Patricia SPEIGHT *v.* Benjamin SPEIGHT/Hakim Beyah

CA 89-159 781 S.W.2d 39

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

Jewel E. Holloway, Child Support Enforcement Unit of Pulaski County, for appellant.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Pulaski County Chancery Court. Appellant, Patricia Speight, appeals the dismissal of her motion asking that appellee, Benjamin Speight/Hakim Beyah, be cited for contempt for his failure to comply with the October 4, 1983, agreed order by which

he was to pay child support in the amount of $200.00 per month. We reverse and remand.

The parties here were divorced in Pulaski County Chancery Court, Second Division, on September 29, 1972. Appellant was awarded custody of the couple's two minor children and appellee was ordered to pay child support at the rate of $40.00 per week.

Following appellant's first petition to show cause, appellee on March 12, 1975, was held in contempt for his failure to comply with the prior order of the court concerning child support payments. At that hearing appellee was ordered to make the $40.00 per week payments through the Master in Chancery. It was further ordered that appellant have judgment against appellee in the amount of $720.00 for arrearages in child support.

In 1979, appellant, then a resident of Michigan, through that state filed an incoming Uniform Reciprocal Enforcement of Support Act action asking the court to order appellee to properly support his minor children. A hearing on the petition was held November 27, 1979, at which time child support was set at $60.00 per week and a wage assignment was granted.

Appellant again in 1981 filed a motion and show cause order. A December 7, 1981, hearing resulted in judgment for appellant in the sum of $11,315.00 for past due child support and a wage assignment for $75.00 per week. Of this amount, $60.00 was to be current support and $15.00 was to be applied to arrearages.

On October 4, 1983, another contempt motion filed by appellant was resolved. By way of an agreed order entered into by the parties appellant was given judgment for an additional $3,760.00 in arrearages and child support was revised to $160.00 per month for current support and $40.00 per month to be applied to arrearages.

Appellant, on October 25, 1988, filed an amended motion alleging new arrearages of $5,955.00 for the period March 1, 1984, through August 31, 1988. At the November 8, 1988, hearing on the motion in Pulaski County Chancery Court, appellee's counsel moved that appellants' motion be dismissed based on the common law theory of election of remedies. Appellee asserted that the 1983 wage assignment barred any subsequent action for contempt because the two were opposite remedies.

From the chancellor's granting this oral motion to dismiss with prejudice comes this appeal.

Appellant raises the following three points for reversal: 1) The chancellor erred in granting appellee's oral motion to dismiss because it was not properly pled or proven; 2) the chancellor erred in granting appellee's oral motion to dismiss based on an election of remedies theory because the "remedies" sought herein do not fit the requirements for an election of remedies theory; 3) the chancellor erred in granting appellee's oral motion to dismiss based on an election of remedies theory because Ark. Code Ann. § 9-14-202 proscribes such a ruling. However, because we find merit in appellant's second point we will not address the first or last points.

Appellant in her second point argues that a wage assignment for the payment of chid support and a motion and show cause order requesting that the court exercise its contempt power are not the types of totally separate remedies to which the election of remedies doctrine applies.

For the election of remedies doctrine to apply there must be concurrent, inconsistent remedies. *Toney* v. *Haskins*, 271 Ark. 190, 608 S.W.2d 28 (Ark. App. 1980). Furthermore, the election of remedies rule is not favored by the courts. *Id.* at 198, 608 S.W.2d at 32.

The first consideration is whether there actually are two remedies involved. In making this determination we look at both the nature of a wage assignment and that of the contempt order. In support of her argument appellant asserts that a show cause proceeding in which the defendant is accused of willful contempt of court for failing to pay child support will be adjudicated on the merits by the court. After either a judgment is granted for the arrearages or the defendant purges himself of the contempt or otherwise satisfies the court's requirement in this regard, the proceeding is finalized and the plaintiff cannot in the future raise the same issues concerning those arrearages. The issue regarding those particular arrearages is *res judicata* in any subsequent proceeding.

She also contends that in contrast, a wage assignment is merely a procedural administrative device made available to the

court by statute to facilitate the regular payment of child support. The court, at any time upon proper motion, can modify the wage assignment as to the amount paid and the time of payments, as well as the party to whom it is directed.

Appellant continues by stating that a contempt proceeding instituted by the obligee in a child support case is clearly a legal remedy which is pursued to enforce the obligation, whereas, the implementation of an income withholding order is not a legal remedy in the sense required to make the election of remedies doctrine applicable.

We agree with appellant's assertion that the actions of requesting a wage assignment for payment of a child support obligation and a subsequent show cause proceeding are not two remedies between which the movant is required to choose under the election of remedies theory. Therefore, it was error for the chancellor, based on an election of remedies theory, to dismiss appellant's motion for contempt. For this reason we reverse and remand.

Reversed and remanded.

COOPER and ROGERS, JJ., agree.

Laura Elizabeth GUNNELL *v.* Steven Craig GUNNELL

CA 89-176 780 S.W.2d 597

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

Gill, Johnson & Gill, by: *Brooks A. Gill*, for appellant.

Russell D. Berry, for appellee.

GEORGE K. CRACRAFT, Judge. Laura Gunnell appeals from a decree of the Arkansas County Chancery Court granting Steven Gunnell a divorce. She contends that the chancellor erred in granting the divorce because appellee presented insufficient proof of his grounds. We agree and reverse.

Appellee sought and obtained a divorce on grounds of general indignities. *See* Ark. Code Ann. § 9-12-301(4) (1987). Appellant did not answer the complaint but did appear at the hearing. Appellee's entire testimony as to his grounds for divorce was as follows:

Q. Did you all have problems during your marriage?

A. Yes, sir.

Q. Did these problems build up to the point where you all

can no longer live together as husband and wife?

A. Yes sir.

Q. And this resulted in your separation?

A. Yes, sir.

Divorce is a creature of statute and can only be granted upon proof of a statutory ground. *Harpole* v. *Harpole*, 10 Ark. App. 298, 644 S.W.2d 480 (1984). In *Harpole*, we quoted the Arkansas Supreme Court's definition of what evidence is necessary to establish indignities as a ground for divorce:

> It is for the court to determine whether or not the alleged offending spouse has been guilty of acts or conduct amounting to rudeness, contempt, studied neglect or open insult, and whether such conduct and acts have been pursued so habitually and to such an extent as to render the condition of the complaining party so intolerable as to justify the annulment of the marriage bonds. *This determination must be based upon facts testified to by witnesses, and not upon beliefs or conclusions of the witnesses. It is essential, therefore, that proof should be made of specific acts and language showing the rudeness, contempt and indignities complained of. General statements of witnesses that defendant was rude or contemptuous toward the plaintiff are not alone sufficient. The witness must state facts—that is, specific acts and conduct from which he arrives at the belief or conclusion which he states in general terms—so that the court may be able to determine whether those acts and such conduct are of such a nature as to justify the conclusion or belief reached by the witness.* The facts, if testified to, might show only an exhibition of temper or of irritability probably provoked or of short duration. The mere want of congeniality and the consequent quarrels resulting therefrom are not sufficient to constitute that cruelty or those indignities which under our statute will justify a divorce.

10 Ark. App. at 302-303, 664 S.W.2d at 483 (quoting *Bell* v. *Bell*, 105 Ark. 194, 195-96, 150 S.W. 1031, 1032 (1912)) (emphasis added by the court in *Harpole*). *See also Price* v. *Price*, 29 Ark. App. 212, 780 S.W.2d 342 (1989).

