for the search of a vehicle.

See Gordon v. *State*, 259 Ark. 134, 529 S.W.2d 330 (1976). If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search. *United States* v. *Ross*, 456 U.S. 798 (1982); *Cook* v. *State, supra; Munguia* v. *State, supra*. In reviewing the trial court's action in granting or denying motions to suppress evidence obtained by warrantless searches, the appellate court makes an independent determination based on the totality of the circumstances, but it will not set aside the trial court's finding unless it is clearly against the preponderance of the evidence. *Munguia* v. *State, supra*.

Viewing the totality of the circumstances, the evidence was that the trooper lawfully stopped the vehicle for speeding, and formed the suspicion that the occupants may have been illegal aliens. This suspicion, coupled with their having given him conflicting accounts as to their destination, justified the asking of further questions, which revealed a prior weapons violation on the part of Murillo. The trooper was then further justified in inquiring about a weapon, and subsequently securing the weapon in the vehicle, at which time he detected the odor of marijuana. Trooper Scarborough testified that he was familiar with the odor of marijuana based on his training and experience as a police officer. The credibility of this witness was a question for the trial court to determine. *Bell* v. *State*, 296 Ark. 458, 757 S.W.2d 937 (1988); *Smith* v. *State*, 292 Ark. 162, 729 S.W.2d 5 (1987). We therefore decline appellant's invitation to assess the witness's credibility on appeal. Based on a review of the totality of the circumstances, we cannot say that the trial court's denial of the motion to suppress was clearly against the preponderance of the evidence.

We also do not agree with the appellant's contention that the appellant was unreasonably detained, or that the detection of the odor of marijuana resulted from an interrogation and information received without *Miranda* warnings having been given. In *Berkemer* v. *McCarty*, 468 U.S. 420 (1984), the Supreme Court held that persons temporarily detained pursuant to a routine traffic stop are not "in custody" for the purposes of *Miranda. See also, Pennsylvania* v. *Bruder*, ___ U.S. ___, 109 S.Ct. 205 (1988). The Court reasoned that *Miranda* was not implicated in these situations as the stop is presumptively

temporary and brief, it is in public, and that the atmosphere surrounding an ordinary traffic stop is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda*. It was held that a motorist detained pursuant to a traffic stop is entitled to a recitation of his rights only when he is "subjected to treatment that renders him 'in custody' for practical purposes." 468 U.S. at 440. The Court also said that the officer may ask the detained a moderate number of questions to determine his identity and to try to obtain information confirming or disspelling the officer's suspicions. Guided by these principles, and in light of the circumstances surrounding the detention, we conclude that *Miranda* warnings were not required in this instance.

As part of the first issue raised by the appellant, he contends that the trial court abused its discretion in denying the appellant's motion to sever on the ground that an inadmissible out of court statement made by Murillo was used against him in violation of Ark. R. Crim. P. 22.3. As his second argument for reversal, he contends that the trial court erred, citing *Bruton* v. *United States*, 391 U.S. 123 (1968), in denying his motion for a mistrial and allowing the introduction of this statement as being violative of the right of confrontation guaranteed by the sixth amendment. Since these issues are related, we will address them together.

At the omnibus hearing, it was disclosed that Trooper Scarborough had fallen into a lake while photographing the marijuana that was discovered. Trooper Eremea testified that when this occurred, Murillo exclaimed, "What happened? Did he drop some of our marijuana in the water and go after it?" The appellant moved for a severance based on the possible introduction of this statement at trial. The trial court initially denied a severance on this ground on a determination that the statement was admissible as a statement of a co-conspirator pursuant to Ark. R. Evid. 801(d)(2)(v). The court deferred making a definitive ruling; however, during opening statement, Murillo's counsel mentioned the statement whereupon appellant's counsel moved for a mistrial. The trial court denied the motion and admonished the jury.

In *Bruton* v. *United States, supra*, the Supreme Court held that a defendant's right of cross-examination secured

by the confrontation clause of the sixth amendment is denied by the admission of incriminating statements made by a codefendant. Also, Rule 22.3 of the Arkansas Rules of Criminal Procedure provides:

> (a) When a defendant moves for a severance because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court shall determine whether the prosecution intends to offer the statement in evidence at the trial. If so, the court shall require the prosecuting attorney to elect one (1) of the following courses:
> (i) a joint trial at which the statement is not admitted into evidence;
> (ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been deleted, provided that, as deleted, the statement will not prejudice the moving defendant; or
> (iii) severance of the moving defendant.

Thus the rule sets out three options when such statements are to be introduced. The requirements of this rule are mandatory. *Moore* v. *State*, 297 Ark. 296, 761 S.W.2d 894 (1988). However the rule announced in *Bruton, supra*, is not violated when the statement is otherwise admissible as one made by a co-conspirator. *Bourjaily* v. *United States*, 107 S.Ct. 2775 (1987). Likewise, according to the language of the rule, the requirements of Rule 22.3 do not come into play if the statement is admissible against the defendant. The question then here turns on whether Murillo's statement was admissible pursuant to this exception to the hearsay rule.

Rule 801(d)(2)(v) provides that a statement is not hearsay if it is one made by a co-conspirator of a party during the course and furtherance of the conspiracy. Although the trial judge deferred ruling on this matter, he ultimately determined that the statement was admissible under this exception, permitted its introduction, and denied the motion for a severance.

The appellant advances numerous arguments contending that the statement was not admissible pursuant to the exception. However, only one of the arguments he now advances

was raised at trial. The record shows that the discussions between court and counsel concerning the admissibility of the statement under Rule 801(d)(2)(v) involved only whether there was sufficient evidence of the existence of a conspiracy for the exception to be applicable. All other questions now raised by the appellant have not been preserved for appeal. Unless a clear, specific and timely objection is made in the trial court that gives the court a fair opportunity to discern and consider the argument and correct the asserted error, the argument will not be considered on appeal. *Clark* v. *State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989). Furthermore, the grounds for objection may not be changed on appeal. *Id.*

The appellant argues that the evidence of a conspiracy was non-existent. The trial court found that the two were traveling together in a vehicle where the odor of marijuana was described as strong. The two gave inconsistent statements as to their destination, and no luggage was found in the truck. We cannot say that the trial court erred in concluding that there was evidence of a conspiracy for the purposes of this exception. Although the trial court did not consider the statement as being some evidence of the existence of a conspiracy, we note that the statement itself is probative of the issue as to whether a conspiracy existed. *See Bourjaily* v. *United States, supra.* We further note that the jury was given an instruction on the conspiracy issue in connection with any statements made relative thereto without objection.

Even assuming for the moment that the statement was not admissible under Rule 801(d)(2)(v), or that a severance should have been granted because of the statement, we do not believe that reversible error would have occurred. The Supreme Court in *Schneble* v. *Florida*, 405 U.S. 427 (1972), said:

> The mere finding of a violation of the *Bruton* rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.

Id. at 430. *See also Brazel* v. *State*, 296 Ark. 563, 759 S.W.2d 28 (1988).

While Murillo was a passenger in the vehicle, the statement itself provided the most incriminating evidence of his participation in the crime. Yet despite the introduction of the statement, Murillo was acquitted; therefore the jury must not have attributed much weight to the statement. On the other hand, it was established that the appellant was the owner and driver of the vehicle in which 400 pounds of marijuana was concealed. We could conclude, therefore, in light of the evidence against the appellant, and the apparent lack of prejudice occasioned by the admission of the statement, that if there were any error it would have been harmless beyond a reasonable doubt.

Finally, the appellant argues that a severance should have been granted as the joint trial denied him the right to a fair determination of his guilt. In *McDaniel* v. *State*, 278 Ark. 631, 648 S.W.2d 57 (1983), the supreme court listed seven factors favoring severance:

> (1) where defenses are antagonistic; (2) where it is difficult to segregate the evidence; (3) where there is a lack of substantial evidence implicating one defendant except for the accusation of the other defendant; (4) where one defendant could have deprived the other of all peremptory challenges; (5) where if one defendant chooses to testify the other is compelled to do so; (6) where one defendant has no prior criminal record and the other has; (7) where circumstantial evidence against one defendant appears stronger than against the other.

Id. at 638, 648 S.W.2d at 60. Of these factors, only those concerning the prior convictions of Murillo and alleged antagonistic defenses are pertinent here. Appellant again makes an argument based upon the admission of the statement, but we have already disposed of that argument in the previous discussion and find it unnecessary to again address it here.

The issue of a severance is to be determined on a case by case basis considering the totality of the circumstances. *Rhodes* v. *State*, 280 Ark. 156, 655 S.W.2d 421 (1983). The trial court's decision denying a motion to sever will not be disturbed

unless the appellate court finds that there has been an abuse of discretion. *Ford* v. *State*, 296 Ark. 8, 753 S.W.2d 258 (1988).

[redacted] With regard to Murillo's prior convictions, the prosecution announced at the outset that it had no intention of introducing such evidence, and had instructed the police officers who were to testify not to mention this information. Murillo chose not to testify, and no such evidence of his prior convictions was introduced. We cannot say that the appellant was prejudiced then by Murillo's criminal history.

[redacted] The appellant alleges that the defenses were antagonistic. While the defenses may have been somewhat inconsistent, the record does not reveal an "irreconcilable situation" where each defendant denied involvement in the crime and placed blame on the other. *See Rhodes* v. *State, supra.* The fact that defenses may be antagonistic does not compel the granting of a severance in every instance. As stated by the court in *McDaniel* v. *State, supra*:

> We do not suggest that simply because defenses are antagonistic the trial court must grant severance or risk reversal, merely that where the defenses are antagonistic, particularly in capital cases, careful consideration should be given to *all* the factors which weigh for or against achieving substantial justice in the trial process, and where it can be seen that either defendant is unduly jeopardized by a joint trial, severance should be granted.

Id. at 639, 648 S.W.2d at 60 (emphasis in original).

Considering the totality of the circumstances, we cannot say that the trial court abused its discretion.

AFFIRMED.

CRACRAFT and COOPER, JJ., agree.

HOLIDAY INN and U.S. Fire Insurance Company
v. Darryl COLEMAN

CA 89-377 778 S.W.2d 649

Court of Appeals of Arkansas
En Banc
Opinion delivered November 1, 1989

Walter A. Murray, for movant Arkansas Self Insurers Ass'n.

Michael W. Mitchell of *Mitchell & Rochell* and *Friday, Eldredge & Clark*, by: *Diane S. Mackey*, for movants Arkansas Hospital Ass'n, Arkansas Medical Society, Arkansas Chiropractic Ass'n, Arkansas Chapter of American Physical Therapy Ass'n, Arkansas Podiatric Medical Ass'n, and Arkansas State Dental Ass'n.

PER CURIAM. The Arkansas Self Insurers Association and the Arkansas Hospital Association, et al., have filed motions for leave to file amicus curiae briefs in conjunction with this workers' compensation case. In *Ferguson* v. *Brick*, 279 Ark. 168, 649 S.W.2d 397 (1983), the Arkansas Supreme Court, in a per curiam opinion, traced the history of the amicus curiae brief. The supreme court recognized that "the undertaking of the amicus has changed from that of an impartial friend of the court to that of an acknowledged adversary." The reason that such briefs have been welcomed is "the possibility that an amicus brief will have legal significance." *Ferguson*, 279 Ark. at 173.

The actual holding in *Ferguson* v. *Brick* is that permission to file such a brief would be denied when the purpose was nothing more than to make a political endorsement of the basic brief and it was obvious that the moving party would discuss nothing of legal significance.

[redacted] Although the movants here are "acknowledged advocates" we cannot say with assurance that their briefs would be of no legal significance. We therefore grant the motions.

MAYFIELD, J., concurs in part and dissents in part.

MELVIN MAYFIELD, Judge, concurring in part; dissenting in part. This court has granted motions allowing amici curiae briefs to be filed in this case. I dissent as to the brief to be filed by the Arkansas Self Insurers Association.

Rule 19 of the rules of this court and the Arkansas Supreme Court provides that a motion for permission to file an amicus curiae brief should "state the reasons why such a brief is thought to be necessary." The motion of the Arkansas Self Insurers Association states its brief is thought to be necessary because: (1) the Self Insurers Association is a nonprofit organization consisting of approximately 89 companies employing 60,000 members throughout the state, (2) the Association realizes "the impact of the judicial decisions from which appeal is now taken upon self-insured employers throughout the state," and (3) the Arkansas Workers' Compensation Commission has "erroneously" interpreted the law involved in this case.

I think those reasons fall far short of revealing any necessity for the filing of an amicus curiae brief by the Association. At best, they simply reveal that the Association thinks the Workers' Compensation Commission has erroneously interpreted the law and unless corrected this will "impact" upon the members of the Association. The "law" involved is referred to as Ark. Code Ann. § 11-9-715 (1987). A quick look at this statute reveals that it deals with fees for legal services rendered in litigation over claims for workers' compensation. The Association tells us nothing about the precise question involved. It apparently involves the Commission's allowance of an attorney's fee to be paid by the employer of an injured worker, and it is probably a safe bet that the Association thinks the Commission should not have allowed the fee or should have allowed a smaller fee. But other than registering its protest, why is it necessary for the Association to file an amicus curiae brief?

Furthermore, it is plain to me that the Association really does not want to file an amicus curiae brief in the traditional sense

of the term. In *Ferguson* v. *Brick*, 279 Ark. 168, 649 S.W.2d 397 (1983), the Arkansas Supreme Court pointed out that the term *amicus curiae* "is old Latin which literally means 'a friend of the court.' " However, the court said, "the undertaking of the amicus has changed from that of an impartial friend of the court to that of an acknowledged adversary." So, in *Ferguson* the court denied the motion for permission to file an amicus brief because it appeared "nothing of legal significance" would be discussed and the proposed brief would be "solely for the purpose of judicial lobbying."

While I cannot say that the Arkansas Self Insurers Association brief would discuss "nothing" of legal significance or that it would be "solely" for the purpose of judicial lobbying, I can state that the Association's motion, in my judgment, has not demonstrated why it is necessary that the brief be filed and it is perfectly obvious that the Association hopes its brief will help persuade this court to make a decision in keeping with the Association's interests.

In 3A C.J.S. *Amicus Curiae* § 3 (1973), it is stated:

> The privilege to be heard as an amicus curiae rests within the discretion of the court, and the court may grant or refuse leave, according as it deems the proffered information timely and useful or otherwise.

I would deny the motion of the Arkansas Self Insurers Association to file an amicus curiae brief in this case.

Another motion to file amici curiae briefs has been filed by the Arkansas Hospital Association and five other associations, although the motion states it is anticipated that one joint brief will be submitted by them. I concur in allowing these briefs, or brief, to be filed. Contrary to the motion filed by the Arkansas Self Insurers Association, the motion by these other associations states the specific point they want to argue, states that the appellant insurance company has no "concrete interest" in the point these other associations wish to argue, and states that the point is not likely to be briefed unless the motion is allowed. Under those circumstances, I think it proper to allow these associations to file a joint amici curiae brief.

Therefore, I dissent in part and concur in part in the action of the majority of this court.

Marvin G. JOHNSON and Barbara Johnson *v.*
SOUTHERN ELECTRIC, INC.

CA 89-95 779 S.W.2d 190

Court of Appeals of Arkansas
Division I
Opinion delivered November 8, 1989

Streett & Kennedy, by: *Alex G. Streett*, for appellant.

Jon R. Sanford, for appellee.

GEORGE K. CRACRAFT, Judge. Marvin and Barbara Johnson appeal from a chancery court order enforcing a materialmen's lien on their property in favor of Southern Electric, Inc. They contend that the chancellor's findings are clearly against the preponderance of the evidence and that his conclusions based thereon are erroneous. We agree and reverse.

In 1987, appellants undertook the construction of a multi-building project to be known as "North Park Plaza." The first building was constructed by Morton Buildings, Incorporated, for which Ron Milburn acted as chief supervisor. Milburn, although not licensed as a contractor under Ark. Code Ann. § 17-22-101 et seq. (1987), was familiar with the construction industry, having acted as general contractor and in a supervisory capacity on a number of construction projects. When appellants undertook to erect the second structure, Milburn agreed to individually "contract" the project at a cost of $49,700.00 plus his fee of $4,500.00. In the course of the construction, Milburn subcontracted some of the work to AAA Contractors, Inc. Appellee, Southern Electric, Inc., delivered materials on orders from AAA for use in appellants' building. Before the materials were supplied, appellants were not given notice that a lien could be impressed upon their property if materialmen went unpaid. *See* Ark. Code Ann. § 18-44-115 (1987). Materials with a value of $6,768.16, delivered by Southern Electric, were not paid for. Within the time permitted

by law, Southern Electric brought this action to enforce a materialmen's lien, naming AAA Contractors, Inc.,[1] and appellants as defendants. Milburn was not made a party.

Appellants answered, denying that they were indebted to appellee in any amount. They also alleged that appellee was not entitled to a lien because appellants had not been served with the statutory notice required by Ark. Code Ann. § 18-44-115 (1987). Appellants further alleged that Milburn was a contractor and had not been made a party to the action as required by Ark. Code Ann. § 18-44-124 (1987), and they moved to dismiss the action on that ground.

Appellants' motion to dismiss for appellee's failure to make Milburn a party to the action was denied on a finding that Milburn was "not acting as a contractor, but was operating in a supervisory capacity." After a subsequent hearing on the merits, the chancellor reaffirmed his previous finding that Milburn was not a contractor and, as such, was not a necessary party defendant to the action. He also found that the notice requirement of Ark. Code Ann. § 18-44-115 was inapplicable because the construction in question was commercial in nature. The chancellor then impressed a lien on appellants' property and ordered the property sold to satisfy the lien.

On appeal, appellants argue two points: (1) the trial court erred in finding that Milburn was not a contractor and, therefore, not a necessary party; and (2) the trial court erred in holding that the notice requirements of Ark. Code Ann. § 18-44-115 (1987) did not apply. We find sufficient merit in the first of these contentions to require reversal, and, therefore, we do not reach the second.

Arkansas Code Annotated § 18-44-101 et seq. (1987) provides that persons furnishing materials for improvements to and upon land, under a contract with the owner or his agent, shall, upon complying with subsequent provisions of that act, be entitled to a lien upon the building and the land upon which it is situated. Arkansas Code Annotated § 18-44-124

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[1] No judgment was entered against AAA Contractors, Inc., because it had sought Chapter 7 relief in the bankruptcy court.

(1987) provides, that, in all cases where a lien is filed by any person other than a contractor, it shall be the duty of the contractor to defend the action at his own expense.

The facts with regard to Milburn's status were not disputed. Appellant Marvin Johnson testified that he hired Ron Milburn to be his "general contractor, to buy this building, and put the whole thing together for me. I had an agreement with Mr. Milburn that he would bring in the building at $54,200.00, including his fee, and he, in fact, did this. If the building had come in over this price, I would have been looking to Ron Milburn to pay it." Appellants did not hire anyone, negotiate with any subcontractors, or order any materials. They had no dealings with Southern Electric, Inc., and were not even aware that Southern Electric, Inc., had furnished materials for the building. All invoices were sent to Milburn, who approved them and took them to appellants for payment. Appellant Marvin Johnson testified: "I know that I contracted with Mr. Ron Milburn to be my general contractor . . . . It would be fair to say that I had a certain project with certain dimensions, certain size, some cost limitations, and Ron Milburn agreed to build it for a set fee. That is what a general contractor does."