Here, as in *Harpole*, appellee testified only in conclusory terms, without any mention of any specific acts or conduct of appellant to justify those conclusions. This proof was clearly insufficient.

Relying on cases related to corroboration of grounds for divorce, appellee argues that, since appellant did not file an answer and testified that she was not contesting the divorce, a different standard of proof of grounds should be applied. We cannot agree. Our law makes a clear distinction between the requirements as to *proof* of grounds and those as to *corroboration* of grounds. Except in cases grounded on continuous separation without cohabitation, *see Hodges* v. *Hodges*, 27 Ark. App. 250, 770 S.W.2d 164 (1989); Ark. Code Ann. § 9-12-306(c) (1987), corroboration of grounds is not required in uncontested cases and may be waived in contested cases. Ark. Code Ann. § 9-12-306(a) and (b) (1987). *See also Rachel* v. *Rachel*, 294 Ark. 110, 741 S.W.2d 240 (1987). In contested cases where corroboration has not been waived but there is no intimation of collusion, the corroborating evidence may be relatively slight. *Hilburn* v. *Hilburn*, 287 Ark. 50, 696 S.W.2d 718 (1985). However, regardless of whether a divorce is contested or uncontested, the injured party must always prove his grounds for divorce; our statutory law does not allow a spouse to waive proof of grounds. *Harpole* v. *Harpole*, *supra*. Nor has there been any relaxation of our rule requiring that the ground of indignities to the person be proved by evidence of specific acts and conduct. *Harpole*, which cites an unbroken line of cases, makes this clear.

We conclude from our *de novo* review of the record that appellee failed to offer sufficient proof to warrant a dissolution of the marriage. For this reason, we do not address additional issues presented by this appeal.

Reversed and dismissed.

MAYFIELD, J., agrees.

JENNINGS, J., concurs.

JOHN E. JENNINGS, Judge, concurring. I concur because the case is clearly governed by our decision in *Harpole*. We may, however, at sometime in the future wish to re-examine the rule which permits the issue of the sufficiency of evidence of grounds in

a divorce case to be raised for the first time on appeal.

IN THE MATTER OF the Adoption of Jennifer DAILEY

CA 89-63 784 S.W.2d 782

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

William A. Lafferty, for appellant.

Wallace, Dover & Dixon, by: *Philip E. Dixon* and *M. Darren O'Quinn*, for appellee.

JAMES R. COOPER, Judge. This is the second appeal in this adoption case. The appellant, the natural mother, argues that the probate judge erred in granting the appellees' motion for summary judgment and in dismissing the appellant's petition to withdraw her consent to the adoption. We reverse and remand.

On January 16, 1986, the appellant signed a consent to the adoption of her daughter by the appellees, and on January 17, 1986, the probate court entered an adoption decree. The appellant attempted to withdraw her consent, asserting that it had been obtained by fraud and duress. The probate court ruled that the decree was final and, that as a matter of law, she could not raise an issue of fact as to her right to withdraw consent. On appeal to this Court, we reversed and remanded, holding that the appellant could withdraw her consent upon a showing that it was obtained by fraud, duress, or intimidation. *In re Jennifer Dailey*, 20 Ark. App. 180, 726 S.W.2d 292 (1987). We remanded after finding that the trial court had erred in granting summary judgment, and

ordered a hearing on whether the appellant's consent was wrongfully obtained.

On May 27, 1988, the appellees filed sixteen requests for admissions. Request number two asked the appellant to admit that she was "not acting under duress, fraud or under misrepresentation at the time [she] executed the Consent to Adopt," and request number sixteen asked the appellant to admit "that it would be in the best interests of the minor child that this adoption be granted." The requests for admissions were to be answered by June 29, 1988; however, they were not filed until July 8, 1988. The probate court, noting that the responses were unverified and relying on Ark. R. Civ. P. 36, deemed the requests for admissions admitted and granted the appellees' motion for summary judgment. In his order the probate judge clearly relied on requests for admissions numbers two and sixteen in granting the summary judgment. Verification by the parties is no longer necessary on requests for admissions. Ark. R. Civ. P. Rule 36(a) (1987).

Requests for admissions are generally considered to be designed to ascertain an adversary's position, and are not discovery devices to ascertain relevant facts. *Van Langen* v. *Chadwick*, 173 N.J.Super. 517, 414 A.2d 618 (1980). The purpose of the rule is to facilitate trial by weeding out facts about which there is no true controversy but which are often difficult or expensive to prove. *Id.; see United Coal Cos.* v. *Powell Construction Co.*, 839 F. 2d 958 (3d Cir. 1988); *ASEA, Inc.* v. *Southern Pacific Transportation Co.*, 669 F. 2d 1242 (9th Cir. 1981); *Webb* v. *Westinghouse Electric Corp.*, 81 F.R.D. 431 (E.D. Pa., 1978); *Linde* v. *Kilbourne*, 543 S.W.2d 543 (Mo. App. 1976).

Although the Arkansas Rules of Civil Procedure allow for a request for an admission which concerns the application of law to fact, Ark. R. Civ. P. 36(a), admissions designed to directly discover what legal conclusions the opposing attorney intends to draw from those facts are improper. *See Equal Employment Opportunity Commission* v. *Otto*, 75 F.R.D. 624 (D. Md. 1976). An element of the burden of proof, or even the ultimate issue in the case may be addressed in a request for admission under Rule 36, and the admission of these matters may not be avoided because the request calls for application of the facts to the law, the truth of an ultimate issue, or opinion or

conclusion so long as the opinion called for is not on an abstract proposition of law. *Linde, supra.* It is the concession of the issue, otherwise determinable by the trier of fact, which comes into evidence, not the assumptions of the party who makes the admission. *Id.* A request for admission of a pure matter of law is improper. *Jensen* v. *Pioneer Dodge Center, Inc.*, 702 P.2d 98 (Utah 1985).

In the present case, the probate court relied entirely upon requests for admissions two and sixteen, both of which are bare conclusions of law. There are no facts mentioned in the requests and, therefore, we cannot call them the "application of facts to law." We hold that in this case, where the appellant has attempted to obtain a hearing on the fraud and duress issues as they apply to her signing the consent to adopt, where we remanded the case and ordered such a hearing to be held, and where the issues are already developed and narrowed for trial, that the probate court erred in granting summary judgment on the basis of the improper requests for admissions. Even had the requests for admission been proper, to allow this result to stand would be to allow technical considerations to prevail over substantial justice. *See Jensen, supra.* We reverse and remand with directions to the probate court to hold a hearing to determine whether fraud or duress was employed in obtaining the appellant's signature on the consent to adopt.

Reversed and remanded.

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

Bienuenido CRESPO *v.* STATE of Arkansas

CA CR 89-71 780 S.W.2d 592

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

David L. Dunagin, Deputy Public Defender, for appellant.

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

JOHN E. JENNINGS, Judge. Appellant, Bienuenido Crespo, was charged in Sebastian County Circuit Court with burglary and aggravated robbery. The jury found Crespo guilty of both offenses, and also made a specific finding that he had been armed with a deadly weapon. In accordance with the jury verdicts, Crespo was sentenced to five years imprisonment for the burglary and twelve years for the aggravated robbery. In addition, the court applied the sentencing provision of Ark. Code Ann. § 16-90-121 (1987), which imposes a minimum of ten years to be served without parole when a person is found guilty of a felony involving the use of a deadly weapon. On appeal, Crespo contends that the trial court erred in instructing the jury on the use of a deadly weapon. We disagree and affirm.

AMCI 6001 is the jury instruction regarding use of a deadly weapon, and it is based on Ark. Code Ann. § 16-90-121. That section provides:

Any person who is found guilty of or pleads guilty to a

> felony involving the use of a deadly weapon, whether or not an element of the crime, shall be sentenced to serve a minimum of ten (10) years in the state prison without parole but subject to reduction by meritorious good-time credit.

Appellant argues that this section covers an action that was already an element of aggravated robbery as defined in Ark. Code Ann. § 5-12-103(a)(1). Appellant seems to argue that aggravated robbery is already an "enhancement provision" applied to robbery and imposed for the use of a deadly weapon, so that to apply further "enhancement" under § 16-90-121 for the same use of the same deadly weapon impermissibly subjects appellant to "double jeopardy." For support, appellant relies primarily on *Busic* v. *United States*, 446 U.S. 398, 100 S.Ct. 1747 (1980).

Busic dealt with the application of federal enhancement statutes, and turned upon the failure of Congress to make clear its intent regarding the application of 18 U.S.C. § 924(c) to analogous enhancement provisions in pre-existing statutes defining federal crimes. Unlike the intent of Congress in enacting 18 U.S.C. § 924(c) as found in *Busic*, the intent of the Arkansas State Legislature in passing § 16-90-121 is clear. That section plainly states that it is to apply to one found guilty of a felony involving use of a deadly weapon *whether or not* such use is an element of the crime. The section thus applies to aggravated robbery, and provides that the sentence will be a minimum of ten years served without parole. Here, appellant was sentenced to twelve years on the aggravated robbery charge and an additional five years on the burglary charge. The application of § 16-90-121 does not impose an additional sentence, but merely precludes the possibility of Crespo being eligible for parole before serving ten years, subject to reduction for meritorious good time.

In *Missouri* v. *Hunter*, 459 U.S. 359, 103 S.Ct. 673 (1983), the Supreme Court addressed a situation similar to that presented here. The Court examined a Missouri statute which imposed an additional three year term of imprisonment for the commission of a felony with a deadly weapon. In rejecting the Missouri Supreme Court's finding that such a provision violated the Double Jeopardy Clause, the Court stated:

> This view manifests a misreading of our cases on the

> meaning of the Double Jeopardy Clause of the Fifth Amendment; we need hardly go so far as suggested to decide that a legislature constitutionally can prescribe cumulative punishments for violation of its first-degree robbery statute and its armed criminal action statute.
>
> * * *
>
> With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.
>
> * * *
>
> Here, the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.
>
> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct under Blockburger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court may impose cumulative punishment under such statutes in a single trial.

It is clear that the application of Ark. Code Ann. § 16-90-121 to one convicted of aggravated robbery does not constitute double jeopardy. The trial court did not err in giving AMCI 6001 to the jury.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

STRICK LEASE, INC. *v.* M.P. JUELS and Charles P. Cummings

CA 89-135 780 S.W.2d 594

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

Skokos, Coleman & Rainwater, P.A., by: *Randy Coleman* and *George E. Gibbs*, for appellant.

Harold W. Madden, for appellee M.P. Juels.

Kemp, Duckett & Hopkins, for appellee Charles P. Cummings.

JUDITH ROGERS, Judge. The appellant, Strick Lease, Inc., appeals from an order of the Pulaski County Circuit Court denying its motion for summary judgment and thereby dismissing its application for the registration of a foreign judgment rendered in Pennsylvania by confession against the appellees, M.P. Juels and Charles P. Cummings. For reversal, the appellant contends that the trial court erred in concluding that the foreign judgment was not entitled to full faith and credit based on its finding that the judgment was rendered contrary to the basic requirements of due process, including notice and the opportunity to appear, and that the rendering court did not have personal jurisdiction over the appellees. We reverse and remand.

A brief recitation of the facts is necessary for a clear understanding of the questions thus presented in this appeal. In 1985, the appellees personally guaranteed payment to the appellant for equipment leased by their company, Transportation Service, Inc. Appellees are both residents of North Little Rock and their corporate business is conducted there. The guarantee agreements signed individually by the appellees contains the following provisions:

> Section 13 Waiver of Pre-judgment Hearing. If any payment or amount or any other charge or sum which is required to be paid by Guarantor shall remain unpaid on any day when the same ought to be paid by the Guarantor, Guarantor hereby empowers any prothonotary, Clerk of Court or attorney of any court of record to appear for Guarantor in any and all actions which may be brought

> [including] actions to confess judgment against the Guarantor for all or part or expense specified in the Agreements then unpaid.
>
> Section 14 Governing Law. This guarantee agreement shall be construed and interpreted in accordance with the laws of the State of Pennsylvania.
>
> Section 15 Guarantee Agreement. Guarantor hereby submits to the jurisdiction of the Courts of the Commonwealth of Pennsylvania.

Upon default, appellant proceeded in accordance with the cognovit provision of the agreement, and on January 11, 1988, obtained a judgment by confession in the amount of $37,481 in the Court of Common Pleas in Bucks County, Pennsylvania, pursuant to the statutory law and procedure existing in that state. *See* Pa. R. Civ. P. §§ 2951-61 (1989). More specifically, the judgment was obtained by appellant's attorney, Anthony L. Lamm, who filed a complaint professing to appear on behalf of the appellees for the confession of judgment in favor of the appellant. The complaint was accompanied by individual affidavits, purporting to be those of the appellees, but which were signed by Lamm, directing that judgment be entered against them.

Thereafter, appellant applied for the registration of the Pennsylvania judgment in the Pulaski County Circuit Court, and subsequently moved for summary judgment that its application be granted. The appellees resisted the application and the motion for summary judgment on grounds that they were not afforded due process, citing the absence of notice and the opportunity to appear prior to the entry of judgment in Pennsylvania, and that they had no contacts with the state of Pennsylvania sufficient to establish personal jurisdiction. Appellee Cummings filed an affidavit stating generally that he had never appeared in any Pennsylvania action, that he never authorized Lamm to appear on his behalf or confess judgment, and that the first notice he had of the Pennsylvania judgment was received when he was served with the present application for the registration of the foreign judgment.

The trial court ruled in favor of the appellees, and in its order of December 5, 1988, stated:

> [U]pon consideration of the pleadings and statements of [Appellant's] counsel, the Court finds that the foreign judgments which [Appellant] seeks to register were rendered contrary to basic constitutional requirements of due process, including notice and opportunity to appear, and the rendering court did not have jurisdiction of the person of [Appellee], Charles Cummings, or [Appellee], M.P. Juels, and [Appellant's] Application to Register Foreign Judgment, as amended, and its Motion for Summary Judgment should be dismissed.