Ron Milburn testified that he had been hired to be appellants' general contractor. He agreed to complete the project for the sum of $49,700.00, and a fee of $4,500.00. He testified that the total contract price was to be $54,200.00 and that appellant had paid him that amount plus some extras that were not in issue. Milburn testified that his duties were to hire the workers, supervise the job, and make sure it was done properly. He was the only person who did any of the hiring and firing. He had instructed appellants as to what they should and should not do during the course of the project, and not to get involved because "I didn't want a bunch of change orders I didn't understand. I didn't want him to make an agreement that I was not aware of and then come back to me and say that I didn't do the job." Throughout his testimony, Milburn referred to himself as "general contractor for Mr. Johnson," and that he had engaged AAA for its part of the work on the project. Milburn also had no knowledge that Southern Electric was supplying any materials for the construction.

Harold Delaney, the owner of AAA, testified that he did not have any contact with appellants. He directed all of his questions and received all of his instructions regarding the job to Milburn. Steve Thompson, Southern Electric's branch manager, testified that all invoices from his company were billed to AAA and the purchases were made by an employee of AAA.

Appellants contend that the chancellor clearly erred in finding on this evidence that Milburn was acting merely in a supervisory capacity, apparently as the agent of appellants, and not as a contractor within the meaning of Ark. Code Ann. § 18-44-124 (1987). On appeal, chancery cases are tried *de novo* on the record. However, we will not reverse the findings of the chancellor unless they are clearly erroneous, or clearly against the preponderance of the evidence. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *RAD-Razorback Limited Partnership* v. *B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462 (1986). Here, after giving due deference to the superior position of the chancellor, we conclude that the finding that Milburn was not acting as a contractor is clearly erroneous.

Arkansas Code Annotated § 18-44-124 (1987), requiring that the contractor be a party to the action, does not define the term contractor. However, in *Davidson* v. *Smith*, 258 Ark. 969, 530 S.W.2d 356 (1975), the supreme court cited with approval the general definition of a contractor found in 17 C.J.S. *Contracts* § 11 (1963). The court adopted the definition of a contractor as "a party who contracts or covenants to construct works or erect buildings, perform work or supply articles at a certain price or rate usually for a specific improvement under a contract with an owner." *Davidson*, 258 Ark. at 972-73, 530 S.W.2d at 358.

On the other hand, our courts define the relation of agency as the result of conduct by two parties manifesting that one of them is willing for the other to act for him, subject to his control, and that the other consents to so act. The principal must in some manner indicate that the agent is to act for him and the agent must act, or agree to act, on the principal's behalf and subject to his control. The two essential elements of the definition are authorization and right to control. *Evans* v. *White*, 284 Ark.

376, 682 S.W.2d 733 (1985).

Here, it is clear from the record that appellants had no right to control Milburn's actions and did not attempt to do so. To the contrary, Milburn's testimony made it clear that part of his agreement with appellants was that he not be subject to any control and that he be free to conduct the project as he saw fit. From our *de novo* review of the record, we must conclude that the chancellor's finding that Milburn acted merely as an agent and not as a contractor is clearly erroneous.

Our supreme court has consistently held that Ark. Code Ann. § 18-44-124 (1987) means that in suits to foreclose materialmen's liens the contractor is a necessary party and must be made a party within the period provided in the act for enforcement of such liens. Failure to do so results in dismissal of the lien action. *Rasmussen* v. *Reed*, 255 Ark. 1064, 505 S.W.2d 222 (1974); *People's Building & Loan Association* v. *Leslie Lumber Co.*, 183 Ark. 800, 38 S.W.2d 759 (1931); *Cruce* v. *Mitchell*, 122 Ark. 141, 182 S.W. 530 (1916); *Simpson* v. *J.W. Black Lumber Co.*, 114 Ark. 464, 172 S.W. 883 (1914). These cases hold that the contractor is a necessary party because the owners know nothing about the nature or amount of furnished materials that have gone into the construction of their improvement. The contractor is a necessary party, both for his own and the owners' protection, because the owners have a right to look to him for the payment of any judgment that might be recovered against them for materials furnished. The owners should not be compelled to resort to another action against the contractor in which the contractor would be at liberty to claim that he did not owe the materialmen the amount for which the judgment was rendered and the lien enforced. It is the intention of the law to have the contractor defend all such actions and be bound by the judgment rendered.

As we have concluded that Milburn acted as a contractor and was, therefore, a necessary party to appellee's suit, we must also conclude that the trial court erred in not dismissing the action for appellee's failure to make Milburn a party.

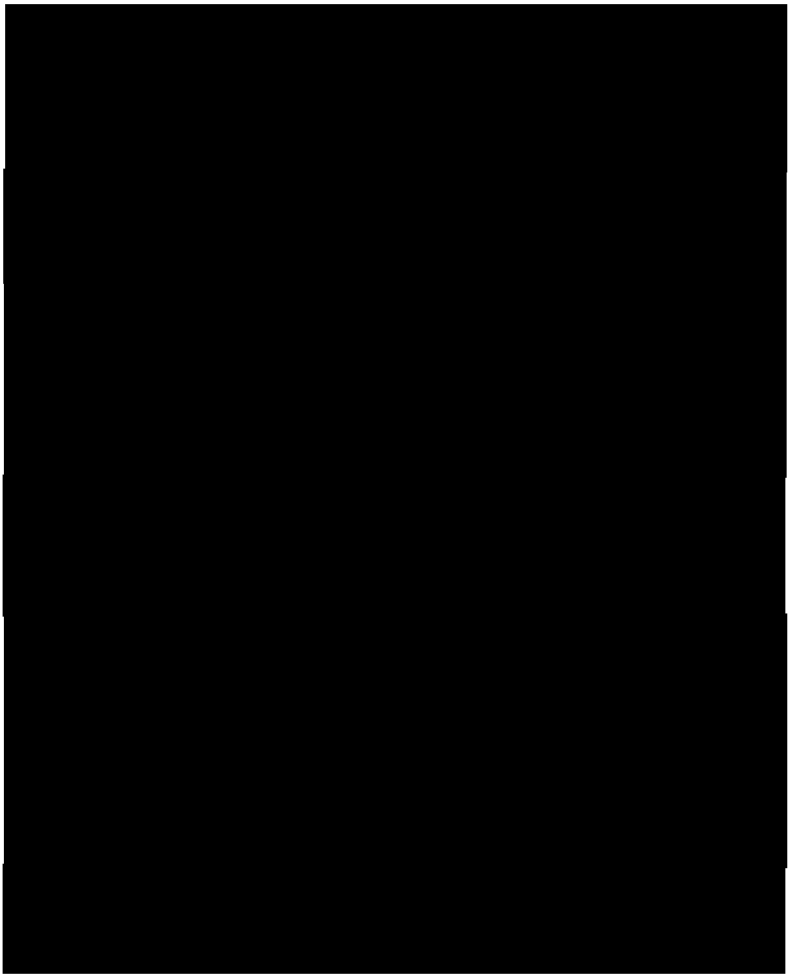
Reversed.

COOPER and ROGERS, JJ., agree.

Willie May JONES *v.* UNION MOTOR COMPANY, INC.

CA 89-240 779 S.W.2d 537

Court of Appeals of Arkansas
Division I
Opinion delivered November 8, 1989
[Rehearing denied December 6, 1989.]



Patrick Parsons, Legal Services of Arkansas, for appellant.

JAMES R. COOPER, Judge. Willie Mae Jones appeals from a judgment for the appellee, Union Motor Company, Inc., for the deficiency remaining after the repossession and sale of an automobile. The appellant contends that the sale was commercially unreasonable because the appellee failed to comply with the requirements of the Uniform Commercial Code. We affirm.

On May 29, 1985, the appellant purchased a 1980 Toyota automobile from the appellee and financed $2,767.00 of the purchase price. The appellee took a security interest in the automobile and later assigned the contract to General Motors Acceptance Corporation (hereinafter "GMAC") with recourse. The appellant defaulted in her payments, and on October 24, 1986, the automobile was repossessed and taken to the appellee's lot. On that date, GMAC sent the following notice to the appellant:

Since you have not made your payments, we have taken your vehicle. It is to be held at *Union Motor Co., Hwy 81 S., Monticello, AR.* It must be held at least until 9:00 a.m. *Nov. 3, 1986.* It may be sold at any time after that. (A sale includes a lease.)

To get your vehicle back you must pay all past due payments, plus expenses. Then you must start your monthly payments again. You can get your vehicle back any time until it is sold. As of the date of this letter you must pay:

Past Due Payments (2 of $130.89 and one of $____)	$261.78	
Late Charges	$ 60.53	
Expenses	$ 30.00	ESTIMATED
Total	$352.01	

The longer you wait, the more you may have to pay to get your vehicle back. Only reasonable expenses may be charged. They must be the direct result of retaking, storing, and selling the vehicle. We can also charge you the costs of getting it ready for sale and reasonable lawyers' fees.

If the vehicle is sold, the unpaid balance, expenses, and other liens will be deducted from the sale price. If any money is left, it must be sent to you within 45 days. If you do not get the money, you may have the right to sue for it plus any penalties fixed by law.

If the sale price is less than the total amount you owe, *you still owe the rest.*

. . . .

Contact us to get your vehicle back. If you have any questions, let us know.

On November 25, 1986, pursuant to the terms of the assignment, the appellee repurchased the contract from GMAC.

The automobile remained for sale on the appellee's lot for

approximately four months. In February 1987, it was sold for $275.00, and the appellee then brought suit for the deficiency of $1,347.92. The appellant defended the action on the ground that the sale was commercially unreasonable, and she filed a counterclaim against the appellee for damages resulting from the appellee's failure to provide adequate notice of the sale.

At trial, Jan Coomer, an employee of GMAC, testified the notice was mailed to the appellant on October 24, 1986, by GMAC on its behalf and that the appellee repurchased the contract from GMAC on November 25, 1986. The repossession report was introduced through her testimony. It reveals that, at the time of repossession, the interior and upholstery of the automobile showed excessive wear; that the finish was scratched; that the windshield was broken; that the right front fender was damaged; and that the automobile's mileage was 94,048.

Wayne Dye, Union Motor Company's acting general manager during the relevant time frame, testified that the automobile was in bad condition for resale when it was repossessed and that the brakes were repaired for sale. Dye testified that the automobile was placed on the appellee's lot for sale to the general public after November 3, 1986, and remained there for a period of four months. He testified that appellee had several automobile wholesalers look at the automobile in order to ascertain its value and that $275.00 was all he could get for it.

Willie Mae Jones testified that the automobile was damaged and had been driven over 78,000 miles when she purchased it. She also testified that the automobile looked almost the same when it was repossessed as when she bought it.

On November 10, 1988, the circuit court awarded judgment to the appellee in the amount of $1,347.92, plus costs, attorney's fees, and interest. The court made the following findings:

> 2. That there was only one notice sent to the Defendant in this case, which was a notice dated October 24, 1986, and which was sent to the Defendant by General Motors Acceptance Corporation; that the said notice received by the Defendant was reasonable notification of the sale conducted by the Plaintiff, Union Motor Company, Incorporated, as required by Arkansas law.

> 3. That the content and wording of the aforesaid notice was adequate and sufficient and provided the Defendant with the information and notice as required by Arkansas law.
>
> 4. That the sale of the Defendant's repossessed vehicle as conducted by the Plaintiff was a private sale and that it was conducted in a commercially reasonable manner.

On appeal, the appellant argues four points: (1) that the trial court erred in finding that the appellee was not required to send an additional notice of sale to the appellant; (2) that the trial court erred in finding that the notice was sufficient under the requirements of the Uniform Commercial Code; (3) that the trial court erred in finding that the sale was conducted in a commercially reasonable manner; and (4) that the trial court erred in not awarding judgment to the appellant on her counterclaim.

For her first point on appeal, the appellant argues that Ark. Code Ann. Section 4-9-504(3) (1987) requires that the secured party which ultimately disposes of the repossessed collateral is required to send the required notice. The appellant argues that, because the appellee repurchased the contract from GMAC after GMAC sent notice to the appellant but prior to the sale of the collateral, the appellee should have sent additional notice to the appellant. The appellant, however, concedes that the Arkansas Supreme Court's holding in *Brown* v. *Ford*, 280 Ark. 261, 658 S.W.2d 355 (1983), contradicts this position but urges this Court to overrule that decision.

Arkansas Code Annotated Section 4-9-504(3) provides in pertinent part:

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

See also Anglin v. *Chrysler Credit Corp*, 27 Ark. App. 173, 175, 768 S.W.2d 44, 45 (1989).

In *First State Bank of Morrilton* v. *Hallett*, 291 Ark. 37, 41-42, 722 S.W.2d 555, 556-57 (1987), the Supreme Court ruled that, when a creditor repossesses collateral and sells it without sending proper notice to the debtor as required by the Uniform Commercial Code, the creditor is not entitled to a deficiency judgment. "When the code provisions have delineated the guidelines and procedures governing statutorily created liability, then those requirements must be consistently adhered to when that liability is determined." *First Nat'l Bank of Wynne* v. *Hess*, 23 Ark. App. 129, 134, 743 S.W.2d 825, 827 (1988) (quoting *First State Bank of Morrilton*, 291 Ark. at 41, 722 S.W.2d at 557). "If the secured creditor wishes a deficiency judgment he must obey the law. If he does not obey the law, he may not have his deficiency judgment." *First State Bank of Morrilton*, 291 Ark. at 41, 722 S.W.2d at 557, quoting *Atlas Thrift Co.* v. *Horan*, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315, 321 (1972).

In *Brown, supra*, an automobile was sold by Lakeshore Motor Company after the contract was repurchased by Lakeshore from Ford Motor Credit Company. The automobile was repossessed by Ford Credit on July 2, 1980, the Ford Credit mailed notice to the debtor that the car was on Lakeshore's lot, that it would be sold at private sale any time after ten days from the date of notice, and that Brown would be liable for any deficiency. On September 2, Lakeshore repurchased the contract from Ford Credit and ultimately sold the automobile sixteen months later, after encountering difficulty in obtaining a purchaser. A deficiency judgment was entered against Brown, who argued on appeal that the sale was not commercially reasonable because Lakeshore failed to sell the collateral within a commercially reasonable time. The Supreme Court disagreed. Brown also argued that the notice given by Ford Credit was insufficient for a sale which was held by Lakeshore sixteen months later. The Court stated:

> Brown next argues that the notice given by Ford Credit was insufficient for a sale held by Lakeshore 16 months later. We do not agree. The secured party has only a duty to give reasonable notice of the time after which any private sale will be made. A second notice is not required even though a significant period of time passes before resale. See Ark. Stat. Ann. Section 85-9-504(3) (Supp.

1983).

> Brown also argues the notice was misleading in that it stated Lakeshore was to sell the car, but the car could be redeemed prior to sale from Ford Credit Company. We find no merit to this argument. Ford Credit was an assignee of the contract and was a secured party along with Lakeshore. Brown admits to receiving notice from Ford Credit. The fact that Brown went by and discussed with the dealer the possibility of getting the car back proves that the notice was sufficient to prevent her from being misled. This further shows that the notice was given in time to allow the appellant to exercise her right of redemption.

280 Ark. at 264, 658 S.W.2d at 356-57.

In the case at bar, the appellee did not repurchase the contract from GMAC until a few weeks after November 3, 1986, the date after which the automobile was placed for sale. Further, the notice clearly indicates that the automobile was located at the appellee's address, where it was ultimately sold. We find no material distinctions between the facts of the case at bar and those in *Brown*, and therefore, we find no merit in the appellant's first point.

Secondly, the appellant argues that the notice sent by GMAC was insufficient because it did not specifically state that the sale would be public or private or that the repossessed collateral would *actually* be sold. Section 4-9-504(3) does not specifically require that the words "public" or "private" be used in the notice. In their treatise, *Uniform Commercial Code*, James White and Robert Summers note that:

> For a private sale of collateral that is neither perishable nor threatens to decline speedily in value, nor is customarily sold on a recognized market, the creditor must inform the debtor of "the time after which any private sale or other intended disposition is to be made * * *." For such public sales, 9-504 requires different information: "the time and place of any public sale * * *."
>
> The contents of a notice for a private sale, then, are sufficient if the notice says: "The collateral will be sold at a private sale on or after (a particular date)". Courts have,

> however, given effect to a notice that in substance says: "The collateral will be sold in a private sale ten days or more after the sending of this notice." Both forms of notice give the debtor a minimum time in which to arrange alternate financing so to redeem, or to find a substitute buyer, or to solicit bids. Moreover, both alert the debtor to the date on which he should be concerned to oversee or inquire about any proposed sales.
>
> Despite the straightforward Code language, a few courts insist that the secured creditor provide still further information. For example, one court requires creditors to state explicitly in their notices whether the sale is to be public or private. We see no reason for such a requirement, assuming the contents of the notice are otherwise clearly worded, given that harsh consequences may flow from secured party's failure to send proper notice, and the text of 9-504 adopts a minimalist approach.

J. White & R. Summers, *Uniform Commercial Code* Section 27-12, at 600-01 (3d ed. 1988).

The distinction between private sale and public sale was recognized by the Arkansas Supreme Court in *Barker* v. *Horn*, 245 Ark. 315, 316, 432 S.W.2d 21, 22 (1968), where the Court stated that, although the statute requires notice of the time and place of public sale, only reasonable notification of the time after which a private sale will be made is required. In the treatise, *Uniform Commercial Code*, the authors state that:

> Before the creditor can sell or otherwise dispose of the collateral, 9-504(3) requires the creditor to send notice to the debtor.
>
> The purpose of notice is to give the debtor an opportunity either to discharge the debt and redeem the collateral, to produce another purchaser or to see that the sale is conducted in a commercially reasonable manner. [*Buran Equip. Co.* v. *H & C Investment Co.*, 142 Cal. App. 3d 338, 190 Cal. Rptr. 878, 881 (1983).]
>
> Cases involving notice issues should be resolved with these three purposes in mind.

J. White & R. Summers, *Uniform Commercial Code* Section 27-12, at 598-99 (3d ed. 1988). *Accord Bank of Dover* v. *Shipley*, 299 Ark. 451, 773 S.W.2d 825 (1989). Here, the automobile in question was not disposed of at public sale, and the circuit court specifically found that it was sold at private sale. It was not necessary that the notice expressly use the term "private sale."

[redacted] We also disagree with the appellant's argument that the notice is ambiguous. Although it stated that the automobile "may be sold at any time" after November 3, 1986, the clear intent of the notice, taken as a whole, is that attempts would be made to sell the automobile after November 3, 1986. Clearly, the notice sufficiently informed the appellant so that she could adequately protect her interest in the automobile. We hold that this was adequate compliance with Section 4-9-504(3).

[redacted] For the appellant's third point, she argues that the sale was not commercially reasonable because the automobile, after having been purchased by the appellant for over $3,400.00, was sold less than two years later for only $275.00. Whether a sale of collateral was conducted in a commercially reasonable manner is essentially a factual question. *Farmers and Merchants Bank* v. *Barnes*, 17 Ark. App. 139, 142, 705 S.W.2d 450, 452 (1986); *Henry v. Trickey*, 9 Ark. App. 47, 49, 653 S.W.2d 138, 139 (1983). The findings of fact of a circuit court sitting as a jury will not be reversed on appeal unless clearly against a preponderance of the evidence, and in making that determination, this court gives due regard to the superior opportunity of the trial court to judge the credibility of the witnesses and the weight to be given their testimony. *Bass* v. *Serv. Supply Co.*, 25 Ark. App. 273, 276, 757 S.W.2d 189, 190 (1988); Ark. R. Civ. P. 52(a).

[redacted] Further, the fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. *Thrower* v. *Union-Lincoln Mercury, Inc.*, 282 Ark. 585, 590, 670 S.W.2d 430, 433 (1984); Ark. Code Ann. Section 4-9-507(2) (1987). "Any difference between the fair market value and the price actually received, however, is ordinarily a material consideration, but this fact must be examined in light of all aspects of the sale to determine commercial reasonableness." *Id.*

Accord Farmers Equip. Co. v. *Miller*, 252 Ark. 1092, 1097, 482 S.W.2d 805, 809-10 (1972); *Womack* v. *First State Bank of Calico Rock*, 21 Ark. App. 33, 39, 728 S.W.2d 194, 197 (1987).