The Uniform Act, found at Ark. Code Ann. §§ 16-66-601—619 (1987), requires only that the foreign judgment be regular on its face and duly authenticated to be subject to registration. *Dolin* v. *Dolin*, 9 Ark. App. 329, 659 S.W.2d 954 (1983). Under the full faith and credit clause of the United States Constitution, Art. 4, § 1, a foreign judgment is as conclusive on collateral attack, except for defenses of fraud in the procurement or want of jurisdiction in the rendering court, as a domestic judgment would be. *Cella* v. *Cella*, 12 Ark. App. 156, 671 S.W.2d 764 (1984). These judgments are presumed valid, and an answer asserting lack of jurisdiction is not evidence of the fact and the burden of proving it is on the one attacking the foreign judgment. *Dolin* v. *Dolin, supra.*

As its first point for reversal, the appellant argues that the trial court erred in holding that the Pennsylvania judgment was rendered in violation of the appellees' right to due process. Secondly, the appellant contends that the trial court erred in finding that the Pennsylvania Court lacked personal jurisdiction over the appellees. Particularly, it is the appellant's contention that the appellees waived their rights to pre-judgment notice and the opportunity to defend, as well as the requirement of personal jurisdiction, as evidenced by the terms of the guarantee agreements.

As authority, appellant has referred us to the companion cases decided by the United States Supreme Court of *D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174 (1972), and *Swarb* v. *Lennox*, 405 U.S. 191 (1972), in which the Court addressed the due process validity of cognovit provisions. In *Overmyer*, the Court observed that the cognovit is the ancient legal device by

which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly with the appearance, on the debtor's behalf, of an attorney designated by the holder. 405 U.S. at 176. The Court went on to hold that a cognovit clause is not *per se* violative of Fourteenth Amendment due process, as due process rights to notice and hearing prior to a civil judgment are subject to waiver, provided that the waiver be voluntary, knowing, and intelligently made.

In *Swarb, supra*, the Court had before it the Pennsylvania statutory scheme at issue in the present case. In affirming the limited decision of the lower court, the Court declined to declare that the Pennsylvania rules and statutes were *per se* unconstitutional in recognition that under appropriate circumstances, a cognovit debtor may be held effectively and legally to have waived those rights he would possess if the document he signed had contained no cognovit provision. 405 U.S. at 200.

It is clear from these decisions that notice and the opportunity to appear can be waived without doing violence to the due process clause. However, it is also equally clear that the validity of cognovit provisions is governed by the facts of each particular case. *Overmyer*, 405 U.S. at 188; *Swarb*, 405 U.S. at 201.

Likewise, the requirement of personal jurisdiction, being an individual right, can, like other such rights, be waived. *Insurance Corp. of Ireland, Ltd.* v. *Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703 (1982). Accordingly, parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even waive notice altogether. *Nat'l Equipment Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 316 (1964).

Therefore, in light of the foregoing authorities, we conclude that the trial court erred in concluding that the foreign judgment was rendered in a facially unconstitutional manner and without personal jurisdiction, inasmuch as such rights are subject to waiver. However, on the basis of the record now before us, we cannot also conclude that the waiver of these rights was "voluntary, knowing and intelligently made." As stated in *Overmyer*, "[w]e do not presume acquiescence in the loss of fundamental rights." 405 U.S. at 186, *quoting Ohio Bell Tel. Co.* v. *Public*

Utilities Comm'n, 301 U.S. 292, 307 (1937).

In his response to the appellant's motion for summary judgment, appellee asserted "that he has never consented to entry of a judgment against him in Bucks County, Pennsylvania; [and] that he has not knowingly waived his constitutional right to due process of law." It appears that these assertions challenging the jurisdiction of the rendering court were not fully developed in this summary proceeding. When a trial record discloses a simple failure of proof, justice demands that we remand the cause to allow an opportunity to supply the defect unless it clearly appears that there can be no recovery. *Ross* v. *Moore*, 25 Ark. App. 325, 758 S.W.2d 423 (1988). Here, it is not apparent that no recovery can be had, and we believe a remand is the appropriate course in this case where such substantial rights are involved. Therefore, we reverse and remand for proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

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

Cary S. POLLACK and Robin Craft *v.* PULASKI BANK & TRUST COMPANY

CA 89-255 781 S.W.2d 497

Court of Appeals of Arkansas
Division I
Opinion delivered December 20, 1989

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Smith Law Firm, Ltd., by: *Floyd A. Healy*, for appellant.

C.B. Blackard III, for appellee.

JAMES R. COOPER, Judge. On July 15, 1987, the appellants executed a promissory note to the appellee in the original principal amount of $62,180.12, giving a security interest in equipment used in the appellants' business, The Image Factory, Inc. The security agreement required the appellee to give five days' written notice before sale of the collateral in the event of default and repossession. In October 1987, the note was in default, and the appellants voluntarily surrendered possession of the equipment to the appellee. The parties kept in close contact with each other, and both attempted to secure a purchaser of the equipment. In February 1988, the appellee accepted an offer in the amount of $50,000.00 from Filmed Events Network. Although the appellee contacted the appellant Robin Craft and obtained her consent to the sale, the appellant Cary Pollack was not contacted, and no written notice was sent to either of the appellants. The appellee subsequently sued the appellants for the deficiency. After a bench trial on February 6, 1989, the trial court found that the sale of the collateral had been conducted in a commercially reasonable manner and entered judgment for the appellee in the amount of $14,871.48, plus costs. From that decision, comes this appeal.

For reversal, the appellants contend that the trial court erred in finding that the sale of the collateral was conducted in a commercially reasonable manner and that, because the conduct of the sale was commercially unreasonable, the appellee was not entitled to a deficiency judgment. We affirm in part and reverse in part.

The parties' security agreement provided that:

> If any of the Collateral is perishable or threatens to

> decline speedily in value or is of a type customarily sold on a recognized market, no notice of sale or other disposition shall be given by Bank to Borrower. Otherwise Bank will give Borrower prior written notice of the time and place of any public sale or of the date after which any private sale or other intended disposition is to be made, by mailing such notice postage prepaid by Certified or Registered Mail, to the address of Borrower shown at the beginning of this Agreement at least five (5) days before the day of the sale or disposition.

At trial, Jean Blackwood, vice president and commercial loan officer for Pulaski Bank, testified that, on February 1, 1988, Phillip Moore, with Filmed Events Network, contacted her about the collateral. Ms. Blackwood stated that he looked at the equipment, called her back the next day, and made an offer of $45,000.00. Ms. Blackwood refused this offer, and Mr. Moore made another offer of $50,000.00. She testified that she informed him that she would have to wait until the next day to give him an answer and that she immediately called Ms. Craft to inform her about the $50,000.00 offer; Ms. Craft told her that the appellant, Mr. Pollack, was out of town and that there was no way to reach him but that he would be calling Ms. Craft later. She testified that Ms. Craft told her that she (Ms. Craft) was trying to get in touch with another potential purchaser. Ms. Blackwood stated that she called Ms. Craft the next morning to see if Ms. Craft had been able to contact anyone, and was informed that Ms. Craft had not been able to do so. Ms. Blackwood stated that Ms. Craft told her, if she (Ms. Blackwood) had not heard from her within an hour, to go ahead and accept the offer. Ms. Blackwood testified that she waited two hours and then called Ms. Craft back; at that time, Ms. Craft told her to go ahead and sell the equipment to Filmed Events Network. Ms. Blackwood testified that, immediately thereafter, Mr. Moore called her; she accepted his offer and told him the papers would be ready the next day. Ms. Blackwood stated that, later that same afternoon, Ms. Craft called and told her that someone else was willing to purchase the equipment for as much as $70,000.00. Ms. Blackwood stated that she told Ms. Craft that she did not believe the appellee could break its oral agreement with Filmed Events Network, and that Ms. Blackwood met the next morning with the president of the bank, the

bank's attorney, and another vice president of the appellee. Ms. Blackwood testified, "[i]t was decided that, although the other offer was more and would pay us off, that we could not go back on our word. I mean, we had said we would do something, and we were liable for that." Ms. Blackwood admitted that the gentleman that had contacted Ms. Craft also called her at the bank. Ms. Blackwood also admitted that the offer from Filmed Events Network was simply an oral offer and that the appellants were not given written notice of the sale.