At the time of its repossession, the automobile had over 94,000 miles on it. Although the testimony was in conflict about the condition of the automobile at the time of its sale and its repossession, this was an issue for the circuit judge to resolve. Additionally, the automobile was available for sale to the general public on the appellee's lot, and wholesalers were invited to view it. In light of the evidence, we cannot say that the circuit judge's finding that the sale was commercially reasonable is clearly against a preponderance of the evidence.

Because we find no merit to the appellant's first three points on appeal, we also find no error in the circuit judge's denial of the appellant's counterclaim.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

A. Anthony VACCARO *v.* Robert C. SMITH
d/b/a Smith & Son Enterprises

CA 89-181 779 S.W.2d 193

Court of Appeals of Arkansas
Division I
Opinion delivered November 8, 1989

[redacted]

Evans, Farrar, Reis & Love, by: *Bryan J. Reis*, for appellant.

Curtis L. Ridgway, Jr., for appellee.

JOHN E. JENNINGS, Judge. This was a suit in contract. Appellant, Anthony Vaccaro, lives on Lake Hamilton in Hot Springs. In early 1987, he entered into a written contract with the appellee, Robert C. Smith. Smith was to construct a motorized trolley from Vaccaro's house down a fairly steep incline to his boat dock on the lake. The contract provided:

> This contract between Robert C. Smith dba Smith and Sons Enterprises (contractor) and A. Anthony Vaccaro for the construction and installation of one (1) radio controlled trolley on the premise of A. Anthony Vaccaro.
>
> A. Anthony Vaccaro to pay for all material at contractor's cost, and pay $20.00 per man hour for construction and installation of said trolley.

Estimated cost: $8,000.00

Payment. $1,500 in advance for purchase of materials and one draw after at least 50% completion of job. Balance upon completion.

Specifications on equipment:

All steel car and rails with counter weighted car, 2 hp winch to run at approximately 100 feet per minute. Safety brake on rails to prevent car from traveling if counter weight should become disconnected. Sears digital controller, landing with hand rails and car equipped with hand rails and gate interlocked so car cannot be moved until gate is locked.

Diamond plate decking on car and landing black primer.

The agreement was signed by both parties and dated June 2, 1987. Construction was completed on July 17, 1987, and Smith billed Vaccaro for $16,369.07. Vaccaro refused to pay more than the $7,500.00 which he had paid Smith during the course of construction and Smith filed a lien for the balance. Subsequently, Smith sued to foreclose that lien.

At trial Smith testified that, because of the terrain, he could not have made an accurate estimate of the cost of installing the rails, and that he told Vaccaro this. Smith's profit on the job came from the difference between the contract price for labor of $20.00 per man hour and the $10.00 per hour he paid for millwright labor or the $15.00 per hour he paid to welders. He testified that he had anticipated using only 400 feet of iron but ended up using 900 feet, because of the steep terrain.

Mr. Vaccaro and his ex-wife, Gloria Vaccaro, both testified that, despite the language of the contract, the parties intended that the cost of the job would not exceed $8,000.00.

Bryan Reis, Vaccaro's counsel on this appeal, testified at trial that he represented Vaccaro on a fulltime basis.[1] He said

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[1] The supreme court has held that it is not appropriate to serve as appellate counsel after having testified in the case. *Boling* v. *Gibson*, 266 Ark. 310, 584 S.W.2d 14 (1979);

that Smith told him he had no idea what the job would cost when he began the work. He also said Smith told him that it didn't matter whether he told Vaccaro of cost overruns because "Vaccaro was rich."

On this evidence the court held that Smith was entitled to recover the first $8,000.00 for material costs and labor in accordance with the contract, but that he was only entitled to recover the actual cost of labor for the excess over $8,000.00. The chancellor held that Smith was entitled to $12,944.50 and awarded a net judgment of $5,444.50, after deducting the amount previously paid.

On appeal, Vaccaro contends that Smith's recovery should have been limited to $8,000.00. On cross-appeal, Smith contends that the chancellor erred in not awarding him the full amount claimed. We find no error and affirm.

Appellant contends that the chancellor erred in not construing the contract as setting a maximum cost of $8,000.00. If the contract was ambiguous, as the appellant contends, then its meaning would be a question of fact for the chancellor to determine. *Floyd* v. *Ottercreek Homeowners Assoc.*, 23 Ark. App. 31, 742 S.W.2d 120 (1988); *Don Gilstrap Builders, Inc.* v. *Jackson*, 269 Ark. 876, 601 S.W.2d 270 (Ark. App. 1980). We do not agree, however, that the language of this contract was ambiguous. In *J.E. Hathman, Inc.* v. *Sigma Alpha Epsilon Club*, 491 S.W.2d 261 (Mo. 1973), the court said that "the words 'estimate' and 'estimated' are inconsistent with a promise to do specific work for an exact sum. The word 'estimate' negates certainty; it means 'to calculate roughly, or to form an opinion as to amount from imperfect data.' " *J.E. Hathman, Inc.*, at 266. (Citation omitted.) The court held that the word "estimated" was not an ambiguous term.

Appellant also argues that the court erred in not holding that Smith was estopped from recovering more than the amount of the estimate. This argument is based on appellant's contention that Smith represented to him that the trolley would cost no more than $8,000.00. Smith, however, denied making

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

such a representation and that testimony, together with the language of the contract itself, is sufficient to support a finding that such a representation was not made.

Appellant's main contention on appeal, and appellee's argument on cross-appeal, center on the interpretation and application by the trial court of *Clark & Friberg* v. *Madeira*, 252 Ark. 157, 477 S.W.2d 817 (1972). In that case Madeira and his wife bought an older house in Eureka Springs. They hired Friberg, an architect, to prepare plans for the remodeling of the house and to supervise the construction. They also hired Clark as the general contractor on a cost plus ten percent basis. Friberg was to be paid six percent of the cost of the work.

Friberg prepared contracts for the Madeiras which contained a cost estimate of $23,000.00 and stated that the work would be completed in ninety days. The actual cost was $43,000.00 and it took fifteen months to complete the work. In the resulting lawsuit the jury found for the homeowners.

On appeal, the architect argued that he should have been entitled to his six percent fee on the total cost of the project. The supreme court said:

> One cannot profit by his own wrong. Consequently an architect whose cost estimate is culpably below the actual cost of the job is not entitled to a commission *upon the excess*. (Citations omitted and emphasis added.)

252 Ark. at 158.

In the case at bar, appellant contends that the proper application of *Clark* to the facts of the case at bar requires that Smith be disallowed any recovery over and above the amount of his estimate. We think however, the trial court's interpretation of the supreme court's decision in *Clark* was the correct one. The chancellor held that Smith's estimate was "culpably below the actual cost of the job" and therefore refused to allow him any profit on the amount by which the actual cost exceeded the estimate. This is the same result reached in *Clark* and is consistent with the holding in that case.

On cross-appeal, the appellee contends that the principle in *Clark* should not be extended to apply to non-architects.

Here, however, Smith had previous experience in building trolleys of this kind and was responsible for its layout design, as well as its construction. We think the rule in *Clark* is sufficiently broad to extend to the facts of the case at bar.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

Sylvia Dianne VINEYARD *v.* STATE of Arkansas

CA CR 89-147 782 S.W.2d 370

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

Don G. Gillaspie, for appellant.

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

PER CURIAM. On June 1, 1989, a motion for rule on clerk was

filed in this case in the Arkansas Supreme Court under number RC 89-25. The motion, signed by appellant's attorney, alleged the appellant had been convicted of manslaughter in the Union Circuit Court and by "Judgment and Commitment Order dated March 29, 1988, sentenced to imprisonment for a term of ten (10) years in the Department of Correction." The motion also alleged that a notice of appeal had been filed and the time for lodging the record on appeal had been extended to August 15, 1988.

The motion for rule on clerk further alleged that counsel for appellant (there is no indication that counsel was court-appointed) received the record on appeal within the period for lodging the record as extended by the trial court, but due to counsel's fault the record was not filed in the appellate court within that period. The motion prayed for a rule directing the appellate court to file the record. On June 19, 1989, the Arkansas Supreme Court granted the motion on the basis that appellant's attorney "admits that the failure to file the record in time was due to fault on his part." And on that date, June 19, 1989, the record was filed in the Arkansas Court of Appeals.

However, prior to the filing of the record on appeal, the trial court, on May 30, 1989, entered an order revoking appellant's appeal bond for the reason that the record had not been filed in the appellate court. Therefore, after the record had been filed in the Court of Appeals, the appellant, on August 3, 1989, filed a "Petition for Certiorari or Motion for Mandamus" in the Court of Appeals alleging that the trial court had revoked appellant's bond without a hearing and asking the appellate court to reinstate the bond or to reinvest the trial court with authority to conduct a hearing on appellant's motion for bond and to certify the record of that hearing to this court. On August 16, 1989, under the authority of *Perry* v. *State*, 275 Ark. 170, 628 S.W.2d 304 (1982), this court entered an order reinvesting the trial court with jurisdiction to hear the motion for bail.

Thereafter, on October 17, 1989, the appellant filed in this court a "Motion to Supplement the Record and Motion for Bail on Appeal" alleging that the trial court had held a hearing on August 29, 1989, but had denied appeal bail to appellant, and appellant prayed that this court review the action of the trial court and issue an order admitting appellant to bail.

We have reviewed the record of the trial court's action taken in response to our per curiam of August 16, 1989. This record was tendered in two parts. The first portion was tendered September 25, 1989, and contains a copy of the trial court's docket showing a hearing held on August 28, 1989, pursuant to our per curiam. The second portion of the record was tendered on October 17, 1989, and contains the testimony taken at the trial court's hearing and the court's written order entered on October 2, 1989, denying bail.

The record before us shows that at the beginning of the hearing conducted pursuant to our per curiam, the trial court reminded counsel for appellant that after the appellant had been sentenced on March 29, 1988, she was at that time permitted to remain on bond; that the trial transcript had been filed with the clerk of the trial court on June 23, 1988, and picked up by appellant's counsel on July 27, 1988; and that the transcript was not filed in the appellate court until June 19, 1989, when the Arkansas Supreme Court granted a motion for rule on the clerk. The trial court clearly informed counsel that his delay in filing the record on appeal was the primary reason the appellant's bond had been revoked on May 30, 1989 (almost a year after counsel had picked up the record from the clerk of the trial court). And the trial court clearly informed counsel that it was the court's opinion that under Ark. Code Ann. § 16-91-110(b)(2) (Supp. 1987) (as amended by Act 31 of 1987), counsel had the burden of establishing that the appeal was "not for the purpose of delay and that it raises a substantial question of law or fact." Counsel for appellant, however, made only general references to issues he was in the process of briefing for the appellate court, stated he did not have his notes on those issues with him, but contended that the issues he would raise on appeal were "not frivolous."

A deputy prosecuting attorney told the trial judge that the state "would clearly disagree" with appellant as to whether the appeal had any merit. He stated that the issues on appeal referred to by appellant's counsel concerned admissibility of evidence and reminded the court that this matter had been briefed for the trial court before trial and that the court had ruled on the questions presented based on "the case law as presented by both parties."

The trial judge concluded the hearing by giving counsel for

appellant ten days in which to submit a "written brief or any written matter" to convince the court that the appeal was not for delay but raised a substantial question of law. Counsel told the judge he would be "happy to do that" and stated that ten days would "be sufficient."

However, the supplemental record filed here shows that the trial judge entered a written order stating no brief had been submitted to the court; the court was convinced that the appeal was "filed for purpose of delay"; and the appellant's motion for bond on appeal was denied.

In appellant's "Motion to Supplement the Record and Motion for Bail on Appeal," filed in this court on October 17, 1989, appellant's counsel admits that no brief was filed with the trial court; alleges that he has now filed the appellant's brief in *this* court which shows there is merit to the appeal; and states that the appellant has now been incarcerated in the Department of Correction.

We find that the trial judge's action in refusing to release the appellant to bail pending appeal is supported by the record before us. In *Perry* v. *State*, 275 Ark. 170, 628 S.W.2d 304 (1982), the court said:

> Appeal bonds are governed by [Criminal Procedure] Rules 36.5, 36.6, and 36.7. When such a bond is to be set the circuit judge has already heard the evidence at the trial, knows the actual sentence imposed, and is thus in an improved position to weigh the risk of defendant's nonappearance pending appeal. Moreover, under Rule 36.5 the trial judge may deny an appeal bond altogether and deliver the defendant to the custody of the sheriff, under conditions that were not even applicable when the pretrial bond was set. With respect to the appeal bond there is no requirement that the trial judge make written findings in fixing the amount of the bond. If this petitioner thinks that the appeal bond is too high, his remedy is not in this court but in the trial court.

275 Ark. at 171-172. Criminal Procedure Rule 36.5 provides persons convicted of crimes other than capital offenses shall be admitted to bail or otherwise set at liberty by the trial court except

if the court finds:

> (a)
>
> (i) there is substantial risk that the defendant will not appear to answer the judgment following conclusion of the appellate proceedings; or
>
> (ii) there is substantial risk that the defendant will commit a serious crime, intimidate witnesses, harass or take retaliatory action against any juror, or otherwise interfere with the administration of justice.

A comparison of the above provisions of Rule 36.5(a) and the provisions of Ark. Code Ann. § 16-91-110(b)(1) (Supp. 1987), referred to by the trial court, reveals that they cover the same things except that the code adds "or pose a danger to the safety of any other person" after the words "or otherwise interfere with the administration of justice." Paragraph (b) of Rule 36.5 provides:

> (b) In making the release determination the trial court shall take into account the nature of the crime and sentence imposed in addition to the factors enumerated in Rule 8.5(b) as relevant to a release decision.

One of the factors set out in Rule 8.5(b) is (vi) "the nature of the current charge and any mitigating or aggravating factors that may bear on the likelihood of conviction and the possible penalty." Ark. Code Ann. § 16-91-110(b)(2) (Supp. 1987) provides that a criminal defendant sentenced to imprisonment may not be released on bail pending appeal unless the court finds: "That the appeal is not for the purpose of delay and that it raises a substantial question of law or fact."

Thus, it is clear that Ark. Code Ann. § 16-91-110 makes substantially the same requirements for bond on appeal as does Criminal Procedure Rule 36.5 (including the factor set out in Rule 8.5(b)(vi), referred to in Rule 36.5). The trial court specifically found in its order entered on October 10, 1989, that "bond on appeal is denied in accordance with [Ark. Code Ann.] 16-91-110(b)(1) and (2). Both the code and the rule require that the trial court consider whether the criminal defendant (1) will appear at the conclusion of the appellate proceedings, and (2) the likelihood of conviction. We think the record before us supports

the trial court's order in both respects. Although the evidence shows the appellant contacted the sheriff's office each day (after the trial court revoked her bond) to see if there was space in the Department of Correction for her, this does not necessarily mean she could be found if she were on bail when her ten-year sentence was affirmed on appeal. At least, this is a matter for the trial court to decide.

Moreover, the record made before the trial court clearly supports its finding that this appeal is for the purpose of delay and does not raise a substantial question of law or fact, and we think that alone is sufficient to support the trial court's order denying bail pending appeal.

The motion for bail pending appeal is denied, and the clerk of this court is directed to file the supplemental record tendered September 25, 1989, and the supplemental transcript tendered October 17, 1989, as parts of the record in this case.

Doris VARNELL *v.* UNION CARBIDE and American Motorists

CA 89-26 779 S.W.2d 543

Court of Appeals of Arkansas
En Banc
Opinion delivered November 15, 1989
[Rehearing denied December 13, 1989.*]

*Cooper and Rogers, JJ., would grant rehearing. Jennings, J., not participating.

Thompson & Dodge, P.A., by: *John Dodge*, for appellant.

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

DONALD L. CORBIN, Chief Judge. Appellant was employed as a machine operator's adjuster for appellee, Union Carbide, on July 25, 1985, when she injured her back while stepping off a step. The employer's non-occupational group insurance carrier paid medical benefits for appellant and also, together with the em-

ployer, made payments to appellant of $300.00 per week from July 29, 1985, through November 24, 1985, and $40.00 per week from November 24, 1985, through January 27, 1986, as benefits under a sick pay plan provided by the employer.

A hearing was held before an administrative law judge on February 27, 1986, to determine appellant's entitlement to workers' compensation benefits. Appellant contended that she sustained a compensable accidental injury which entitled her to temporary total disability benefits, permanent partial disability benefits, medical expenses, and a controverted attorney's fee. Appellee contended that appellant had not suffered a compensable work-related injury but alternatively argued that if appellant sustained a compensable injury, it was entitled to credit for the weekly disability benefits and medical expenses previously paid by its group insurance carrier.

The administrative law judge concluded by opinion rendered February 23, 1987, that appellant sustained an injury arising out of and in the course of her employment and that she was temporarily totally disabled from July 26, 1985, to a date yet to be determined. The issue of permanent partial disability was premature at the time of the hearing and was held in abeyance. The administrative law judge also found that appellee was responsible for all reasonable and necessary medical expenses incurred by appellant as a result of her injury. Additionally, the law judge found that appellee was entitled to credit for all amounts previously paid by it and its group insurance carrier toward medical expenses and temporary total disability benefits. In addition, the administrative law judge awarded an attorney's fee on the amounts of weekly benefits and medical expenses previously paid to appellant under the group insurance coverage which was fully funded by appellee but limited the fee to the difference between benefits awarded and those already paid.

Appellant appealed to the Workers' Compensation Commission, contending that the administrative law judge erred in granting appellee credit for the amounts already paid toward her disability and medical expenses by appellee and its group carrier. Appellant also contended that the law judge erred in limiting the amount of attorney's fees to the difference between benefits awarded and benefits already paid. By opinion entered Septem-

ber 8, 1988, the Commission affirmed the opinion of the administrative law judge in all respects.

On appeal, appellant argues the same two points she argued at the Commission level. We reverse on both issues and remand.

I.

IT WAS ERROR FOR APPELLEE TO BE AWARDED CREDIT FOR ALL DISABILITY BENEFITS RECEIVED BY THE CLAIMANT AS A RESULT OF GROUP INSURANCE COVERAGE AND FOR AMOUNTS PAID IN EXCESS OF THE COMPENSATION RATE UNDER THE GROUP INSURANCE POLICY.

The issue in this point for reversal is whether the payments made by appellee were "advance payments for compensation" allowing for a setoff against previous payments or whether they were "sick pay benefits" for which no setoff is allowed. Appellant argues that the payments were not intended to be advance payments for compensation but "were strictly fringe benefits and taxable as income" to her. Appellee argues and the Commission held that the previous payments were advance payments for compensation and appellees were, therefore, entitled to a setoff against payments already made.

The statute around which this controversy centers is Arkansas Code Annotated Section 11-9-807 (1987) which provides:

> If the employer has made advance payments for compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due. If the injured employee receives full wages during disability, he shall not be entitled to compensation during the period.

The evidence reveals that Gene Bland, the employee relations manager for appellee, testified he was involved in the decision to treat appellant's injury as non-occupational based upon his belief that appellant had periodic back problems "due to whatever cause." Mr. Bland testified that an employee on non-occupational pay receives $40.00 a week from Metropolitan, one of appellee's insurance carriers, and appellee pays the remainder of money necessary to amount to a total of 85% of the employee's

average weekly wages. Mr. Bland testified that the non-occupational pay plan is a noncontributory one to which the employees do not contribute. Bland testified that Blue Cross/Blue Shield of Arkansas is appellee's carrier for medical insurance and that, like the non-occupational coverage, is noncontributory.

The Commission's ruling that the payments to appellant were advance payments for compensation for which appellee was entitled to a credit was predicated upon the following reasoning contained in its opinion:

> While Varnell cites several cases in which the credit was not allowed, the monies paid in those cases did not constitute "advance payments of compensation." For example, the employer's representative in *Looney v. Sears, Roebuck & Company*, 236 Ark. 868, 371 S.W.2d 6 (1963) admitted that a gratuity was intended. Similarly, the payments in *Southwestern Bell Telephone Company* v. *Siegler*, 240 Ark. 132, 398 S.W.2d 531 (1966) were labeled as "benefits" in the employee's handbook. In Varnell's case, however, the payments could not have been insurance "benefits" since the group health insurance company only paid $40.00 per week and the employer made up the deficit between that and 85% of the employee's weekly wage. It is also obvious that the monies were not payments in lieu of wages since the amount was less than Varnell's wages. Neither were they gratuities since the purpose was to compensate employees for the expenses of illnesses rather than to make a gift or provide a bonus.
>
> Having eliminated other possibilities (as required by *Siegler*), we conclude that the payments should be treated as advance payments of compensation. If such payments are not so treated, claimants who are dishonest could routinely collect from both the Workers' Compensation carrier and from the group health carrier. On the other hand, where the payment by the group carrier is the employer's mistake, the carrier would have a right of subrogation against the workers' compensation carrier, and the latter would eventually pay the same benefits twice, once to the claimant and once to the group carrier.

> Finally, we find this case distinguishable from *Emerson Electric* v. *Cargile*, 5 Ark. App. 123, 633 S.W.2d 389 (1982), where the employee paid the entire premium, and the Court termed the plan a "private contract" having no relevance to the employees' workers' compensation rights. The plan here, by the way of contrast, was fully funded by Union Carbide. We find that Varnell's case is on all fours with *Lion Oil Company* v. *Reeves*, 221 Ark. 5, 254 S.W.2d 450 (1952), where the credit was allowed for payments intended to represent a percentage of wages, which is the situation here. If there is a conflict between *Reeves* and *Cargile*, a decision of the Arkansas Supreme Court obviously controls over a decision of the Arkansas Court of Appeals.

In the *Lion Oil* case relied upon by the Commission, the employer, a self-insurer, paid the employee amounts "aggregating full wages" during his injury period for which the employer received full credit for the excess of the amount paid over what the workers' compensation benefits would have been for that period of time. In making this determination to allow *Lion Oil* such credit, the court stated: "It is highly probable that Reeves [employee] thought the excess payments he received were gratuities, and certainly the oil company was endeavoring to provide for the workers' current needs." In *Looney* v. *Sears Roebuck*, 236 Ark. 868, 371 S.W.2d 6 (1963), the supreme court deemed it wise to limit the holding of *Lion Oil* to its own particular facts making a clear distinction between "advance payments of compensation" and payment of "wages and gratuities." *Looney* specifically held that the excess of wages paid over the weekly compensation award cannot be deducted from the award. Further, it held that the employer cannot make such payments and later claim credit for the excess against an award made. The *Looney* court declared that where it is shown that both parties intended that the payment be compensation in advance, the credit is allowed against future benefits. In the case at bar, we find no evidence suggesting such intent. At the beginning of the hearing before the administrative law judge, counsel for appellees stated that appellant had not been paid anything in the way of workers' compensation benefits and that appellant had not suffered a compensable injury.

[redacted] While the reasoning by the Commission set out above

may be a plausible alternative that is followed by a minority of jurisdictions, we believe the general rule set out in A. Larson, *The Law of Workmen's Compensation* Section 97.51(a) (1989), is the direction followed by Arkansas to wit:

> As to the private pensions or health and accident insurance, whether provided by the employer, union, or the individual's own purchase, there is ordinarily no occasion for reduction of compensation benefits.

Judge Cracraft writing for a majority in *Emerson Electric* v. *Cargile*, 5 Ark. App. 123, 633 S.W.2d 389 (1982) in reliance upon *Southwestern Bell Telephone Company* v. *Siegler*, 240 Ark. 132, 398 S.W.2d 531 (1966), noted that our supreme court adopted the above Larson's rule insofar as it dealt with health and accident insurance provided by the employer. Judge Cracraft wrote:

> We conclude that the sounder rules to apply are that where the insurance, whether private or company administered, is provided and funded by the employer the rule announced in *Southwestern Bell Telephone Company, supra*, should be followed and the employer afforded the right to show, if he can, that the payments were "payments of compensation in advance."

Emerson, 5 Ark. App. at 126, 633 S.W.2d at 391. In *Emerson*, the Commission held that payments made to the claimant were not advance payments of compensation and, therefore, no setoff was allowed. In rendering its decision, the Commission took into consideration that although the insurance was offered through the employer, the claimant paid *all* premiums on the insurance. This court affirmed the Commission's disallowance of a setoff by finding that the relationship was a private contractual one in which the employer did nothing more than make the group coverage available at the employee's sole expense.

In any event, *Southwestern Bell*, cited above, mandates a reversal in the case at bar. At this point, we note that in *Southwestern Bell* the claimant, before his award of permanent partial disability, received full wages during his permanent disability for which his employer claimed a set off. Whereas in the case at bar, the award of permanent partial disability was held in

abeyance and instead deals with a set off claimed by the employer against a current award of temporary total disability. Having noted this distinction, we find that the same principles apply for purposes of allowing or disallowing set offs to employers for amounts previously paid. In *Southwestern Bell*, the employee sustained a knee injury while in the course of his employment and received his normal rate of pay ($128.00 per week) during his disability period under a "Plan" provided by the employer. The "Plan" was contained in a 28 page printed booklet and included disability payments to an injured employee during a period of disability. The "Plan" was fully funded by the employer and the employee made no contribution to it. The language of the "Plan" did not state that any benefits received under it would be considered as advanced payments of compensation.

The employee in *Southwestern Bell* suffered a residual injury and sought partial disability benefits in addition to those benefits previously received under the "Plan" claiming that one had nothing to do with the other. The employer claimed that the payments under the "Plan" represented an advance payment of compensation for disability and that it should be allowed a setoff against the workers' compensation award for any amounts paid the claimant under the "Plan."

The supreme court stated that the interpretation of the "Plan" was a question of law and also noted that without any designation in the "Plan" itself, the monies received by that employee might have been wages, gratuities, benefits or advance payment of compensation, and until the company showed that under the "Plan" such payment "could have been nothing except advance payment of compensation the company failed to establish its case." The court held that only where the employer clearly establishes that the sums paid or provided by it to an injured employee are advanced payments of compensation could it be entitled to any setoff. In all other situations, the employee could recover the full amount of his disability benefits provided under the Workers' Compensation Act.

Applying the principles established in *Southwestern Bell* to the case at bar, the evidence reveals that appellee sought through the testimony of Gene Bland to establish its case and meet its burden of proof to show that the payments received by appellant

were "payments of compensation in advance." Mr. Bland's testimony generally reveals that he has a high opinion of appellant and her work ethic, and would be happy for her to return to work. He also testified that he was involved in the decision to treat appellant's claim as a non-occupational injury; however, he admitted that he did not discuss this matter or his decision in this regard with appellant "at that time or even later." Furthermore, Mr. Bland stated that he acted in good faith in determining to treat appellant's injury as non-occupational and "at that time" he really thought the treatment and payments were in the proper category. Mr. Bland's testimony also revealed general information about appellee's non-occupational injury plan as well as how it is funded, the lack of employee contribution, and the treatment of appellant's claim under this plan.

Appellant's testimony revealed that at the time she filled out the report to claim benefits for her work-related accident, she was not told by appellee nor was she aware that the form she signed was for a non-occupational type incident. Also, she stated that she later refused to sign forms concerning payment of medical bills because she noticed that there was language on the forms categorizing her injury as "non-occupational." There was no viable evidence showing that both parties clearly intended that the payments were compensation in advance. In fact, the evidence bears out that the treatment of appellant's claim as a non-occupational injury was the result of a unilateral decision made by appellee and totally unbeknownst to appellant. It is apparent from case law and from statute that a clear distinction is drawn between money received as "advanced payment of compensation" and "wages and gratuities." *Southwestern Bell Tel. Co.* v. *Siegler*, 240 Ark. 132, 398 S.W.2d 531 (1966); *Looney* v. *Sears Roebuck*, 236 Ark. 868, 371 S.W.2d 6 (1963); *Arkansas Louisiana Gas Co.* v. *Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983); *Hill* v. *CGR Medical Corp.*, 9 Ark. App. 334, 660 S.W.2d 171 (1983); *Emerson Elec.* v. *Cargile*, 5 Ark. App. 123, 633 S.W.2d 389 (1982); Ark. Code Ann. § 11-9-102(8), (9) (1987). Based upon the foregoing, there is no substantial evidence to support a finding by the Commission that the payments made to appellant were payments of compensation in advance.

Our standard of review on appeal is whether the

decision is supported by substantial evidence. *Boyd* v. *General Indus.*, 22 Ark. App. 103, 733 S.W.2d 750 (1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Phillips* v. *State*, 271 Ark. 96, 607 S.W.2d 664 (1980). This standard must not totally insulate the Commission from judicial review and render this court's function in these cases meaningless. We will reverse a decision of the Commission where convinced that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission. *Wade* v. *Mr. C. Cavenaugh's*, 25 Ark. App. 237, 756 S.W.2d 923 (1988). In the instant case, we cannot say that fair-minded persons would have reached the same conclusion about granting appellee a setoff against "advance payments for compensation." For the reasons discussed, we reverse on this point.

II.

THE COMMISSION ERRED IN AWARDING HER AN ATTORNEY'S FEE ONLY ON THOSE AMOUNTS IN EXCESS OF THOSE PAID TO HER UNDER THE NON-OCCUPATIONAL DISABILITY PLAN AND THE GROUP MEDICAL INSURANCE PLAN.

We agree with appellant's contention. In *Ragon* v. *Great American Indemnity Company*, 224 Ark. 387, 273 S.W.2d 524 (1954) the supreme court stated that attorney fees in a workers' compensation case should consist of a percentage of the amounts expended for medical services and hospitalization in addition to a percentage of the compensation awarded to the claimant, since the compensation for which the fees are to be derived includes medical and hospital services. A reading of this case and our case, *General Industries* v. *Gibson*, 22 Ark. App. 217, 738 S.W.2d 104 (1987), leaves us with the inescapable conclusion that the allowance or disallowance of an attorney's fee does not hinge on whether the medical bills were paid by a collateral source. The test is that fees are calculated on the amount controverted and awarded. *Hot Spring County Bicentennial Park* v. *Walker*, 271 Ark. 688, 610 S.W.2d 268 (1981); Ark. Code Ann. § 11-9-715 (1987). The claim in the instant case was controverted in its entirety and thus under the authority of

Ragon, 224 Ark. 387, 273 S.W.2d 524 (1954) and other cases, appellant is entitled to an attorney's fee based upon the total controverted claim without a reduction for amounts paid by collateral sources. We reverse and remand for the entry of an order in keeping with this opinion.

Reversed and remanded.

JENNINGS, J., not participating.

WRIGHT, ERNIE E., Special Judge, agrees.

ROGERS, J., concurs.

COOPER, J., dissents.

JUDITH ROGERS, Judge, concurring. I concur in the result and decision of the court as it is both a correct statement and clarification of the law at the present time. I am concerned, however, that the burden of proof is such that it erects an almost impossible barrier for the employer to overcome to establish that such payments were intended as advance payment of compensation. Consequently, I am concerned that injured employees will not receive needed funds since payments may be withheld pending final adjudication. The employers may fear that the payments will subsequently not be credited as advance payments of compensation.

JAMES R. COOPER, Judge, dissenting. I dissent because I believe there was substantial evidence to support the Commission's finding that the payments made to the appellant by the appellee were advance payments of compensation. In *Emerson Electric* v. *Cargile*, 5 Ark. App. 123, 633 S.W.2d 389 (1982), we held that, where the employer provides insurance, the employer may attempt to show that the payments were advance payments of compensation. The Supreme Court drew distinctions between advance payment of compensation and other types of payments made by an employer in *Southwestern Bell Telephone Co.* v. *Siegler*, 240 Ark. 132, 398 S.W.2d 531 (1966). The *Siegler* Court held that an employer is entitled to an offset when the employer clearly establishes that the amount received by the employee was an advance payment of compensation:

> The money which Siegler received might have been either (a) *wages*, (b) *gratuities*, (c) *benefits*, or (d) *advance*

> *payment of compensation.* Until the Company showed that under the Plan such payment could have been nothing except *advance payment of compensation,* the Company failed to establish its case.

Id. at 136 (emphasis in the original). I submit that an employer has met his burden under *Siegler* when he has produced substantial evidence to show that the payments to the employee were not wages, gratuities, or benefits, and could therefore have been nothing except advance payment of compensation, and that the Commission could properly find that the appellee did so in the case at bar.

With regard to wages, there was evidence to show that the appellant was not working when the payments were made and that, unlike the circumstances presented in *Siegler, supra,* the amount paid the appellant was not identical to her weekly wages. The amount paid the appellant also provided some evidence that the payments were not gratuities: the record shows that the payments were neither identical to the appellant's wages, nor was the amount determined arbitrarily. Instead, there was evidence that the amount of the payments was calculated as a percentage of the appellant's weekly wages. Workers' compensation benefits are likewise computed as a percentage of the employee's weekly wages. *See* Ark. Code Ann. § 11-9-518 (1987). Furthermore, this case is distinguishable from *Looney* v. *Sears Roebuck,* 236 Ark. 868, 371 S.W.2d 6 (1963), where the employer's agent testified that the payments were intended as gratuities. No such testimony appears in this record.

The evidence with respect to benefits requires more discussion. *Siegler, supra,* draws a distinction between benefits and advance payments of compensation, but does not say what that distinction is. Compensation is itself a form of benefit, *see Brooks* v. *Arkansas-Best Freight System,* 247 Ark. 61, 444 S.W.2d 246 (1969), which defines "compensation" under what is now Ark. Code Ann. § 11-9-518 (1987) as "money benefits paid to the employee for disability." Therefore, "benefits" under *Siegler* must refer to benefits *other* than those payable to employees for disability. Under the employer's "Plan" in *Siegler,* benefits were not limited to disability, but were also payable to employees for

loss of time for unspecified reasons and as pensions. 240 Ark. at 134-35. In the case at bar, however, the only evidence relating to the purpose for which such payments were made was the employer's agent's testimony that the payments were predicated on the employee having suffered an injury resulting in an inability to work. The evidence therefore showed that the payments were made for disability, and were thus not the type of "benefits" excluded under *Siegler*.

We review the findings of the Commission in the light most favorable to those findings, giving the testimony its strongest probative force in favor of the Commission's action, to determine whether they are supported by substantial evidence. *Tyson's Foods, Inc.* v. *Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988). We are required to give the Commission's findings the force and verity that would attach to a jury verdict, *Central Mahoney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984), and even should the Commission's findings appear to be contrary to the preponderance of the evidence, we must affirm if reasonable minds could have reached the conclusion reached by the Commission. *Hyman* v. *Farmland Feed Mill*, 24 Ark. App. 63, 748 S.W.2d 151 (1988). We reverse the decision only where we are convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Id.* I am convinced that the appellee presented sufficient evidence to show that the payments were not wages, gratuities, or benefits to permit reasonable minds to conclude that the payments were intended as advance payment of compensation.

Nor do I agree with the majority's holding that the appellant is entitled to an attorney's fee based on the total amount controverted without reduction for amounts paid by collateral sources. As the majority correctly notes, attorney's fees are calculated on the amount controverted and awarded. *General Industries* v. *Gibson*, 22 Ark. App. 217, 738 S.W.2d 104 (1987). Although the payment of part of the medical bills by a collateral source was not found to be significant in that case, the collateral source in *Gibson* was an insurer which had intervened in the case. In contrast, the collateral source in the case at bar was an insurer which had not intervened or otherwise disputed its liability in any manner. I do not agree that the amounts paid by the insurer in the

case at bar were "controverted" for the purposes of awarding attorney's fees.

I dissent.

TRACOR/MBA *v.* BAPTIST MEDICAL CENTER

CA 89-70 780 S.W.2d 26

Court of Appeals of Arkansas
Division II
Opinion delivered November 22, 1989
[Supplemental Opinion on Denial of Rehearing
January 31, 1989.*]

*Mayfield, J., concurs.

Walter A. Murray Law Firm, for appellant.

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

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Arkansas Workers' Compensation Commission. Appellant, Tracor/MBA, appeals from an order of the full Commission entered October 12, 1988, which affirmed the opinion of the administrative law judge as modified and awarded appellee, Baptist Medical Center, medical expenses totaling $200,932.05. We reverse and remand.

It is undisputed that Sandra Bearden was critically burned in an explosion at appellant's munitions plant on December 19, 1983, and was hospitalized for 124 days thereafter. Appellee submitted a computerized bill to appellant in the amount of $201,490.30 for the care and treatment of Ms. Bearden during her hospitalization. Appellant presented this bill to its insurance company, Northwestern National, who hired Intracorp to per-

form an audit of the charges as was its standard business practice with large medical bills. The audit, performed by employee Iva Moss, indicated that appellee's computerized bill revealed errors resulting in $25,267.47 in reductions leaving a balance due of $176,222.83. Appellee did not perform its own audit but instead accepted Intracorp's audit for insurance purposes.

Appellant paid $138,434.44 of the bill and disputed payment of the amount of reduction reflected in the audit. The case proceeded to a hearing before an administrative law judge on October 9, 1985, who found that appellant should pay a total amount of $176,664.83 of charges on the bill indicating that the audit conducted by Intracorp properly reflected the amount due with one deduction in the amount of $442.00. Appellee appealed this determination to the full Commission which affirmed the administrative law judge's decision as modified and awarded appellee medical expenses in the full amount billed, less $558.25 for a Maalox medication error made by appellee's staff leaving a balance due of $200,932.05. It is from this decision that appellant brings this appeal.

Appellant raises the two points for reversal which are set out below:

I.

THE FULL COMMISSION'S DECISION AWARDING APPELLEE MEDICAL EXPENSES IN THE AMOUNT OF $200,932.05 IS CONTRARY TO ARK. CODE ANN. § 11-9-517 AND IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

II.

THE FULL COMMISSION'S AWARD OF ATTORNEY'S FEES TO THE ATTORNEY FOR THE APPELLEE IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND INSTEAD THE FULL COMMISSION SHOULD HAVE AWARDED ATTORNEY'S FEES TO THE ATTORNEY FOR THE APPELLANT.

Under its first point for reversal, appellant argues that

appellee was not entitled to payment for the entire amount of its computerized bill because the audit revealed that over $25,000.00 of charges were undocumented and therefore unreasonable within the parameters of the Workers' Compensation Act, specifically Arkansas Code Annotated Section 11-9-517 (1987). That statute provides as follows:

> The commission is authorized to establish rules and regulations, including schedules of maximum allowable fees for specified medical services rendered with respect to compensable injuries, for the purpose of *controlling the cost* of medical and hospital services and supplies provided pursuant to §§ 11-9-508—11-9-516. [Emphasis supplied.]

Appellant argues that the legislature's purpose in passing the above legislation was to encourage the Commission to *control medical costs*. However, appellant contends that the Commission's decision in the present case reflects its refusal to control costs because it did not require appellee, as the medical provider, to prove that the medical services and supplies in question were reasonable and necessary as required by Arkansas Code Annotated § 11-9-513 (1987) or that they were ever actually provided at all.