Ms. Craft testified that Ms. Blackwood had called her and said that she had an offer that was good for twenty-four hours for $50,000.00 from Filmed Events Network. She stated that Charles Friedman contacted her on the same day that Ms. Blackwood had told her about the other offer. Ms. Craft testified as follows:

> Q. Was there ever a monetary figure discussed as to how much Mr. Freidman would purchase the collateral for?
>
> A. Yes, there was. I told him that I had just talked to Jean a few hours before and there had been — an offer had been made for $50,000, which she was going to accept or had accepted. And I didn't know at that point, but he told me then — he said, "I can go as high as 70, if that makes any difference. If you can get them to talk to me, I could go as high as 70,000." I told him that the balance owed on the equipment was 63 and that he could get it for 63, around in there, because we weren't interested in making a profit on the system. We just wanted the bank paid off.
>
> Q. Do you have personal knowledge whether or not Mr. Freidman called the bank and communicated his offer to them?
>
> A. I talked to him two or three times that day. He called back at one point that afternoon and said he had contacted the bank himself, and he had spoken to a man in the loan department — he didn't know who it was that he talked to — and the person told him she knows that this equipment has already been sold and that, "We wouldn't even discuss it. It's a done deal," more or less.

Mr. Pollack testified that the appellee had represented to

him that he would be involved in the sale or disposition of the collateral and would have an opportunity to discuss offers because he had the most knowledge about the value of the equipment.

Charles Friedman testified that he communicated his willingness to pay up to $70,000.00 for the equipment to the appellee and was informed that the appellee had a verbal commitment with another company and would not deal with him.

At the conclusion of trial, the circuit judge stated:

> I think the provision for the notification does not cover the situation when they are in constant contact with the debtor as they were here. That is the intent to let them know what is going on. Make sure the debtor knows what you're doing. They're in almost daily contact with the debtor and conferring about what is going on about the sale. It's kind of silly to say, "We are letting you know what is going on. We are sending a five-day day notice," especially when the offer is in hand, as you told me here today.

The circuit court entered judgment for the appellee and stated:

> 3. In February 1988, the [appellee] received an oral offer to purchase the collateral for $50,000.00. Prior to accepting the offer, the [appellee's] officer, Jean Blackwood, telephoned the [appellant], Robin Craft (wife of the [appellant], Cary Pollack), and informed her of the offer. The parties concurred that the offer was the highest they had received so far and should be accepted.
>
> 4. After the [appellee] accepted the offer, the [appellants] were contacted by one Charles Israel Freedman [sic] who claimed he would be willing to purchase the collateral for more than $50,000.00. Having already accepted the previous offer of $50,000.00, the [appellee] was unable to sell the collateral to Mr. Freedman [sic].
>
> 5. All aspects of the sale of the collateral were commercially reasonable as required by Arkansas Code Annotated section 4-9-504. The provision contained within

> the security agreement requiring the mailing of written notice five days before the sale did not apply due to the constant communication between the parties regarding the sale of the collateral.

On appeal, the appellants argue that, since no written notice of the sale was provided, the appellee did not conduct the sale of the collateral in a commercially reasonable manner as provided in Ark. Code Ann. Section 4-9-504(3) (1987). They rely on *McIlroy Bank & Trust* v. *Seven Day Builders of Arkansas, Inc.*, 1 Ark. App. 121, 613 S.W.2d 837 (1981), for their assertion that the appellee was required to give them written notice of the sale, and further, they argue that the security agreement itself provided that they were to receive at least five days' written notice of the sale. The appellee correctly argues that *McIlroy Bank & Trust* dealt with Ark. Code Ann. Section 4-9-505 (former Ark. Stat. Ann. Section 85-9-505 (Supp. 1979)) and does not apply here. The appellee contends that the language of Ark. Code Ann. Section 4-9-504(3) does not require the secured party to send written notice to the debtors and does not proscribe notification by telephone. They also argue that, even if written notice was required, the appellants waived that right by their post-default conduct, i.e., their close contact with the bank in their efforts to secure a purchaser and Ms. Craft's statement to Ms. Blackwood to go ahead and accept Filmed Events Network's offer.

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 had 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 the appellants signed after default a statement renouncing or modifying their 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 *Barker* v. *Horn*, 245 Ark. 315, 432 S.W.2d 21 (1968), the Court held that reasonable notice was not provided where oral notice of sale was given without any specification as to the time of sale. The Court did not specifically approve of oral notice and stated:

> Thus, there was no evidence upon which to base any finding that notice was given. There is no contention that such notice was not required in this case. The statute requires notice of the time and place of public sale. While only reasonable notification of the time after which a private sale will be made is required, appellee's oral notice was of a sale to the highest bidder without specification of any time. For this reason, it cannot be said to constitute reasonable notice.

245 Ark. at 316, 432 S.W.2d at 22.

We believe that Section 4-9-504(3) implies that written

notice must be sent to the debtor and specifically requires a writing, signed by the debtor after default, before the debtor's right to such notice may be modified or renounced. It is apparent that the circuit judge considered that the appellants were estopped from relying on the defense of lack of written notice because Ms. Craft was informed of the proposed sale of the collateral and agreed that Mr. Moore's offer should be accepted. The situation is similar to that presented in *Wheeless v. Eudora Bank*, 256 Ark. 644, 509 S.W.2d 532 (1974), where the creditor maintained that the appellant debtor had acquiesced in a repossession and subsequent sale of an automobile; the debtor, however, testified that no one had discussed the sale with him at any time and that he had not consented to the procedure. The bank's officer testified that he had informed the debtor in advance that the bank was going to repossess the automobile and sell it but admitted that he had mentioned no specific date. The Court reversed, holding that the trial court erred in ruling that the appellant debtor was estopped to assert lack of notice as a defense and stated:

> Appellee admits it did not comply with the notice requirement but asserts that appellant had prior knowledge of the sale which constituted a waiver of his right to notice and that, having such knowledge, he was estopped to claim lack of notice as a defense. The testimony of appellee's vice president, Arnold, was in direct conflict with that of appellant as to whether appellant was told of the sale, and signed over the title before or after the sale occurred. Appellee also contends this was a private sale and appellant's statement that he knew the car had been repossessed and his surrender of the keys to employees of Eudora Motor Company amounted to an admission he had notice that after that time the car was subject to private sale. The notice provision of Ark. Stat. Ann. Section 85-9-504 requires more than this. Knowledge of repossession does not equate with notice of sale, nor does knowledge that an automobile will eventually be sold. The debtor is entitled to notification of a specific date after which the creditor intends to dispose of the property. This would provide the debtor a fixed period within which to protect himself from an inadequate sale price in any manner he

> saw fit. *Nelson* v. *Monarch Investment Plan of Henderson, Inc.*, 452 S.W.2d 375, 7 UCC Rep. Serv. 394 (Ky. March 27, 1970). Therefore, the determination of whether appellant had prior knowledge of the sale and whether that knowledge would estop him from asserting lack of notice as a defense must be made on the basis of the conflicting testimony of appellant and Arnold.
>
> We are committed to the doctrine that, since estoppel bars the truth to the contrary, the party asserting it must prove it strictly, there must be certainty to every intent, the facts constituting it must not be taken by argument or inference and nothing can be supplied by intendment. *Ford Motor Credit Co.* v. *Exchange Bank*, 251 Ark. 881, 476 S.W.2d 208; *McFaddin* v. *Bell*, 168 Ark. 826, 272 S.W. 62. The evidence supporting the claim of estoppel in this case is certainly not free from argument. The trial court erred in ruling that appellant was estopped to assert lack of notice as a defense.