We find merit in appellant's argument because we believe there were questions to be decided as to the accuracy and reliability of the computerized bill submitted to appellant and as to whether appellee, Baptist Medical Center, had, in fact, furnished the services and supplies in question to Sandra Bearden. Therefore, the issue presented for decision concerns the degree and nature of proof required from a hospital to sustain its claim for the costs of medicals provided to its patient.

The proof offered by appellee to meet its burden of establishing the reasonableness and necessity of its charges was presented through the computerized bill and the testimony of Ann Schweitzer, nurse in charge of the Intensive Care Unit, and Larry Lazenby, Vice-President of Baptist Medical Center.

Nurse Schweitzer's testimony explained the care and treatment given to Ms. Bearden and how Bearden's account was charged for items and services used in her care. She explained the special procedures to be followed with burn patients to decrease

their exposure to infection by use of sterile gowns, gloves, etc., by all those with whom the patient comes in physical contact. Additionally, clean caps, masks, and booties must be put on each time one enters the patient's room. Schweitzer explained that Bearden was required to use a special Clinitron bed which prevents burn victims from having undue pressure on their skin and bones. She further explained the necessity of sterile Clinitron sheets over the bed. Schweitzer further explained that burns require constant debriding (removal of dead skin) and that the staff used Chux, an unsterile pad, during this procedure to keep the sheet from becoming wet.

Nurse Schweitzer explained that the Intensive Care Unit has a computer terminal at the nurses station from which one can call up a particular patient's name and then order whatever is needed for the care and treatment of that patient. Upon receipt, the ordered items are taken to the patient's room or restocked in the central supply area. She explained that under appellee's standard of care, all medications are required to be documented and that the staff strives to do so 100% of the time; however, perfection is not always achieved because Intensive Care Unit staff members do not always have ample time to make documentation on a patient's chart as to "what is done with the patient and for the patient."

Larry Lazenby explained that appellee, Baptist Medical Center, routinely conducts internal audits to insure the best operational procedures and documentation of records—medical, ordering, purchasing, and outside materials management. He explained that when nurses order any item or drug for a patient on the computer terminal, it automatically prints the order in the receiving department and charges the patient's file.

Appellant presented testimony of Iva Moss who performed the audit of the bill in question. She related that medical record charts should contain all clinical information regarding a patient's treatment and her audit was compiled utilizing all information provided her from appellee. Moss testified regarding the procedure whereby she arrived at the undocumented charges exceeding $25,000.00. To determine the accuracy of the charges and the applicability of all charges on the bill, she stated that she itemized each entry on the bill, its cost, and the amount. Charges

were placed in three categories: those not documented, those not related to the injury, and undercharges. Moss testified that she compared the notations and contents of Ms. Bearden's chart to the charges on her bill and when discrepancies were found, appellee was asked to furnish documentation or adjust the bill in that amount. When Moss found items charted but not billed, she issued appellee credit. Further, she explained that she does not contend that the charges reflected on appellee's computerized bill were exorbitant or unreasonable but that the charges were disallowed because appellee could not or would not present documentation to support the validity of the charges. Moss testified that hospitals are required to chart all medicals received by a patient, therefore, she reduced the bill by amounts reflected on the computerized bill and not charted.

Ms. Moss's reduction of the bill was for undocumented charges for numerous services and medicals, the largest reduction (exceeding $10,000) being for undocumented pharmacy charges comprised, in part, of morphine. Moss also disallowed some charges for discrepancies in documentation for gowns, masks, caps, shoe covers and sterile sheets. Moss questioned the use of three times the number of caps as masks and gowns. Additionally, she disallowed charges for all expenses relating to an incident where a student nurse erroneously gave Ms. Bearden an intraveneous administration of Maalox. Moss also disallowed other undocumented charges involving lab work, radiology, physical therapy, respiratory therapy, operating room charge, Intensive Care Unit surgery, blood transfusions, and the use of Chux.

After reviewing the testimony and the computerized bill, the full Commission, with one dissent, held that appellee made a prima facie case of reasonableness of its charges and that appellant failed to produce competent and credible evidence to overcome appellee's proof.

The determination of what constitutes reasonable and necessary medical treatment is a fact question for the Commission. *Savage* v. *General Indus.*, 23 Ark. App. 188, 745 S.W.2d 644 (1988). On review, this court must view the evidence in the light most favorable to the findings of the Commission and give the testimony its strongest probative force in favor of the Commission's action. *Allen Canning Co.* v. *McReynolds*, 5 Ark.

App. 78, 632 S.W.2d 450 (1982). This court may not reverse the Commission's decision unless it is convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. *Silvicraft, Inc.* v. *Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

Here, the Commission found that "all charges are documented in the form of the electronic record" and with the exception of the Maalox incident, the charges are reasonable and necessary. From our review of the entire record, we cannot conscientiously conclude that fair-minded persons with the same facts before them could reach the conclusion arrived at by the Commission. Accordingly, this case is reversed and remanded. Although we do not pretend to conclude that all charges disallowed by Moss are absolutely correct, we do find unresolved questions regarding accuracy and reliability of the disputed charges. The full Commission carries the unenvied burden of determining the reasonableness and necessity of medical charges in light of its overall duty to control medical costs in Workers' Compensation cases. With those objectives in mind, it is the opinion of this court that there is a higher degree of proof required for proving administration of controlled substances and health services versus supplies.

The best evidence of actual drugs administered to a patient is the handwritten hospital patient chart upon which all medications are required to be logged. This is not only important as evidence of what substances were given to the patient but also a prudent means of protecting the nurse, doctor, and hospital when the standard of care is challenged. Notwithstanding this requirement, here not only did appellee's witness, Nurse Schweitzer, candidly admit that staff members fail to make chart entries for what is done with and for the patient, she was also frank in stating that she could not account for the discrepancies in the varying amounts of caps, gowns, and masks. Mr. Lazenby's testimony revealed that no internal audit was conducted of Ms. Bearden's bill and although he was familiar with Moss's billing summary, he never actually looked at her work sheets to see how she arrived at the disputed amounts. For these reasons, Mr. Lazenby readily admitted that he could neither agree nor disagree with Moss's audit.

At the very least, this evidence reveals the strong possibility that the bill contains charges for medication not given, services not rendered, procedures not performed, and supplies not delivered. The Commission noted that "to cling to antiquated ways" is to fail to recognize that our society is changing from one that deals in paper to one that deals in electronic impulses. In its zeal to abolish "outmoded procedures," the Commission failed to realize that the computer is only as accurate as the person programming it. Furthermore, a hospital's documentation of administered medications is *required* to be logged on a chart in good old-fashioned manual handwriting regardless of the computerized billing procedures utilized by the hospital. We are alarmed by the posture taken by the Commission in this regard. The effect of the Commission's decision will make it virtually impossible to challenge a computerized hospital bill regardless of available evidence challenging the accuracy of the bill.

In rendering its decision, the Commission also found that appellant failed to rebut appellee's proof because Moss was not qualified to make judgment on the bill because she had no special background, education, or training in accounting, auditing, or hospital administration. Regarding Moss's qualifications, the evidence reveals that she has 22 years experience in the practice of nursing and holds a position as manager of the Medical Review Department of Intracorp, a nationwide entity. During the previous two and one-half years with Intracorp, Ms. Moss conducted 500 audits with approximately 100 of that amount conducted on bills submitted by appellee.

Therefore, we cannot say that Moss was not qualified to perform the audit because it is well settled that an expert need only be someone possessing skill or knowledge beyond that of persons of ordinary intelligence. There is no requirement that the witness be the most competent person to testify on those particular items. *See Dildine* v. *Clark Equip. Co.*, 282 Ark. 130, 666 S.W.2d 692 (1984). Based on the foregoing, we do not find that the Commission required appellee hospital to properly account for the charges in question. Therefore, its decision is reversed and the cause remanded for a redetermination of the disputed amounts in a manner consistent with the dictates of this opinion.

Because we are reversing the Commission's award and

remanding the case for a redetermination of the disputed charges, we also reverse its award of attorney fees to appellee based on the difference between the total amount of the computerized bill and sums previously paid by appellant. After the Commission makes a determination on remand of the final amount owed appellee on the questioned charges in the audit, the award of attorney's fees to appellee can be redetermined utilizing the new amounts.

Reversed and remanded.

MAYFIELD, J., agrees.

JENNINGS, J., concurs.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
JANUARY 31, 1990

785 S.W.2d 59

PER CURIAM. Petition for rehearing is denied.

MELVIN MAYFIELD, Judge, concurring. I concur in the court's en banc decision to deny the petition for rehearing filed in the above styled case. *See Tracor/MBA* v. *Baptist Medical Center*, 29 Ark. App. 198, 780 S.W.2d 26 (1989). However, since I was a member of the panel that remanded this case to the Commission, I want to explain why I think the petition for rehearing should be denied.

The basis of the controversy in this case is set out in the opinion of the administrative law judge which states that the appellant's insurance carrier submitted the appellee's bill for hospitalization of appellant's employee to a company that performs hospital bill auditing and that this company simply sought to determine whether the hospital patient actually received the items for which she was charged. The reason for this audit is tacitly recognized by the appellee who explains in its own brief that by a computerized process items are charged to a patient when the item is ordered, and "while it might be said that this system does not show that item was actually *used* by a patient, it clearly does indicate the item was specifically ordered for use on that patient." (Emphasis supplied by appellee.)

The audit disallowed more than $25,000.00 of the hospital's $201,490.30 bill. All but $442.00 of the amount disallowed by the

audit was also disallowed by the law judge who pointed out that most of the items disallowed by the audit were not challenged by the appellee hospital who chose "to rely on their contentions that their computerized billing system was accurate and could not be challenged by the type of audit" performed for the appellant's insurance carrier. The full Commission greatly reduced the amount disallowed by the law judge and allowed all of the appellee's bill except $558.25.

In our opinion of November 22, 1989, we reversed the decision of the Arkansas Workers' Compensation Commission and remanded the matter for a new determination in accordance with our finding that the person who performed the audit was qualified to do so, and for the Commission to allow the appellee an opportunity to present evidence to rebut the findings set out in the audit. I agreed to the reversal and remand because I viewed the issue before us as the same old question of substantial evidence, even though it was presented in a new package. The test is well established. In order to reverse a factual decision of the Commission, we must be convinced that fair-minded men with the same facts before them, could not have arrived at the same conclusion arrived at by the Commission, *Plastics Research & Development Co.* v. *Goodpaster*, 251 Ark. 1029, 476 S.W.2d 242 (1972); and we affirm if reasonable minds could reach the Commission's conclusions, *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979). *See also Snow* v. *ALCOA*, 15 Ark. App. 205, 691 S.W.2d 194 (1985).

However, in this case, much of the focus of the Commission was upon the appellee's method of bookkeeping. Each commissioner wrote a separate opinion. One thought the appellant's insurance carrier failed "to recognize that our society is changing from one that deals in paper to one that deals in electronic impulses." A concurring commissioner supported "the idea of auditing hospital bills" but thought there "must be more than simply a challenge of the hospital's record-keeping practices." The third commissioner, however, dissented on the basis that the appellee did not prove "by a preponderance of the evidence that the charges submitted were reasonable and necessary and that the services were in fact provided." Under all the circumstances, I think it was proper to reverse and remand this matter to the Commission to allow it to focus clearly on the factual issues it

must decide.

I would point out that we have noted the fact that the reference in our original opinion to the argument made by appellant concerning Ark. Code Ann. § 11-9-517 (1987) was to a statute enacted after the hospital charges in this case occurred. Had appellee called our attention to the date of the enactment of the statute in its original brief—instead of its petition for rehearing—we probably would not have mentioned the statute in our opinion; however, we also note that appellee claims its charges would have been appropriate even if they were subject to that statute.

Jenny GUINN *v.* Chan HOLCOMBE

CA 89-183 780 S.W.2d 30

Court of Appeals of Arkansas
Division II
Opinion delivered November 22, 1989
[Rehearing denied January 10, 1990.]

Sexton Law Firm, P.A., by: *Sam Sexton III,* for appellant.

GEORGE K. CRACRAFT, Judge. Jenny Guinn appeals from an order of the Crawford County Chancery Court finding that her lease of a building to Chan Holcombe was valid and ordering its enforcement. We find no merit in her points for reversal and affirm.

A clear understanding of the arguments necessitates some discussion of a prior lawsuit which involved the same factual background. On October 1, 1983, appellee entered into a contract to sell a parcel of real property to Nuggett & Associates, Inc., (hereinafter the "corporation") for $15,500.00, payable in monthly installments, with the conveyance to be made after all payments were made. The property consisted of a lot on which was located a dwelling and a detached garage used by appellee for storage. On the same day, the corporation leased the garage to appellant, who was the president of the corporation, and she in turn leased the garage to appellee for a term of five years, reciting a consideration of "$1.00 and good and other valuable consideration." On August 5, 1985, prior to the end of the lease term, appellant notified appellee that he must remove his property from

the garage or it would be considered abandoned and disposed of. Appellee immediately complied with that request. Appellee then wrote a letter to appellant in which he stated that part of the consideration for the contract of sale was appellant's agreement to lease the garage to him and that he would not perform the contract of sale according to its terms until that breach was rectified.

The corporation brought an action against appellee for specific performance of the contract of sale. Appellee counterclaimed for damages resulting from the breach of the lease agreement, asserting that although the lease agreement had been executed by appellant and not the corporation, they were one and the same. In that case, the court ordered appellee to specifically perform the contract of sale with the corporation. Appellee's counterclaim based on appellant's breach of the lease agreement was dismissed based on the court's findings that appellee's contract of sale was with the corporation, that appellant was acting only as a corporate officer, and that appellant was not a party to the action.

Appellee then brought this action against appellant individually, seeking specific performance of the lease agreement or, in the alternative, damages for its breach. The trial court found that the lease agreement was valid and based on adequate consideration, that of appellee's promise to sell the property to the corporation in exchange for appellant's promise to lease the garage to appellee. The court concluded that the agreement to convey the property to the corporation at appellant's request constituted the other valuable consideration for the lease and ordered specific performance of the lease agreement.

Appellant contends that the trial court erred in determining that the lease agreement was supported by consideration. Appellant argues that the lease was executed for a nominal consideration of $1.00 and was therefore voluntary and unenforceable. We do not agree.

Appellant correctly states that lease agreements must be supported by consideration, *Lindner* v. *Mid-Continent Petroleum Corp.*, 221 Ark. 241, 252 S.W.2d 631 (1952), and that a conveyance based on nominal consideration is treated as voluntary. *Howard* v. *Howard*, 152 Ark. 387, 238 S.W.2d 604

(1922). However, consideration supporting a promise does not have to move directly to the person making the promise, but may move from the promisor to a third person. *Quattlebaum* v. *Gray*, 252 Ark. 610, 480 S.W.2d 339 (1972); *Hays* v. *McGuirt*, 186 Ark. 702, 55 S.W.2d 76 (1932); 1 S. Williston, *A Treatise on the Law of Contracts* § 113 (3d ed. 1957); 1 A. Corbin, *Corbin on Contracts* § 125 & n.65 (1963); Restatement (Second) of Contracts § 71 (1981). Williston states the rule to be that, if a promisee parts with anything of value at the request of the promisor, it is immaterial that the promisor receives nothing. "[T]he consideration given by the promisee for a promise need not move to the promisor, but may move to anyone requested in the offer." 1 S. Williston, *A Treatise on the Law on Contracts* § 113 at p. 449 (1957). In the Second Restatement, the rule is stated to be that "It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous." Restatement (Second) of Contracts § 71 at p. 176 (1981).

Here, both parties testified that there was other consideration for the lease. Appellant testified that appellee had agreed to pay her $25.00 a month for rent. The court rejected that testimony and accepted appellee's testimony that appellant had promised to execute the lease to him in exchange for his agreement to sell the lot to the corporation. Appellee testified to that agreement in general terms, making it clear that he would not have executed the contract of sale unless he had the lease. His testimony was corroborated by appellant's introduction into evidence of appellee's letter written at the time that he was directed to move his property from the garage. In the letter appellee reminded appellant that the only reason that he had executed the contract of sale was that she had agreed to lease the garage to him and that he therefore considered her action as a breach of contract. He indicated that he would not perform the contract of sale until she either restored him to possession of the garage or paid damages for the breach. It was received in evidence at appellant's request without restricting it to any particular purpose.

The signing of the contract of sale by appellee was sufficient consideration for appellant's promise to execute the lease. We therefore cannot conclude that there was no substantial

evidence to sustain the trial court's finding that the lease agreement was supported by sufficient consideration.

Appellant next argues that as appellee's counterclaim in the prior lawsuit was dismissed on a finding that the contract to sell and the contract to lease were separate and distinct contracts, appellee was barred by the doctrine of *res judicata* from asserting that the lease agreement was supported by appellee's promise to enter into the contract of sale with the corporation. This argument is without merit for several reasons, not the least of which is that appellant was not a party to that action and the court did not have before it or consider the issue of the validity of the consideration for the lease agreement. In order for a judgment to be a bar to a subsequent action, it must be rendered by a court having competent jurisdiction in an action between the same parties or their privies, and the point of controversy must be the same and have been decided on its merits. *Hatch* v. *Scott*, 210 Ark. 665, 197 S.W.2d 559 (1946). The doctrine of *res judicata* is designed to prevent the relitigation of issues which have already been litigated or which might have been litigated. *Lincoln* v. *State*, 287 Ark. 16, 696 S.W.2d 316 (1985); *Wells* v. *Arkansas Public Service Commission*, 272 Ark. 481, 616 S.W.2d 718 (1981).

Appellant also argues that, since there were two separate contracts, neither could stand as consideration for the other and each was required to be supported by independent consideration. We know of no rule that requires such a result, and our earlier discussion of consideration sufficient to support a contract dictates a different one.

Appellant's reliance on *Crookham & Vessels, Inc.* v. *Larry Moyer Trucking, Inc.*, 16 Ark. App. 214, 699 S.W.2d 414 (1985), is misplaced. There appellant entered into a contract under which he agreed to perform certain work for an agreed fee. When he determined that he was unable to complete the work without his costs exceeding that fee, he refused to perform until the other party agreed to pay an additional sum for the work. We held that a promise to do what one is already legally bound to do is not valid consideration, and that the promise to pay an additional sum required additional consideration. This case, therefore, merely stands for the proposition that a promise to perform an

existing contractual obligation is not valid consideration to support a contract.

Nor can we find merit in appellant's argument that permitting appellee to establish that the actual consideration for the lease was his agreement to sell the property violated the parol evidence rule. Parol evidence is proper to show the true consideration of a contract or to show that the consideration recited is not that actually agreed upon. *Williams* v. *J.W. Black Lumber Co.*, 275 Ark. 144, 628 S.W.2d 13 (1982); *Newberry* v. *Newberry*, 218 Ark. 548, 237 S.W.2d 477 (1951); *Sewell* v. *Harkey*, 206 Ark. 24, 174 S.W.2d 113 (1943); *Howard* v. *Howard*, *supra.*

Appellant finally contends that the trial court erred in determining that the lease agreement contained all required elements. Appellant argues that the lease agreement must fail because it lacked mutuality of obligation, which is an essential element of a contract. *Hunt* v. *McIlroy Bank and Trust*, 2 Ark. App. 87, 616 S.W.2d 759 (1981). We disagree. The validity of a contract does not always depend upon mutuality of obligation. Mutuality of obligation is ordinarily required in contracts where the parties exchange a promise for a promise, and each must be bound or neither is bound. It becomes a nonissue when consideration has otherwise been conferred upon one of the parties. A promise in exchange for performance does not require mutuality of obligation. *Eustice* v. *Meytrott*, 100 Ark. 510, 140 S.W.2d 590 (1911); *Carrico* v. *Delp*, 141 Ill. App. 3d 684, 490 N.E.2d 972 (1986); *Leeson* v. *Etchison*, 650 S.W.2d 681 (Mo. App. 1983); *Brack* v. *Brownlee*, 246 Ga. 818, 273 S.E.2d 390 (1980). *See* Restatement (Second) of Contracts § 79 (1981). Here, appellee agreed to sell the house to the corporation on appellant's promise to lease the garage to him. Appellee then executed the contract of sale and appellant was bound to execute the lease. We cannot conclude that the trial court erred in finding that the lease agreement contained all required elements.