256 Ark. at 648, 509 S.W.2d at 534-35.

In the case at bar, we agree with the trial judge that Ms. Craft is estopped to assert lack of written notice as a defense. Estoppel is a doctrine which involves both, not just one, of the parties; the party claiming estoppel must prove he relied in good faith on some act or failure to act by the other party and that, in reliance on that act, he changed his position to his detriment. *Worth* v. *Civil Serv. Comm'n*, 294 Ark. 643, 646, 746 S.W.2d 364, 366 (1988). The evidence shows that Ms. Craft was fully apprised of Filmed Events Network's offer, that she told Ms. Blackwood to accept it, and that, in reliance on her statement to accept the offer, appellee did so. The trial judge did not err in finding that the requirement of written notice did not apply to Ms. Craft.

However, the strict proof necessary to show estoppel is lacking with respect to Mr. Pollack. Spouses are not agents for one another merely by virtue of the marital relationship, *see Langston* v. *Langston*, 3 Ark. App. 286, 625 S.W.2d 554 (1981), and the appellee clearly failed to prove that Ms. Craft had the authority to renounce Mr. Pollack's right to written notice in his absence. Under these circumstances, we do not think that the

appellee could reasonably rely on Ms. Craft's actions insofar as Mr. Pollack's rights are concerned, and we hold that the circuit judge erred in finding that the security agreement's requirement of written notice before sale did not apply to Mr. Pollack.

Whether a sale of collateral was conducted in a commercially reasonable manner is essentially a question of fact. *Farmers and Merchants Bank* v. *Barnes*, 17 Ark. App. 139, 705 S.W.2d 450 (1986). Because the evidence supports a finding that Ms. Craft was estopped to assert lack of written notice of sale as a defense, we hold that the circuit judge's finding that the sale of the collateral was conducted in a commercially reasonable manner is not clearly against the preponderance of the evidence with respect to Ms. Craft. However, because there is no evidence to show that Mr. Pollack was bound by Ms. Craft's actions or was otherwise estopped to assert lack of notice, we hold that the trial court erred in finding the sale to be commercially reasonable with respect to Mr. Pollack in the absence of written notice of sale.

The appellants next argue that, because the sale of the collateral was not conducted in a commercially reasonable manner, the trial court erred in entering a deficiency judgment. We need not address this issue with respect to Ms. Craft, because we have held that the sale was conducted in a commercially reasonable manner insofar as her rights are concerned. However, it is clear, in light of *First State Bank of Morrilton* v. *Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987), that the appellee is not entitled to a deficiency judgment against Mr. Pollack. In *First State Bank of Morrilton*, 291 Ark. at 41-42, 722 S.W.2d at 556-57, the 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).

Affirmed in part; reversed in part.

JENNINGS and MAYFIELD, JJ., agree.

CITY OF FAYETTEVILLE *v.* Joanna BIBB

CA 89-243 781 S.W.2d 493

Court of Appeals of Arkansas
Division I
Opinion delivered December 20, 1989
[Rehearing denied January 24, 1990.]

James N. McCord, for appellant.

Burke & Eldridge, P.A., by: *Thomas B. Burke*, for appellee.

JOHN E. JENNINGS, Judge. This is an appeal from a jury verdict in the Washington County Circuit Court. Appellant, the City of Fayetteville, Arkansas, contends that the trial court erred in denying its motion for a new trial. Appellee, Joanna Bibb, contends on cross-appeal that the court erroneously denied her motion for attorney's fees. We affirm on direct appeal, but reverse and remand on cross-appeal.

Appellee went to work for the city in June of 1971. For the next fifteen years, she worked in various capacities for appellant until she was terminated on October 20, 1986. Her position at the time of her termination was that of business manager, at an annual salary of $21,961.00. She then brought this action seeking compensation for almost 2,000 hours of "compensatory time" earned between January of 1979 and her termination for time worked over and above a normal forty hour work week. There is no dispute that appellee legitimately worked the hours claimed.

Appellant moved for summary judgment, contending that

there were no material issues of fact and that it was entitled to judgment as a matter of law. The trial court denied the motion, the case proceeded to jury trial, and the jury returned a verdict in favor of appellee for $20,779.44, which represented her hourly rate of pay at termination multiplied by the compensatory hours claimed.

Summary judgment is an extreme remedy and should only be granted when it is clear there is no issue of fact to be litigated. *Johnson* v. *Stuckey & Speer, Inc.*, 11 Ark. App. 33, 665 S.W.2d 904 (1984). The object of a summary judgment is not to try the issues but rather to determine whether there are issues to be tried; if there is any doubt whatever, it should be denied. *Wolner* v. *Bogaev*, 290 Ark. 299, 718 S.W.2d 942 (1986). Nevertheless, if a movant makes a prima facie case with its motion for summary judgment, with accompanying evidence, then the burden shifts to the other party, and that party must then come forward with proof to demonstrate that there is a genuine dispute on an issue of material fact. *McDonald* v. *Eubanks*, 292 Ark. 533, 731 S.W.2d 769 (1987). Finally, even if the trial court is convinced that the moving party is entitled to summary judgment, it has discretion to deny the motion. *Karnes* v. *Trumbo*, 28 Ark. App. 34, 770 S.W.2d 199 (1989); *McLain* v. *Meier*, 612 F.2d 349 (8th Cir. 1979).

Appellant argues that the trial court erred in refusing to grant summary judgment. Appellant contends that appellee, in order to recover money payment in lieu of her accumulated "comp time," must show that "such payment is authorized by legislative enactment or other proper authority," citing *Riepe* v. *City of Independence*, 525 S.W.2d 622, 624 (Mo. App. 1975); *Koudelka* v. *Village of Woodridge*, 413 N.E.2d 1381 (Ill. App. 1980); *Rusk* v. *Whitmire*, 541 P.2d 1097 (Nev. 1975); *Pootel* v. *City and County of San Francisco*, 270 P.2d 553 (Cal. App. 1954). A more complete statement of the general rule is found in *Koudelka*: "Generally, municipal employees are not entitled to compensation for overtime work in the absence of a valid contract or law authorizing it. Allowance of compensatory time off for extra hours worked does not necessarily authorize the payment of money in lieu thereof." 413 N.E.2d at 1382, citing 4 McQuillan, *Municipal Corporations*, § 12.194a (3d ed. 1979).