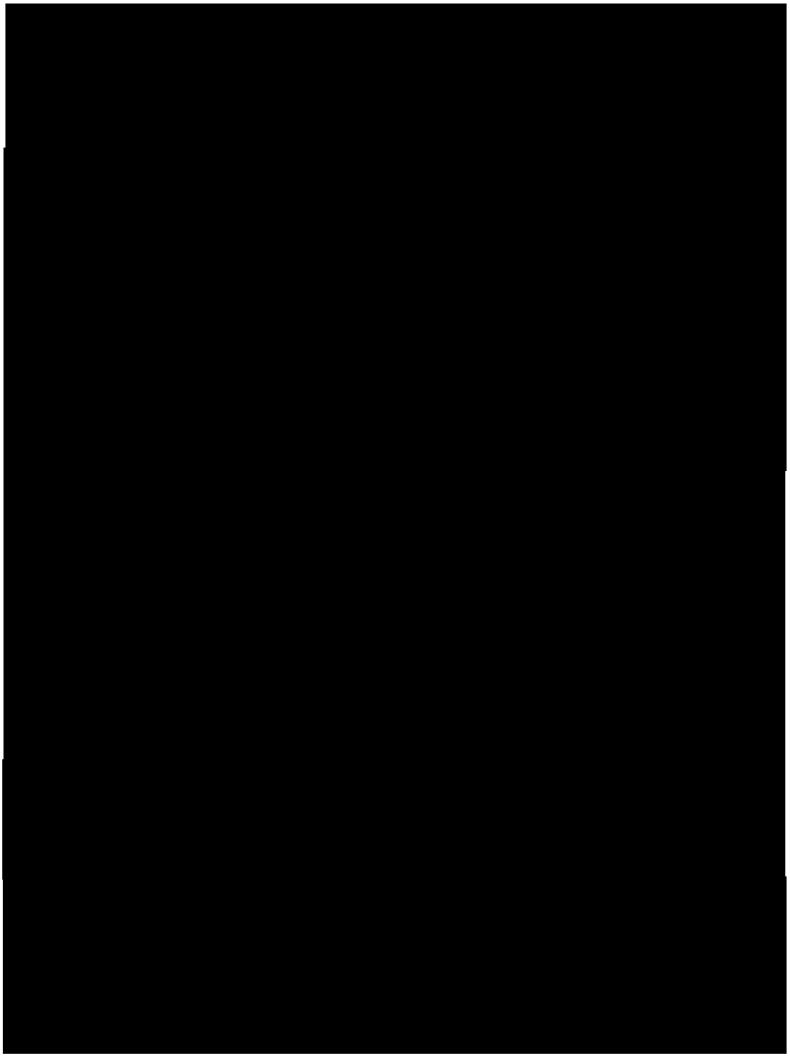
Affirmed.

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

Don M. PRICE *v.* Mary Kellogg PRICE

CA 89-147 780 S.W.2d 342

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



Don M. Price, for appellant.

Walter A. Murray Law Firm, for appellee.

GEORGE K. CRACRAFT, Judge. Don M. Price appeals from an order of the chancery court of Pulaski County granting Mary Kellogg Price a divorce. He contends that appellee did not sufficiently prove and corroborate her grounds for divorce, and that the trial court erred in not granting his motion to dismiss the complaint, in permitting the appellee to amend her complaint, and in allowing attorney's fees. We find no error and affirm.

Appellee testified that when she married appellant he had three "female roommates" residing in the same duplex in which he lived with her as his wife, and that he was supporting all three of them. She stated that after the marriage two of the women moved out but the third one remained. Although appellant continually promised appellee that he would remove the other woman from the duplex, he continued to support her. Appellee testified that appellant's attitude about keeping and supporting

other women had not changed since the parties' separation because, when the woman about whom she complained moved out, another one moved in and was now living with him.

Appellee called no witnesses to corroborate her initial complaints of marital misconduct, but she additionally testified that subsequent to the separation appellant had unjustifiably attempted to have her committed to a mental institution, which caused her considerable anguish. Appellee called Myrtle Jean Blow, a professional counselor with the Adult Protection Service. Ms. Blow testified that appellant had in fact consulted her about having appellee committed, and that in her opinion there were absolutely no grounds to justify such an attempt. She stated, "My opinion was that *he* should be committed."

Appellant objected to appellee's testimony and that of Ms. Blow on grounds that the event had occurred since the suit had been filed and therefore could not be considered as a ground for divorce in this action. The trial court agreed but stated that it would permit appellee to amend her complaint. Appellant objected to the amendment and moved to dismiss for failure to properly prove and corroborate her grounds for divorce. The trial court did not rule on the motion to dismiss, but granted a continuance for a sufficient time to permit the appellee to properly amend her pleadings and for appellant to respond and prepare to meet the allegations. Appellee then filed an amendment embracing all of the grounds that she had previously testified to and including continued presence of another woman in his home and the unjustifiable attempt to commit her to a mental institution. Appellant filed a response denying the allegations.

When court reconvened approximately one month later, appellee again testified as to the circumstances of appellant's attempt to have her committed to a mental institution and that that "made me feel terrible. It made me feel that Don hated me." Rather than recall Ms. Blow, the parties stipulated that if Myrtle Blow and Terry Riley were present in court they would testify that they were social workers employed at the Adult Protective Service, that in the course of their work they knew that appellant attempted to have appellee committed to a mental institution, and that Ms. Blow would testify that she knew appellee very well and there was "absolutely no need" for her to be committed. It

was further stipulated that if Diahna Burleson were present she would testify that she was an attorney in the Pulaski County Prosecuting Attorney's office and that appellant had also approached that office to have appellee committed.

Appellee also testified that from the time the parties were married appellant was openly consorting with and supporting other women in the same duplex in which the parties lived as husband and wife, and that he continued to do so thereafter. Mary Bundy, called as a witness on behalf of appellant, corroborated appellee's testimony that after the parties separated appellant moved Bonnie Lester into the house and that she was living with him at that time.

Appellant first contends that the trial court erred in permitting appellee to amend her complaint to allege those indignities that were inflicted after the original complaint had been filed. There is no reason why pleadings in a divorce action cannot be amended to allege grounds for divorce that have arisen since the original action was commenced. *See Milne* v. *Milne*, 266 Ark. 900, 587 S.W.2d 229 (Ark. App. 1979). Rule 15 of the Arkansas Rules of Civil Procedure provides for liberal amendments to and supplementation of pleadings. Rule 15(a) provides that a party may amend his pleadings at any time unless the court finds that prejudice would result or the disposition of the case would be unduly delayed because of the amendment. Rule 15(b) provides that, where issues are not raised by the pleadings, such amendments to the pleadings as may be necessary to cause them to conform to the evidence and to raise the issues may be made on motion of any party at any time, even after judgment. It further provides that, if evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended in its discretion and may grant a continuance to enable an objecting party to meet such evidence. Rule 15(d) provides that the court may, upon reasonable notice and terms as are just, permit a party to supplement his pleadings to set forth occurrences or events that have happened since the filing of the original pleading.

Here, appellee's testimony as to appellant's attempt to unjustifiably commit her to a mental institution and that he was still living with another woman were acts that occurred after she

filed her suit. Appellant objected that that testimony was not within the issues raised by her pleadings and moved to dismiss. Appellee moved to amend or supplement her complaint so as to include those allegations. Under Rule 15, it was within the court's discretion to allow the pleadings to be amended. The court granted a continuance, both parties filed amended pleadings, and the hearing resumed approximately one month later. Appellant has not pointed out to us in what way he was prejudiced by the action of the court, or that that action in any way prevented him from properly defending against the complaint. We cannot conclude that the trial court abused its discretion in this instance.

For these same reasons, we find no error in the court's refusal to grant appellant's motion to dismiss at the time the continuance was granted.

Appellant next contends that appellee failed to prove and corroborate her grounds for divorce. He bases this argument on the premises that appellee's testimony regarding her grounds was general, conclusory, and not sufficiently specific, and that the trial court erred in considering the parties' stipulation as corroborating evidence. We disagree.

[redacted] The court granted appellee a divorce on grounds of general indignities. In order to grant a divorce on these grounds, the court must find that the offending spouse is guilty of conduct amounting to rudeness, contempt, studied neglect, or open insult, and that the conduct has been pursued so habitually and to such an extent as to render the conditions of the complaining party so intolerable as to justify an annulment of the marriage bonds. This finding must be based on facts testified to by the witness and not upon beliefs or conclusions, in order that the court may be able to determine whether those acts and conduct are of such a nature to justify the conclusions reached by the witness. *Harpole* v. *Harpole*, 10 Ark. App. 298, 664 S.W.2d 480 (1984). From our review of this record, we cannot conclude that appellee's testimony lacked the necessary specificity, or that the acts and conduct to which she testified lacked the necessary character, to support the chancellor's finding that appellee had proven her grounds.

[redacted] Nor can we agree with appellant that the trial court erred in considering the stipulation as to what certain witnesses'

testimony would be if they were present, and that the case therefore should be reversed and dismissed for lack of corroboration of grounds.[1] We cannot conclude that the court is prohibited from considering testimony given by witnesses who were not present in court. Agreed stipulations of what a witness would testify to if present is an accepted method of presenting proof. The stipulation is accepted only as testimony and not as an admission of the facts testified to. *Burton* v. *Brooks*, 25 Ark. 215 (1869). The trier-of-fact is free to give it such weight as it deserves and is free to accept it or reject it in whole or in part. *See* 73 Am. Jur. 2d *Stipulations* § 17 (1974). Moreover, we note that, in any event, appellee's testimony regarding appellant's openly consorting with other women was corroborated by appellant's own witness, who testified to the fact that a woman was then living with appellant.

Appellant finally contends that the trial court erred in allowing attorney's fees in any amount, and that in any event the fee of $1250.00 was excessive. Whether to allow such fees in divorce actions and in what amounts are matters within the chancellor's discretion. In the absence of a clear abuse of discretion in fixing the fee, the chancellor's decision will not be disturbed on appeal. *Wilson* v. *Wilson*, 294 Ark. 194, 741 S.W.2d 640 (1987). In determining the amount of the fee the court may consider a number of factors, including the relative financial conditions of the parties, and may use its own knowledge and experience as a guide. Considerable weight will be given the opinion of the judge before whom the proceedings were conducted. *Paulson* v. *Paulson*, 8 Ark. App. 306, 652 S.W.2d 46 (1983).

Here, appellant was making over $60,000.00 a year as an employee of the Missouri-Pacific Railroad Company, from a vending machine business, and from the Naval Reserve. Appel-

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[1] Appellant's point is apparently based on the proposition that the stipulation constituted a waiver of the requirement of corroboration of grounds or an admission by him to the truth of the evidence contained in the stipulation. While we disagree with this characterization of the stipulation, *see infra*, we do note that, contrary to appellant's assertions, *corroboration* of one's grounds in a contested divorce action may now be waived by the other spouse. *See Rachel* v. *Rachel*, 294 Ark. 110, 741 S.W.2d 240 (1987); Ark. Code Ann. § 9-12-306(b) (1987).

lant also had $30,000.00 in savings accounts. Appellee did not work, and, although there was evidence that she received some money from "another income," there was also evidence that she had incurred a substantial medical bill, which she could not afford to pay. From our review of the record, we cannot conclude that the chancellor abused her discretion in allowing a fee in this case or that the amount allowed was excessive.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

Dixie S. McCLAIN *v.* TEXACO, INC. and Cigna Insurance Company

CA 89-179 780 S.W.2d 34

Court of Appeals of Arkansas
Division I
Opinion delivered November 22, 1989
[Rehearing denied January 10, 1990.*]

*Rogers, J., not participating.

Mays & Crutcher, P.A., by: *Richard L. Mays*, for appellant.

Friday, Eldredge & Clark, by: *James C. Baker, Jr.*, for appellee.

JAMES R. COOPER, Judge. Dixie McClain appeals from a determination by the Workers' Compensation Commission that she had failed in her burden of proving that her disability due to mental illness arose out of and in the course of her employment with Texaco. She first argues that the Commission erred in reversing the administrative law judge's finding that the psychological injury was causally connected to her employment and she contends that the Commission's decision is not supported by substantial evidence. Secondly, she contends that the Commission's reversal of the administrative law judge's opinion amounts to an *ultra vires* use of non-delegable judicial power. We affirm.

When determining the compensability of nontraumatically induced mental illness which is alleged to have resulted from the claimant's work, the claimant must show more than the

ordinary day-to-day stress to which all workers are subjected. *Barrett* v. *Arkansas Rehabilitation Services*, 10 Ark. App. 102, 661 S.W.2d 439 (1983); *Owens* v. *National Health Laboratories, Inc.*, 8 Ark. App. 92, 648 S.W.2d 829 (1983). Whether the stress was more than ordinary and whether the psychological injury was causally connected to it or aggravated by it are questions of fact for the Commission to determine. *Barrett*, *supra*; *Owens*, *supra*.

Although when *Owens*, *supra*, was decided, the Commission still gave the benefit of the doubt to the claimant in deciding such questions of fact, our standard of review with respect to the factual determinations of the Commission remains unchanged: we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission, and we will affirm if there is any substantial evidence to support the findings made. *Johnson* v. *Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989). 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. *Id.* 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. *Johnson*, *supra*. The question for the appellate court is not whether the evidence would have supported findings contrary to the ones made by the Commission, but whether the evidence supports the findings made. *Marrable* v. *Southern LP Gas, Inc.*, 25 Ark. App. 1, 751 S.W.2d 15 (1988).

The record reveals that the appellant went to work for the appellee as the manager of its convenience store located at East Roosevelt and Interstate 30 in Little Rock. She was responsible for hiring employees, ordering gasoline and grocery items, making sure the store was clean and the shelves stocked, making the bank deposits, doing the sales reports and completing various other types of paperwork. The appellant testified that the store was located in a high crime area and because of this fact there was a high turnover of employees. She stated that she often worked sixty-five hours a week and was on call twenty-four hours a day.

She stated that people who were on drugs were constantly in the store and that these persons frequently started fights. Although she had a supervisor, she stated that he was rarely in her

store and that he spent more time at other stores owned by the appellee. When she complained to her supervisor about the working conditions, she was told to "hang on" and was given a one hundred dollar a month raise. She stated that although an assistant manager was supposed to be employed to assist her, the first one quit after a few weeks and another one was not hired until a few weeks before she was terminated.

In November 1986, the appellant began suffering from headaches, nervousness, and irritability. She stated that she also began crying, often uncontrollably, and she sought professional counseling.

The appellant was eventually discharged from Texaco in April 1987 for "borrowing" $500.00 from the night deposit. The appellant admitted that she had taken the money to pay a court fine, which she believed had to be paid in full the next morning. The money was returned early the next day. The appellant was in court on a charge of assaulting a police officer, which arose out of a family dispute.

Medical records reveal that the appellant had a history of depression and suicidal tendencies. She stated that she tried to commit suicide in 1979 after a fight with her boyfriend. She was admitted to the hospital in 1983 after taking an overdose of medication. According to the medical reports, the overdose was related to the recent loss of her job, financial difficulties and the loss of her boyfriend.

The appellant began receiving counseling for her recent problems in the spring of 1987. The reports of Dr. Hope Gibson indicate that the appellant has a very damaged self-esteem secondary to a chaotic childhood and an early marriage. The appellant married at the age of fourteen and divorced when she was twenty-one. Dr. Gibson also indicated that, in June 1987, the appellant was working as a cashier at another convenience store and that this was causing her some stress. In August 1987 the appellant was admitted to Bridgeway Hospital because of a possible suicide attempt. The appellant denied that she had attempted suicide and explained that she had taken medication to help her sleep. She expressed anger at her mother for accusing her of attempting suicide. Apparently the appellant again attempted suicide in 1988.

One medical report indicates that the appellant's depression resulted from stress connected to her employment with Texaco. The report was signed by Dr. Gibson, addressed "To Whom it May Concern," and was dated after this claim was filed, September 27, 1989. The report states, "I believe that the symptoms of anxiety and depression . . . were probably the result of work related stress." The report recommends that the appellant work where "pressures and stress are at a much more reasonable level."

In its opinion, the Commission questions the credibility of the September 27 report because the other evidence overwhelmingly supported a finding that the appellant's problems were not caused by job related stress. This view of the evidence is supported by the record, which shows that other problems related to the appellant's depression were her early marriage and divorce; her inability to bear children; the fact that she and her adopted son have to live with her mother; her anger towards her brothers and sisters because they will not help support her mother; the death of her father when the appellant was three years old; her mother's subsequent marriage to an abusive alcoholic; and her long tempestuous relationship with her boyfriend. The appellant admitted, either at the hearing or in medical reports, that all of these other problems caused her stress. In fact, at the close of the hearing the appellant stated that she was currently doing well. She attributed her improvement, in a large part, to the fact that she was no longer seeing her boyfriend.

We do not agree with the appellant's assertion that Dr. Gibson's report linking the psychological injury to the employment was dismissed by the Commission and should have been given "great weight." The Commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. The testimony of medical experts is an aid to the Commission in its duty to resolve issues of fact. It is the responsibility of the Commission to draw inferences when the testimony is open to more than a single interpretation, whether controverted or uncontroverted, and when it does so, its findings have the force and effect of a jury verdict. *Marrable* v. *Southern LP Gas, Inc.*, 25 Ark. App. 1, 751 S.W.2d 15 (1988).

The appellant also contends that the Commission erred in applying the test for nontraumatically induced mental illness because it compared the stress of all workers to the appellant's situation. The appellant asserts that her stress should have been compared with that suffered by other Texaco workers. We think that the rule implies that the comparison be made between other employees similarly situated.

In *Pate* v. *Workmen's Compensation Appeal Board*, 104 Pa. Commw. 481, 522 A.2d 166 (1987), the claimant worked as an electronics assembler, which required her to work with small components and wires. The claimant asserted that her supervisor's repeated rejection of her work exacerbated her pre-existing schizophrenic condition. In rejecting the claimant's argument that her illness was an objective reaction to an abnormal working condition, the Commonwealth Court of Pennsylvania stated:

> Our review of the record discloses no evidence that Pate's working conditions were any different from those of her fellow employees. While we recognize the tedious and painstaking nature of Pate's work task, these factors alone *are not unusual for this type of employment.* Nor does the testimony support a conclusion that it was abnormal or unusual for Pate's supervisors to reject work which did not meet standards. Criticism for improper work is not *per se* abnormal when an employee has a consistently poor work performance.

522 A.2d at 168 (emphasis added). While comparisons to fellow employees may be of some evidentiary value, the ultimate test is whether the stress constitutes an abnormal working condition for that type of employment.

In this case, the stress the appellant suffered should be compared with that suffered by other convenience store managers. However, the appellant has not shown, by any evidence, that the stress she experienced was more than the ordinary day-to-day stress to which other convenience store managers are subjected. The appellant only testified that her supervisor came to her store once a month and the managers at other stores owned by the appellee had more people to help. We cannot say, on this record, that the Commission erred in finding that the appellant did not

suffer undue stress in her employment.

For her second argument the appellant asserts that the Commission did not have subject matter jurisdiction of her claim, and she argues that we should consider this argument because challenges to subject matter jurisdiction may be raised for the first time on appeal. The appellant asserts that Amend. 26 § 5 of the Arkansas Constitution is an exception to the separation of powers doctrine found in Art. 4 § 1 of the Arkansas Constitution. Amendment 26, section 5 provides in part:

> It (the General Assembly) shall have power to provide the means, methods and forum for adjudicating claims arising under said laws, therefore securing payment of the same.

Citing Justice John Fogleman's concurring opinion in *Ward School Bus Manufacturing, Inc.* v. *Fowler*, 261 Ark. 100, 547 S.W.2d 394 (1977), the appellant asserts that the procedure of appearing before an administrative law judge and subsequently being required to appear before the Commission provides two forums and is therefore in violation of the separation of powers doctrine and, she concludes, the Commission is therefore without subject matter jurisdiction to hear these appeals.

We do not agree that the appellant's argument concerns subject matter jurisdiction. The appellant's argument is a constitutional attack on the validity of the legislature's delegation of authority. A court or agency is said to have subject matter jurisdiction of an action if the case is one of the type of cases that the court or agency has been empowered to entertain by the sovereign from which the court or agency derives its authority. *See* R. Casad, *Jurisdiction in Civil Actions*, ¶ 1.01[1] (1983). In Arkansas the legislature has given the Workers' Compensation Commission the authority to determine claims which arise out of employment. *See Brown* v. *Patterson Construction Co.*, 235 Ark. 433, 361 S.W.2d 14 (1962). In the consideration of a claim for compensation for injuries, the jurisdictional question is a very simple one, consisting of only two elements: whether the claimant was an employee, and whether his injuries were sustained in the course of and arose out of his employment. *Welsh* v. *Industrial Commission of Ohio*, 26 N.E.2d 198, 136 Ohio St. 387 (1940). Because the appellant's argument concerns the validity of the legislature's delegation of authority and does not concern subject

matter jurisdiction, her argument cannot be raised for the first time on appeal. *Hill* v. *White-Rodgers*, 10 Ark. App. 402, 665 S.W.2d 292 (1984). Therefore, we will not address the merits of her argument.

Affirmed.

MAYFIELD and JENNINGS, JJ., agree.

Oralyn Hamilton JAMES *v.* Mark Evan JAMES

CA 89-184 780 S.W.2d 346

Court of Appeals of Arkansas
Division II
Opinion delivered November 29, 1989
[Rehearing denied January 10, 1990.]

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

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

DONALD L. CORBIN, Chief Judge. Appellant, Oralyn Hamilton James, appeals a decision of the Union County Chancery

Court refusing to grant her petition for a change of custody of her two minor children from appellee, Mark Evan James, to appellant. We find error and reverse and remand.

Custody of the minor children, Elizabeth and Christopher, was awarded to appellee upon entry of a decree of divorce on August 21, 1985, subject to appellant's right to visitation. Appellant field her petition for change of custody of July 11, 1988, and the matter was heard by the chancellor on September 23, 1988. On October 3, 1988, an order was entered denying appellant's request for a change of custody after the court concluded that there had been no material change in circumstances making it in the best interest of the children to do so. It is from this denial that this appeal arises.

For reversal, appellant raises the following points: 1) The trial court erred in holding inadmissible evidence that appellee was guilty of fraudulent embezzlement of funds while acting as personal representative of his father's estate; 2) the trial court erred in denying her petition for change of custody; and 3) the trial court erred in denying her motion for relief from order. Appellee cross-appeals from the court's denial of his counterclaim for child support.

Because we find that appellant's first point contains merit and warrants reversal and remand for a new trial, we will not address appellant's remaining points for reversal or appellee's argument on cross-appeal.

In her first point, appellant contends the court erred by sustaining appellee's objection to introduction of relevant and material evidence that appellee fraudulently embezzled funds from his deceased father's estate while acting in the fiduciary capacity of personal representative. We agree.

Appellant's proffer of the excluded evidence reveals testimony of appellee's mother and the family property settlement agreement evidencing appellee's admitted guilt of fraudulently depleting funds from his father's estate thereby depriving his mother and sister of their inheritance. Appellee's mother testified that she became suspicious of appellee's actions with regard to her husband's estate and hired a lawyer to audit the accounts managed by her son, appellee. Appellee became angered by his

mother's actions and refused to allow the children to continue their relationship with her. Fraud was established and an agreement to wind up the estate was entered with appellee's mother replacing him as personal representative of the estate. The agreement revealed that during his administration, appellee practiced fraud, misappropriation, and misuse of estate funds by executing for his personal use four promissory notes to the estate totaling $215,323.53. Appellee did not have any of the misappropriated funds at the time the estate was settled and therefore agreed to deed his office building and his interest in family-owned real property to his mother and sister. Additionally, appellee agreed to sign a $64,000.00 promissory note to his sister evidencing his indebtedness to her for her proportionate share of their father's estate. He agreed not to discharge or modify any of this obligation in bankruptcy proceedings; however, he eventually did so in violation of the agreement.

The court sustained appellee's objection to the above evidence on the grounds of relevancy. Arkansas Rule of Evidence 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 probable or less probable than it would be without the evidence. The appellate court does not reverse a chancellor's ruling on relevancy unless we find an abuse of the trial court's discretion. *Canady* v. *Canady*, 285 Ark. 378, 687 S.W.2d 833 (1985). Here, we find that the trial court abused its discretion by disallowing the introduction of evidence relating to appellee's fraudulent dealings with his father's estate since it was relevant to the ultimate issue of change of parental custody. Here, the proffered evidence reflects adversely on appellee's moral character. The morality of a parent is relevant to the best interest of the children and to the issue of parental custody. *See Nix* v. *Nix*, 17 Ark. App. 219, 706 S.W.2d 403 (1986).

Reversed and remanded.

COOPER and ROGERS, JJ., agree.

The GREEN HOUSE, INC. & Robert C. Sykes, Managing Agent *v.* The ARKANSAS ALCOHOLIC BEVERAGE CONTROL DIVISION, et al.

CA 89-180 780 S.W.2d 347

Court of Appeals of Arkansas
Division I
Opinion delivered November 29, 1989

Peel and Eddy, by: *Richard L. Peel*, for appellant.

Donald R. Bennett, for appellee.

JAMES R. COOPER, Judge. The appellants in this administrative agency case applied for an on-premises, private club alcoholic beverage permit pursuant to Ark. Code Ann. §§ 3-9-221 and 222 (1987). After a hearing on August 17, 1988, the Arkansas Alcoholic Beverage Control Division Board (ABC Board) denied the application on the ground that it was not in the public interest. From that decision, comes this appeal.

For reversal, the appellants contend that there is no substantial evidence to support the Board's finding that issuance of the permit would not be in the public interest, and that the Board's decision was arbitrary, capricious, and an abuse of discretion. We reverse and remand.

[redacted] We initially note that, although this appeal is from the circuit court's affirmance of the Board's denial of the permit, we review the decision of the Board, not the decision of the circuit court. *Johnson* v. *Moore*, 25 Ark. App. 86, 752 S.W.2d 293 (1988).

The record shows that the appellant, Robert Sykes, is the managing agent of The Green House, Inc., a nonprofit organization located in the city of Russellville in Pope County, which is a dry area. Mr. Sykes is also the proprietor of the Ice House, a restaurant in Russellville. The appellants proposed to locate the private club in the Ice House, leasing from the restaurant a small area which would seat approximately 40 people.

We have reviewed the record in this case and are convinced that it must be reversed and remanded to the Arkansas Alcoholic Beverage Control Board for further proceedings consistent with this opinion. Our determination is based on the board's failure to make explicit and concise findings of fact as required by Ark. Code Ann. § 25-15-210(b)(2) (1987), which requires that:

> A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

In the case at bar, the Board concluded that:

> [T]he application is not in the public interest . . . because of the numerous objections that have been received from the Mayor, the Sheriff, the State Senator, the State Representative, the Prosecuting Attorney, and other public officials, as shown by testimony and by letters contained within the file.

A finding that a private club permit is not in the public interest is not supported by substantial evidence if that finding is based solely on the number or official position of the persons who oppose it. *See Snyder* v. *Alcoholic Beverage Control Board*, 1 Ark. App. 92, 613 S.W.2d 126 (1981). However, we are unable to determine from the record whether the Board's finding was based on the mere opposition of the specified public officials, or was instead based on fact-findings derived from the testimony of those officials, because the Board's decision does not include "a concise and explicit statement of the underlying facts" supporting the finding, set forth in the language of Ark. Code Ann. § 3-9-222(f) (1987), that issuance of the permit would not be "in the public interest." Instead, the "findings" of the Board consist of a narrative account of the proceedings and the substance of the testimony presented by the various witnesses. The Board's decision is therefore too lengthy to reproduce in its entirety, but the following short excerpt is illustrative of all eleven of the "findings" recited in the Board's decision:

> After considering all notes, memoranda, and sworn testimony, it is found, TO WIT:
>
> 1. It appears that the matter had been denied by the Director because he found that the application had been very heavily opposed by area residents and public officials.
>
> 2. Offering testimony first were State Senator Luther Hardin and Representative Doc Bryan, both of whom represent this area in the Arkansas General Assembly. Their testimony was taken out of turn as they were in Little Rock to attend a retirement committee meeting and were needed at the State Capitol building.
>
> 3. Comments by Senator Hardin indicate that he was appearing in his capacity as a State Senator. It is his opinion that there is no need for the private club in this area

of Russellville. He believes that the area is not appropriate and notes that there is a church which is immediately next to the proposed property where the private club would be operated. He notes that the establishment fronts on Arkansas Street which is also State Hwy. 7 and that it is a good restaurant but that the private club is just not needed. On cross examination Senator Hardin noted that there were a number of establishments that he would classify as "fine dining" establishments in Russellville some of which have private club permits and some do not. He acknowledged that the Russellville Country Club which has a private club permit has a dues structure which would be much higher than that proposed by the present applicant. Senator Hardin acknowledged that there are a number of private clubs in Pope County that have churches somewhat near to them, as is the case in the present application. He is philosophically against the private club concept, as it operates in dry counties but also has specific objections to this application.

4. Rep. L.L. "Doc" Bryan next testified that he was also opposed to the application because of the close proximity of the private club property to a nearby church. He states that the church holds services two or three nights a week and that he did not see this as being a suitable location for the private club.

. . .

[redacted] Because the Board has merely recited the testimony rather than translating that testimony into findings of fact, we are unable to determine the Board's view of the facts, or the theory of law on which the denial of the permit was based. We addressed a similar situation in *Wright* v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986), where we quoted the following language from *Whispering Pines Home for Senior Citizens* v. *Nicalek*, 48 Ind. Dec. 568, 333 N.E.2d 324 (1975):

> Once again, therefore, we attempt to tell the Board what a satisfactory specific finding of fact is.
>
> It is a simple, straightforward statement of what happened. A statement of what the Board finds has

> happened; not a statement that a witness, or witnesses, testified thus and so. It is stated in sufficient *relevant* detail to make it mentally graphic, i.e., it enables the reader to picture in his mind's eye what happened. And when the reader is a reviewing court the statement must contain all the specific facts relevant to the contested issue or issues so that the court may determine whether the Board has resolved those issues in conformity with the law.

(Emphasis in the original.) The observations of the Board in the case at bar do not rise to the level of findings of fact. Reviewing courts may not supply findings by weighing the evidence themselves, because that function is the responsibility of the administrative agency, which sees the witnesses as they testify. *Arkansas Savings and Loan Ass'n Board* v. *Central Arkansas Savings & Loan Ass'n*, 256 Ark. 846, 510 S.W.2d 872 (1974).

> The findings are insufficient because there was a failure to incorporate therein a proper and acceptable finding of the basic or underlying facts drawn from the evidence. The Board's decision only amounts to the statement 'We have heard the evidence. The evidence does not meet the requirements of the law.' This is not enough.

Central Arkansas Savings & Loan Ass'n, supra, quoting Oklahoma Insp. Bur. v. *State Bd. for Prop. & Cas. Rates*, 406 P.2d 453 (Okla. 1965). We remand to the Board for further proceedings consistent with this opinion.

Reversed and remanded.

JENNINGS and MAYFIELD, JJ., agree.

Jamie POOL *v.* STATE of Arkansas

CA CR 89-103 780 S.W.2d 350

Court of Appeals of Arkansas
Division I
Supplemental Opinion on Denial of Rehearing
November 29, 1989

Byron Thomason, for appellant.

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

JAMES R. COOPER, Judge. The appellant's conviction was affirmed by this Court in an opinion not designated for publication delivered on August 23, 1989. In his petition for rehearing, the appellant asserts that we erred in relying on his judicial confession in light of *Harrison* v. *United States*, 392 U.S. 219 (1968). We do not agree that *Harrison* is controlling, and the petition for rehearing is denied.

Harrison, supra, deals with the admissibility of a defendant's former trial testimony prompted by introduction of an illegally-obtained confession. The case at bar, however, involves the separate question of the effect of a defendant's judicial confession to possession of contraband which, for purpose of analysis, we assume to have been obtained as the result of an illegal search.

The appellant in *Harrison* announced before trial that he would not take the stand on his own behalf. However, after the prosecution introduced Harrison's confession (which was later held to have been illegally obtained), Harrison did testify, admitting facts which placed him at the scene of the crime, gun in hand. 392 U.S. at 220-21. On retrial after an appeal in which the confession was held to be inadmissible, the prosecution introduced Harrison's self-incriminating testimony from the former trial, and he was again convicted. This second conviction was affirmed on appeal. *Id.* at 221.

The United States Supreme Court reversed the affirmance of this second conviction on the grounds that introduction of the illegal confession impelled Harrison's trial testimony, and that this testimony should therefore have been excluded as "the fruit of the poisonous tree." *Id.* at 223-36. The Court held that, having illegally placed Harrison's confession before the jury, the Government had the burden of showing that its illegal action did not

induce Harrison's trial testimony. *Id.* at 225.

The Court noted that, in *Harrison*, it decided "only a case in which the prosecution illegally introduced the defendant's confession in evidence against him at trial in its case-in-chief." *Id.* at 223. The Supreme Court has not extended the *Harrison* rule to cases involving a defendant's judicial confession of a crime following the introduction of physical evidence obtained in violation of the fourth amendment, and we decline to do so because such an extension of the exclusionary rule would serve no valid purpose.

The case at bar is distinguished from the circumstances of *Harrison* in that the appellant's testimony in the case at bar followed the introduction of physical evidence rather than his own confession. The *Harrison* Court placed great emphasis on the powerful inducement to testify which arises when a defendant's confession is introduced into evidence. *See id.* at 226, n. 14. Clearly, having had his own words of confession submitted to the jury, a defendant is powerfully impelled to explain them: no one else is in a position to do so. However, we do not believe that the same type or degree of inducement is present in cases, such as the case at bar, where the challenged evidence is contraband, the presence of which may conceivably be explained in terms of third persons or agencies of which the appellant had no knowledge and over which he had no control. Under these circumstances, the silence of the defendant is not intrinsically damning, and the defendant's inducement to testify does not rise to the same level as that of the defendant who must either explain his own words or let them pass without comment.

We think that the question in the case at bar is whether the relationship between the presumptively illegal search and the appellant's testimony was attenuated to the extent that the judicial confession can be said to have been a product of the appellant's free will. *See Brown* v. *Illinois*, 422 U.S. 590 (1975). In *Wong Sun* v. *United States*, 371 U.S. 471 (1963), the United States Supreme Court discussed the limits of the exclusionary rule:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt

> question is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Id. at 487-88. It is entirely possible that persons arrested illegally may decide to confess as an act of free will unaffected by the initial illegality. *Brown* v. *Illinois, supra*, at 603. The question whether a confession is a product of free will under *Wong Sun* is answered on a case-by-case basis with reference to the surrounding facts, including the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Brown* v. *Illinois, supra*, at 603-04.

[redacted] Here, the record shows that the appellant was arrested after he was stopped at a roadblock and a controlled substance was found in his automobile. At trial, the arresting officer testified that he was shining his flashlight into cars that he stopped, searching for weapons and contraband. The appellant asserted in his brief that the drugs found in the appellant's auto should have been suppressed because their discovery was not inadvertent, an assertion we accept for purpose of analysis. However, we cannot say that the roadblock was an example of flagrant police misconduct in light of the testimony of Sergeant Cleve Barfield, who planned the roadblock. Sergeant Barfield testified that the roadblock lasted for ninety minutes; that all cars coming from both directions were stopped, and that the roadblock was not intended to search for criminal offenses other than driving while intoxicated, but was instead intended primarily to check for licensing and registration violations. Finally, Sergeant Barfield testified that searches for drugs were not discussed or planned; that no special preparations had been made with regard to drug-related arrests; that he saw no officers shining flashlights at random, and that he would have corrected any trooper seen shining a flashlight indiscriminately in the interior of a stopped vehicle. Although it is clear that some of the troopers under Sergeant Barfield's supervision believed they were authorized to use their flashlights to discover contraband as well as protect themselves against weapons, we think the record clearly shows that any misconduct which may have occurred lacked the degree

of purpose required to constitute a flagrant violation. *See Brown* v. *Illinois, supra.*

With respect to the temporal proximity of the arrest to the confession and the presence of intervening circumstances, the record shows that the appellant was arrested on May 22, 1987; and was released on bond on or about May 26, 1987. By May 27, 1987, the appellant had secured counsel and been informed of his rights under *Miranda.* The record also shows that the appellant remained free on bond until his trial on September 19, 1988. Thus, the appellant was free for approximately sixteen months before his attorney called him to testify at trial, where he judicially confessed to possession of approximately twenty-five grams of cocaine. Under these circumstances, we hold that the appellant's judicial confession at trial was a voluntary act sufficiently distinguishable from the roadblock to be purged of any taint of illegality associated with the roadblock.

Petition for rehearing denied.

Elwin A. HOOVER *v.* ARKOMA PRODUCTION COMPANY

CA 89-209 780 S.W.2d 585

Court of Appeals of Arkansas
Division II
Opinion delivered December 6, 1989
[Rehearing denied January 3, 1990.*]

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

Dorsey Ryan and *Eddie N. Christian*, for appellant.

Jones, Gilbreath, Jackson & Moll, by: *Mark Moll*, for appellee.

JAMES R. COOPER, Judge. The appellant in this contract case is a petroleum geologist who worked for the appellee, Arkoma Production Company, from June 1981 to February 1985. The appellant had an employment contract with the appellee dated June 22, 1982, which superseded an initial contract dated June 11, 1981. The issues in this case involve whether the contract was orally modified by the parties in August 1984 and whether the language of the contract gives the appellant the right to participate in wells drilled by the appellee after the appellant left the appellee's employ. The chancellor, after hearing the witnesses and reviewing the evidence, found by clear and convincing evidence that the parties had orally modified the agreement and that the agreement only gave the appellant the right to participate in wells drilled during his employment and not in all the wells drilled in a production unit. From that decision comes this appeal, which was filed in the Supreme Court on the assertion that it involved a question about oil, gas, or mineral rights, jurisdiction over which is in the Supreme Court pursuant to Rule 29(1)(n). The case was transferred by the Supreme Court to the Court of Appeals on May 15, 1989.

For reversal, the appellant contends that the chancellor erred in finding that there had been an oral modification of his written employment contract of June 22, 1982, and that the chancellor erred in finding that the employment contract limited

the appellant's rights to individual boreholes rather than production units. We affirm.