Appellant presented two affidavits in support of its motion for summary judgment. The affidavits of Judy Huffaker, appellant's budget coordinator, and Scott Linebaugh, assistant city manager, stated that under the appellant's personnel policies appellee was not entitled to "overtime" pay, which they contend appellee was claiming. The affidavit filed by appellee stated that she understood from before and during her employment with appellant that she would be entitled to compensatory time for hours worked in excess of forty hours per week, and that she would be able to take that time off from work with pay while employed or would be paid the value of that time in the event of termination. It also stated that other city employees had been paid for accrued compensatory time upon termination of city employment. We think the appellee's affidavit was sufficient to raise an issue of fact as to whether the parties agreed that she would be paid for "comp time" on termination and that, in any event, the trial judge did not abuse his discretion in denying the motion.

Appellant also claims it was error for the trial judge to deny its motion for a new trial, because the evidence was not sufficient. "When a trial judge denies a motion for a new trial, the only issue on appeal is whether the verdict is supported by substantial evidence." *Millsaps* v. *Rhinehart*, 276 Ark. 147, 634 S.W.2d 98 (1982). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Surridge* v. *State*, 279 Ark. 183, 650 S.W.2d 561 (1983). Bibb testified that the primary basis for her understanding that she was entitled to payment for unused comp time was the city personnel policy handbook which she received at the time of her employment. She testified that the handbook stated that employees would be compensated for accumulated unused comp time. Various employees' handbooks issued during the time Bibb worked for the city were introduced into evidence, together with other records relating to the city's compensatory time policy. She also testified that her understanding was based in part on conversations with her immediate superior and direction she had received to keep detailed records relating to compensatory time. There was evidence that other employees similarly situated to Bibb were paid for unused comp time at termination. Donald Grimes, the city manager at the time of Ms. Bibb's

termination, testified that an employee who has accumulated a large number of comp time hours should be paid for those hours on termination. David Mackey, the purchasing, budget, and personnel officer from 1970 to 1978, testified that he had some responsibility for developing the policy on comp time and that it was his understanding that an employee who was terminated would be paid for unused comp time. This evidence was sufficient to raise a question of fact for the jury as to whether there was an agreement to pay for unused compensatory time on termination and constitutes substantial evidence to support the jury's verdict.

Just minutes before the trial began, appellant moved to amend its answer to allege a three year statute of limitations as an affirmative defense. The trial court denied the motion. During instruction conference, after the close of all the proof, the court on its own motion reversed its earlier decision and permitted the amendment, reasoning that no prejudice could result to the appellee because the city "doesn't have a good statute of limitations defense on the merits." The court then refused the city's proffered instruction, which would have limited recovery to "comp time hours" earned during the three years immediately preceding the date the complaint was filed.

Appellant contends that it was error to refuse the instruction. We do not agree. Assuming that it was appropriate for the court to permit the amendment in these circumstances, Ark. Code Ann. § 16-56-105 (1987) requires that suit be brought within three years "after the cause of action accrues." *See Smith* v. *Milam*, 195 Ark. 157, 110 S.W.2d 1062 (1937). Here, the appellee's cause of action did not accrue until her termination. Even if appellant were correct that appellee was limited to recovery only for compensatory time earned during the three years prior to termination, the proffered instruction tied recovery to the date of filing suit and was therefore an incorrect statement of law. The court was correct in refusing the instruction.

On cross-appeal, appellee contends that the trial court erred in refusing to consider an award of attorney's fees under Ark. Code Ann. § 16-22-308 (Supp. 1987). That code section, originally enacted as Act 519 of 1987 provides:

> In any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotia-

> ble instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney fee to be assessed by the court and collected as costs.[1]

The trial court declined to consider an award of attorney's fees for two reasons: (1) that the language of the statute did not apply to the case at bar, and (2) that the act had not gone into effect when the action was commenced. On the first point, we think that the present action can be fairly said to fall under the category of a "civil action to recover on" a "contract" "for labor or services." The correct resolution of the second point turns on whether the statute in question is characterized as "substantive" or "procedural." *See generally Owen* v. *State*, 263 Ark. 493, 565 S.W.2d 607 (1978); *Fowler* v. *McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987). In *Fowler*, we quoted with approval the following language from *Dargel* v. *Henderson*, 200 F.2d 564 (Emer. Ct. App. 1952):

> We think that this conclusion is in accord with the settled rule that changes in procedural or remedial law are generally to be regarded as immediately applicable to existing causes of action and not merely to those which may accrue in the future unless a contrary intent is expressed in the statute.

In *Harrison* v. *Matthews*, 235 Ark. 915, 362 S.W.2d 704 (1962), the court said:

> The rule by which statutes are construed to operate prospectively does not ordinarily apply to procedural or remedial legislation. "The strict rule of construction contended for does not apply to remedial statutes which do not disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation. These should receive a more

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[1] Act 800 of 1989 amended this section by adding the words "or breach of contract" immediately following the language "or for labor or services." The amendment is not material to the question presented here.

> liberal construction, and should be given a retrospective effect whenever such seems to have been the intention of the Legislature." *State ex rel. Moose* v. *Kansas City & M.RY. & B. Co.*, 117 Ark. 606, 174 S.W. 248 [(1914)].

Traditionally a statute would be characterized as "substantive" if it was found to have effected "vested rights." *See, e.g., Foster* v. *Graves*, 168 Ark. 1033, 275 S.W. 653 (1925). In *Forrest City Machine Works, Inc.* v. *Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981), the supreme court used a "vested rights" analysis while noting that that doctrine "is not the only determinative factor and is not always followed in deciding whether to apply a law retroactively." *Aderhold*, 273 Ark. at 41. This court has also analyzed the problem in terms of vested rights. *See, e.g., Arkansas State Police* v. *Welch*, 28 Ark. App. 234, 772 S.W.2d 620 (1989); *Driscoll* v. *Oklahoma Gas & Elec. Co.*, 28 Ark. App. 352, 775 S.W.2d 84 (1989). The best argument to be made against the retrospective application of the attorney's fee statute here is that the attorney's fees statutes "deals not with the procedure for enforcing a remedy . . . but rather with the substance of the remedy itself," i.e., it provides for the award of an attorney's fee where none could be awarded before. *See Welch, supra*, 28 Ark. App. at 237. We reject the argument.

Arkansas Code Annotated § 16-22-308 provides for attorney's fees which may be assessed by the court to be "collected as costs." In *Aluminum Co. of America* v. *Neal*, 4 Ark. App. 11, 626 S.W.2d 620 (1982), we held that a change in the attorney's fees provisions of the workers' compensation act should be given retrospective application. In *Stith* v. *Pinkert*, 217 Ark. 871, 234 S.W.2d 45 (1950) the court said:

> Practice and procedure include the mode of proceeding in the formal steps by which a legal right is enforced. Those words comprehend writs, summonses, and other methods of notice to parties as well as pleadings, rules of evidence *and costs.*

(Emphasis added.)

Courts of other states which have considered the specific issue raised here have held that statutes providing for attorney's fees to be taxed as costs are to be given retrospective application.

Cox v. *American Fidelity Assurance Co.*, 581 P.2d 1325 (Okla. App. 1977); *People* v. *Wagner*, 91 Ill. App. 3rd 254, 414 N.E.2d 773 (1980), *rev'd on other grounds* 89 Ill. 2d 308, 433 N.E.2d 267 (1982); *Jones* v. *Kelley*, 602 S.W.2d 573 (Tex. Civ. App. 1980), *aff'd as modified* 614 S.W.2d 95 (Tex. 1981). In *Cox* the court said:

> The general rule that statutes will be given prospective operation only does not apply to statutes effecting procedure. Taxing of attorney's fees as costs relates to a mode of procedure. (Citations omitted.)