We first address the appellant's assertion that the evidence does not support a finding that the parties orally modified the employment contract. Although this court tries chancery cases *de novo* on appeal, we do not reverse the chancellor's findings of fact unless they are clearly erroneous. *Ballard* v. *Carroll*, 2 Ark. App. 283, 621 S.W.2d 484 (1981); Ark. R. Civ. P. Rule 52(a). We review the evidence in the light most favorable to the appellee, indulging all reasonable inferences in favor of the decree. *Id.* In cases involving a question of oral modification of a written agreement, the modification must be proved by clear and convincing evidence. *City National Bank of Fort Smith* v. *First National Bank & Trust Company of Rogers*, 22 Ark. App. 5, 732 S.W.2d 489 (1987), *Freeman* v. *Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987). Upon review, however, the test is not whether we are convinced that there is clear and convincing evidence to support the findings of the judge, but whether we can say that the judge was clearly wrong in his findings. *Akin* v. *First National Bank*, 25 Ark. App. 341, 758 S.W.2d 141 (1988); Ark. R. Civ. P. Rule 52.

"We have said that in such a case, the question we must answer on appeal is whether the chancellor's finding that the disputed fact was proved by clear and convincing evidence is clearly erroneous. *Freeman* v. *Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987)." *Akin, supra*, at 345. Even where the burden of proof is by clear and convincing evidence, we defer to the superior position of the chancellor to evaluate the evidence. *Akin, supra; Bicknell* v. *Barnes*, 255 Ark. 697, 501 S.W.2d 761 (1973); *Turner* v. *Pennington*, 7 Ark. App. 205, 646 S.W.2d 28 (1983). We have also observed that a requirement that evidence be clear and convincing does not demand that the evidence must be uncontradicted. *City Nat'l Bank of Ft. Smith, supra; Freeman, supra.*

There was evidence at trial to show that, in addition to salary and other benefits, the employment contract of June 22, 1982, provided that the appellant had a right to receive an "overriding royalty interest" ("ORRI") in the appellee's oil and gas leases with the exception of those in the Aetna Gas Field. An ORRI is a

type of incentive pay option to encourage successful research and exploration for gas and petroleum. The Aetna Gas Field was excluded from the appellant's ORRI entitlement because, at the time the contract was negotiated, the lease transactions with regard to the field were underway and the appellant had not been materially involved in the Aetna acquisition. There is no dispute between the parties as far as the Aetna Field exclusion is concerned.

During the course of the Aetna acquisition and as part of the same transaction by which the appellee acquired the Aetna leases during the Aetna acquisition, the appellee obtained rights to an additional 9,000 acres in what is known as the Cecil Field. The appellant testified at trial that the Cecil Field would probably have been excluded from his ORRI rights under the contract had the parties contemplated its acquisition during the course of the Aetna acquisition. However, it was not excluded, and the chancellor found that the appellant had an apparent right to an ORRI in the Cecil Field under the parties' original agreement. Nevertheless, the chancellor also found that this original agreement had been orally modified by the parties and that, under the terms of the modified agreement, the appellant had no right to an ORRI in the Cecil Field. The appellant asserts that the chancellor erred in finding that the appellant assented to the terms of the modified agreement. We do not agree.

The record shows that the appellant confronted Michael McCoy, a managing partner of the appellee, and asserted a right to an ORRI in the Cecil Field. The record also shows that Mr. McCoy proposed a modification of the employment contract whereby the appellant would receive a substantial benefit in exchange for relinquishment of his claim to an ORRI in the Cecil Field. Finally, the record shows that the appellant accepted this benefit and asserted no interest in an ORRI in the Cecil Field for the duration of his employment with the appellee.

The above-mentioned benefit, which the appellant accepted, was the right to participate in the appellee's wells on an "unpromoted" basis. Although ORRI rights should not be confused with the right to participate, both ORRI rights and the right to participate in production may serve as an incentive to employees. Participation in wells can be on either a "promoted" or an

"unpromoted" basis. Participation by the appellant in wells on a "promoted" basis means that he pays 1 % of the costs of drilling a well and, in exchange therefor, receives .67 % of the well's revenues. On the other hand, participation on an "unpromoted" basis means that he pays 1 % of the expenses but is entitled to 1 % of the revenues instead of .67 %. Obviously, "unpromoted" participation is more lucrative than "promoted" participation.

The trial court found that the appellant gave up any interest in an ORRI in the Cecil Field in consideration of his change from promoted to unpromoted status. Among other things, the parties' agreement as to the appellant's employment provided: "Arkoma Production Company agrees to assign you a 1 % of 8/8 overriding royalty interest, proportionately reduced to the working interest owned or controlled by Arkoma and its investors or assigns." The agreement further provided that the overriding royalty interest applied to any lease acquired by the appellee with the exception of the Aetna Field. The agreement also provided:

> You shall have the right to participate for a 1 % working interest, proportionately reduced to the working interest controlled by Arkoma in any wells drilled by Arkoma Production Company, outside the confines of the Aetna Gas Field, or any well drilled by another operator, outside the confines of the Aetna Gas Field, in which Arkoma and its investors own a working interest. You shall be required to participate on the same promoted terms as the other Arkoma in-house investors.

The evidence at trial was that the appellant and another of the appellee's employees, Mark Wilson, had contracts which were virtually identical except as to salary. The above-noted fringe benefit entitlements were apparently worth a large amount of money to the appellant, and he participated in ninety-two wells while in the appellee's employ. Until August 1984, Mr. Wilson and the appellant had participated in the appellee's wells on a promoted basis. Until that time, the appellant requested and received his ORRI on those wells in which he participated on a promoted basis. At some time that August, the appellant and Mr. Wilson had some discussions with Mr. McCoy, a managing partner of the appellee, about whether they were entitled to an ORRI on the Cecil Field. Mr. McCoy's position was that the

Cecil Field lease was a part of the Aetna Field acquisition and, as such, was excluded by the parties' contract. The issue of the Cecil Field override was resolved as to Mr. Wilson by the parties' agreement that Mr. Wilson would terminate his employment with the appellee but be allowed his Cecil Field override. Mr. Wilson testified that the other option discussed with Mr. McCoy would allow him to remain in the appellee's employ upon waiver of any claim to a Cecil Field override in exchange for continued employment and the right to participate in future wells on an unpromoted basis. Mr. Wilson elected to leave Arkoma and take the Cecil Field override, even though it meant giving up lucrative participation rights in future wells.

The appellant's account of the August 1984 discussions with Mr. McCoy does not differ substantially from Mr. McCoy's testimony or that of Mark Wilson. The parties' testimony indicates that, when the question of the Cecil Field override arose, Mr. McCoy proposed two options. One involved a concession of the Cecil Field override with the understanding that employment would terminate; the other involved a waiver of the override right but with continued employment and a more lucrative participation right in future wells. Mr. Wilson took the Cecil override and left the appellee's employ. The appellant expressed a desire to remain in the appellee's employ when given the options and thereafter participated in thirty-three wells on an unpromoted basis after previously participating in a large number of wells on a promoted basis. The evidence was that the Cecil Field override was worth about $200,000.00, while the difference in participation status after August 1984 increased revenues to the appellant by about $171,000.00. During his continued employment, after August 1984, the appellant did not ask for a Cecil Field ORRI.

The appellant asserts that there was no evidence that he specifically expressed agreement to the modification of the contract which Mr. McCoy proposed, and that the evidence was therefore insufficient to support the chancellor's finding that the appellee gave the appellant the right to participate in future wells on an unpromoted basis in exchange for the relinquishment of any claim to an overriding royalty interest in the Cecil Field. We disagree because the appellant's assent to the modification of the employment contract was evidenced by the appellant's abandonment of his claim to a Cecil Field ORRI during his continued

employment after the discussions of August 1984 and by his acceptance of the substantial benefit conferred by the appellee of unpromoted participation status.

In *Beasley* v. *Boren*, 210 Ark. 613, 197 S.W.2d 287 (1946), our Supreme Court observed:

> The parties to a contract may, by their mutual actions in carrying it out, furnish an index to its meaning, which the language thereof fails to do. After all, the written instrument is but an evidence of what the signers thereof propose to bind themselves to do, and when, by their conduct in carrying out the agreement, both of the parties to the contract demonstrate an intention to heal an uncertainty in the contract, the courts will generally adopt this practical construction. [citations omitted]

Beasley, 210 Ark. at 612. Moreover, it has been held that a party who knowingly accepts the benefits of a proposed contract is bound by its terms. *See, e.g., James* v. *P.B. Price Construction Co.,* 240 Ark. 628, 401 S.W.2d 206 (1966). We hold that the chancellor did not clearly err in finding a modification of the employment contract.

Next, the appellant contends that the chancellor erred in finding that the contractual provision granting the appellant "the right to participate for a 1% working interest . . . in any wells drilled" did not entitle the appellant to participate in redrills (located in essentially the same place as the original well), or in new wells (located elsewhere in the production unit) drilled after the appellant left the appellee's employ. Essentially, the question is whether the term "well" as used in the agreement means a single well, or borehole, or whether the term "well" refers to an entire production unit.

The court held that the appellant's "working interest in any wells drilled" was limited solely to boreholes and not the acreage "unit" upon which the wells were drilled. The court found that the contract contemplated working interest rights to exist in single wells with which the appellant was involved and not working interests in entire production units.

The testimony at the trial as to what meaning industry usage and trade would assign to the terms used support the trial court's

findings that the appellant's right was that of participation in wells, not entire units, and only in those with which the appellant was involved while in the appellee's employ. As the chancellor observed, while some of the testimony at trial was conflicting, even the testimony of the appellant's witnesses tended to support the position that the agreement contemplated participation rights extending solely to single wells. As the trial court noted, the evidence demonstrated that the reason employees were given participation rights was to encourage productivity and provide incentive to employees to remain in the company's employ, and no such incentive would need to be propagated after an employee terminated his employment.

Where the terms of a contract are ambiguous and capable of having more than one meaning, extrinsic evidence is permitted to establish the intent of the parties, and the meaning of the contract then becomes a question of fact. *Floyd* v. *Otter Creek Homeowners Association*, 23 Ark. App. 31, 742 S.W.2d 120 (1988). Obviously, the appellant and the appellee disagreed as to the meaning of the term "well" in their agreement. Expert witnesses testified, along with the parties, and there was evidence that former employees did not participate in subsequent wells or redrills after leaving the appellee's employ. The chancellor essentially found that the participation clause of the employment agreement was to serve as a fringe benefit and as an incentive for continued employment. In light of the evidence, we cannot say the chancellor's finding in this regard is erroneous.

In light of the foregoing and based upon our consideration of the record, the decision below is affirmed.

Affirmed.

ROGERS and MAYFIELD, JJ., agree.

Lennie R. MILLER *v.* FIRST NATIONAL BANK of Eastern Arkansas

CA 89-285 780 S.W.2d 589

Court of Appeals of Arkansas
Division I
Opinion delivered December 6, 1989

Victor L. Hill, East Arkansas Legal Services, for appellant.

Butler, Hicky & Long, by: *Philip Hicky II*, for appellee.

MELVIN MAYFIELD, Judge. Lennie R. Miller appeals a judgment of the St. Francis County Circuit Court. He contends that the circuit judge erred in awarding a deficiency judgment to appellee, First National Bank of Eastern Arkansas, because the notice provided by appellee of the repossession and sale of the

collateral was defective and because Lennie C. Miller, who also signed the promissory note, was not provided with notice of the repossession and sale. Because the notice sent to appellant was not in compliance with the requirements of Ark. Code Ann. Section 4-9-504(3) (1987), we reverse.

On May 8, 1984, appellant financed the purchase of an automobile with a loan from appellee in the amount of $4,291.00. Appellant and his father, Lennie C. Miller, signed the promissory note. At the time the loan was made, appellant gave Route 1, Box 28C7, Colt, Arkansas, as his address. Appellant defaulted in his payments, and the automobile was repossessed. On October 9, 1985, appellee sent the following notice to appellant at 307 North Chicago, Brinkley, Arkansas:

> This is to notify you that we will offer at private sale on or after 10:00 o'clock A.M. *October 24, 1985,* at *First National Bank of Eastern Arkansas 101 N. Washington, Forrest City, Ar.* the collateral referred to in the Security Agreement between you, and ourselves, which collateral has been repossessed by us, and is briefly described below.
>
> You may redeem said collateral at any time before we dispose of it, by paying the balance owing to us, including cost of repossession, storing and preparing for sale, if any, as provided in said Security Agreement.
>
> The collateral is now stored at *625 W. Broadway, Forrest City, Ar.*, and consists of *1 - 1980 Chev. Monte Carlo, VIN 1Z373AK420348.*

The notice was sent by certified mail, return receipt requested, and was returned to appellee, "Addressee unknown." No notice was sent to Lennie C. Miller.

The automobile was transported to Memphis, Tennessee, on October 24, 1985, for public auction. Before the auction, an advertisement was published in *The Commercial Appeal*, a Memphis newspaper, which stated:

BANK REPO SALE
NOVEMBER 1, 1985—10 A.M.

1312 THOMAS ST.

PUBLIC AUCTION—These vehicles must be sold as is to the highest bidder. Open to general public and all dealers. Clear title guaranteed by bank.

TERMS: Cash, Cashier's Check or Bank Reference Letter

****

'85 Ford LTD	'84 Mercury Lynx
'85 Ford Escort	'85 Nissan Pulsar
'85 Ford 150 Pick Up	'85 Nissan Stanza
'85 Mercury Marquis	'85 Pontiac Sunbird
'85 Lincoln Town Car	'84 Mercury Cougar

More Than 84 Cars & Trucks To Be Sold

Sale Conducted by Licensed Auctioneers

Phone For Information, 523-6615

The car was sold for $550.00 on November 1, 1985, and appellee sued appellant and Lennie C. Miller for the deficiency. At the time of trial, the outstanding deficiency on the debt was $4,410.51.

At trial, appellant testified that, a few days prior to the repossession, his house on Chicago Street burned down and he moved in with his parents.

Sam Woolridge, appellee's assistant cashier and loan officer, testified that appellant's North Chicago address in Brinkley was obtained from appellant or his father and was, at the time the notice was sent, the last known address of appellant. Woolridge admitted that appellee did not send a notice to Lennie C. Miller, although Woolridge knew his address. Woolridge also admitted that, although the notice indicated that the car would be offered at private sale, it was ultimately sold at public auction.

The circuit judge awarded appellee a deficiency judgment in

the amount of $4,410.51, plus interest, costs and attorney's fees. He dismissed appellee's complaint as to Lennie C. Miller because appellee did not give him notice of the sale of the collateral.

On appeal, appellant asserts that (1) the circuit judge erred in awarding the deficiency judgment to appellee because the notice sent to appellant did not state the time and place of the sale and because it was sent to an incorrect address and (2) that appellee's failure to send notice to Lennie C. Miller forecloses appellee's right to obtain a deficiency judgment against appellant.

Arkansas Code Annotated Section 4-9-504(3) (1987) provides in pertinent part:

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

See also Anglin v. *Chrysler Credit Corp.*, 27 Ark. App. 173, 175, 768 S.W.2d 44, 45 (1989). In the case at bar, there was no evidence that appellant signed after default a statement renouncing or modifying his right to notification of sale.

In their treatise, *Uniform Commercial Code*, James White and Robert Summers note that:

> For a private sale of collateral that is neither perishable nor threatens to decline speedily in value, nor is customarily sold on a recognized market, the creditor must inform the debtor of "the time after which any private sale or other intended disposition is to be made * * *." For such public sales, 9-504 requires different information: "the time and place of any public sale * * *."

J. White & R. Summers, *Uniform Commercial Code* Section 27-12, at 600 (3d ed. 1988). The distinction between private sale and public sale was recognized by the Arkansas Supreme Court in *Barker v. Horn*, 245 Ark. 315, 316, 432 S.W.2d 21, 22 (1968),

where the court stated that, although the statute requires notice of the time and place of public sale, only reasonable notification of the time after which a private sale will be made is required. In *Womack* v. *First State Bank of Calico Rock*, 21 Ark. App. 33, 728 S.W.2d 194 (1987), we stated, "[i]t seems to be generally understood that when the debtor was not given written notice of the time and place of the sale, the sale was not conducted according to the provisions of the Code." 21 Ark. App. at 39, 728 S.W.2d at 197.

In the treatise, *Uniform Commercial Code*, the authors state that:

> Before the creditor can sell or otherwise dispose of the collateral, 9-504(3) requires the creditor to send notice to the debtor.
>
> > The purpose of notice is to give the debtor an opportunity either to discharge the debt and redeem the collateral, to produce another purchaser or to see that the sale is conducted in a commercially reasonable manner. [*Buran Equip. Co.* v. *H & C Investment Co.*, 142 Cal. App. 3d 338, 190 Cal. Rptr. 878, 881 (1983).]
>
> Cases involving notice issues should be resolved with these three purposes in mind.

J. White & R. Summers, *Uniform Commercial Code* Section 27-12, at 598 (3d ed. 1988).

"Send" is defined in Ark. Code Ann. Section 4-1-201(38) (1987) as follows:

> "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

Arkansas Code Annotated Section 4-1-201(26) (1987) states that a person "notifies" or "gives" notice by:

> taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when:
>
> (a) It comes to his attention; or
>
> (b) It is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

In *First State Bank of Morrilton* v. *Hallett*, 291 Ark. 37, 41-42, 722 S.W.2d 555, 556-57 (1987), the supreme court ruled that, when a creditor repossesses collateral and sells it without sending proper notice to the debtor as required by the Uniform Commercial Code, the creditor is not entitled to a deficiency judgment. "When the code provisions have delineated the guidelines and procedures governing statutorily created liability, then those requirements must be consistently adhered to when that liability is determined." *First State Bank of Morrilton,* 291 Ark. at 41, 722 S.W.2d at 557. "If the secured creditor wishes a deficiency judgment he must obey the law. If he does not obey the law, he may not have his deficiency judgment." *First State Bank of Morrilton*, 291 Ark. at 41, 722 S.W.2d at 557, quoting *Atlas Thrift Co.* v. *Horan*, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315, 321 (1972).

We need not decide whether appellee's mailing of the notice to the Chicago Street address was sufficient compliance with the Uniform Commercial Code, because we hold that, even if appellant had actually received the notice, it would have been deficient.

> Even if the secured party's notice to the debtor contains information relating to all the items that the Code and courts require, that information may be incorrect. The Code has no provision addressed to this issue except that 9-504 says that notice must be "commercially reasonable." The most common example is a notice that leads the debtor to believe the creditor plans one type of sale (private or public), but the creditor subsequently holds the other type.

> Courts generally hold that such a notice does not satisfy 9-504(3).

J. White & R. Summers, *Uniform Commercial Code* Section 27-12, at 601 (3d ed. 1988). It was not disputed at trial that the disposition of the collateral in question was by public sale. The notice sent by appellee, however, simply stated that the automobile would be offered at private sale on or after 10:00 a.m., October 24, 1985; it did not provide appellant with the time or the place of the sale. This notice was clearly not in compliance with the requirements of Ark. Code Ann. Section 4-9-504(3) (1987), and appellee is therefore barred from obtaining a deficiency judgment against appellant. *Accord First State Bank of Morrilton, supra*, 291 Ark. at 41-42, 722 S.W.2d at 556-57.

We point out, however, that we do not agree with appellant's argument that appellee's failure to send notice to Lennie C. Miller bars its right to obtain a deficiency judgment against appellant. Indeed, none of the cases cited by appellant support his argument; they hold that a secured party who has failed to comply with the requirement that a guarantor be notified of the sale of collateral may not recover a deficiency judgment against *him. See Hallmark Cards, Inc.* v. *Peevy*, 293 Ark. 594, 598, 739 S.W.2d 691, 694 (1987); *First Nat'l Bank of Wynne* v. *Hess*, 23 Ark. App. 129, 134-35, 743 S.W.2d 825, 827 (1988).

Reversed.

CRACRAFT and JENNINGS, JJ., agree.