We agree.

Appellee does not claim an absolute entitlement to attorney's fees, but recognizes that under the Code provision the award of attorney's fees is a matter addressed to the sound discretion of the trial court. We remand the case to the trial court for a determination on this issue.

Affirmed on direct appeal; reversed and remanded on cross-appeal.

CRACRAFT and MAYFIELD, JJ., agree.

Velerick "Rick" WATTS *v.* LIFE INSURANCE COMPANY OF ARKANSAS

CA 89-269 782 S.W.2d 47

Court of Appeals of Arkansas
Division I
Opinion delivered January 10, 1990

Bill R. Holloway, for appellant.

Davidson, Horne & Hollingsworth, A Professional Association, by: *Allan W. Horne* and *Patrick E. Hollingsworth*, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Desha County Circuit Court. Appellant, Velerick "Rick" Watts, appeals the trial court's granting of a motion for summary judgment by appellee, Life Insurance Company of Arkansas. We

affirm.

Appellant is the named beneficiary in an application for accidental life insurance coverage which was completed on September 3, 1985, by Debbie Watts, appellant's deceased sister and the named insured. On September 18, 1985, Debbie Watts was murdered. On October 10, 1985, appellant submitted proof of claim to appellee. Appellee, upon learning of the death of Debbie Watts, returned the premium that was submitted with the application and denied appellant's claim for benefits. Appellant on April 23, 1988, filed a complaint claiming entitlement to the proceeds of the accidental life insurance policy. Appellee responded by filing on June 13, 1988, a motion for summary judgment stating that there was no insurance in force at the time of decedent's death. From the trial court's granting of the motion on March 2, 1989, comes this appeal.

Appellant's only point for reversal is as follows:

I.

THE LOWER COURT ERRED WHEN IT CONCLUDED THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT TO BE DETERMINED BY A JURY WHEN THE EFFECTIVE DATE ON AN INSURANCE APPLICATION WAS LEFT BLANK UNTIL AFTER IT WAS SIGNED BY THE APPLICANT AND WHEN THERE IS NO LEGITIMATE NEED FOR A WAITING PERIOD BETWEEN THE DATE OF APPLICATION AND THE EFFECTIVE ISSUANCE OF THE POLICY IN THE CASE OF AN ACCIDENTAL DEATH LIFE INSURANCE POLICY.

Arkansas Rules of Civil Procedure 56(c) provides that a summary judgment shall be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The appellate court needs only to decide if the granting of summary judgment was appropriate based on whether the evidentiary items presented by the appellee in support of the motion left a material question of fact unan-

swered. *Barraclough* v. *Arkansas Power & Light Co.*, 268 Ark. 1026, 597 S.W.2d 861 (Ark. App. 1980).

Appellee issued a group accident life insurance policy to Dumas Public Schools on October 1, 1983. On September 3, 1985, the decedent, an employee of Dumas Public Schools, applied to appellee for individual life insurance under the policy and on September 18, 1985, the decedent died. The policy states, "This policy, including the organization's application, endorsements and the attached papers, if any, constitutes the entire contract of insurance." The application which was attached to and formed part of the policy that was issued to Dumas Public School in 1983 provides:

> After the policy effective date, newly eligible persons may apply within 31 days after they become eligible, and individual insurance will become effective on the first day of the month next following the date the application is received. Eligible persons who do not apply either during the initial enrollment period or within 31 days after becoming eligible may thereafter apply, but *individual insurance shall not become effective until the first day of the month next following the date the application is approved by the Company after submission of satisfactory evidence of insurability.* [Emphasis added.]

Appellant asserts that the effective date on the application for insurance was left blank until after it was signed by the decedent thereby making the policy ambiguous as to its effective date and creating a reasonable expectation in the decedent that coverage was in force from the time the premium was submitted with the application. Appellant urges this court to adopt the Pennsylvania rule that although the parties to an insurance contract may fix some future date as the effective date of the policy, the burden is on the insurance company to prove by clear and convincing evidence that the consumer had no reasonable basis for believing coverage would be immediately effective. However, we instead follow our supreme court's holding in *Employers Protective Life Assurance Company* v. *Gatlin*, 246 Ark. 244, 437 S.W.2d 811 (1969), under which an applicant for insurance is afforded no coverage until the coverage becomes effective under the terms of the policy. Only where the receipt or

application expressly provides for temporary insurance is the applicant covered prior to the effective date provided in the policy. *Dove* v. *Arkansas Nat'l Life Ins. Co.*, 238 Ark. 1033, 386 S.W.2d 495 (1965). Furthermore, in order to be ambiguous, a term in an insurance policy must be susceptible to more than one equally reasonable construction. *Wilson* v. *Countryside Casualty Co.*, 5 Ark. App. 202, 634 S.W.2d 398 (1982). Here, the date which was filled in after the application was submitted and which appellant claims causes an ambiguity in the contract is in that portion of the application clearly marked for use by appellee only and as such is not susceptible to more than one reasonable construction.

The above stated provision from the policy in this case is clear and unambiguous and, as there is no provision for temporary coverage, determines the effective date of the individual insurance applied for by the decedent. Because the decedent died prior to that date, no insurance coverage was in effect under the terms of the policy at the time of her death.

Appellant further asserts that as a matter of public policy, Arkansas law regarding the effective date of coverage for policies such as the one in this case should be changed. He argues that because of the nature of the accidental death policy there is no legitimate reason for a waiting period between the application for the policy and its effective date.

Arkansas courts have held that insurance contracts are subject to the same rules as other contracts as follows:

> The insurance company had the right to fix the terms and conditions upon which it would insure the appellee, the latter had the right to accept or reject the insurance under these terms and conditions, but, having accepted the same, it was a contract between them, and, being in violation of no principle of law nor in contravention of the policy of the law, must be enforced according to its terms and meaning; and the courts have the right neither to make contracts for parties nor to vary their contracts to meet and fulfill some notion of abstract justice, and still less of moral obligation.

Interstate Business Men's Accident Assoc. v. *Nichols*, 143 Ark. 369, 220 S.W. 477 (1920) (quoting *Standard Life and Accident Ins. Co.* v. *Ward*, 65 Ark. 295, 45 S.W. 1065 (1898)). More

specifically, our courts have long recognized the right of the insurer to define in its policy the effective date for coverage. *See Harris* v. *Mutual Benefit Health & Accident Ass'n*, 187 Ark. 1038, 63 S.W.2d 975 (1933).

The parties to the insurance contract in the case at bar freely entered into the agreement which provided for coverage to be effective no earlier than the first day of the month next following the date of the application. As the application was submitted on September 3, 1985, and the decedent died prior to October 1, 1985, there was at the time of her death no insurance coverage in effect under the terms of the policy.

The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. *Sirman* v. *Sloss Realty Co.*, 198 Ark. 534, 129 S.W.2d 602 (1939).

We are not convinced by appellant's arguments that this is one of those cases requiring the contract be declared void and, therefore, decline to do so. Furthermore, based on the foregoing we cannot say that the evidentiary items presented by the appellee in support of the motion for summary judgment left a material question of fact unanswered and, therefore, hold that the granting of summary judgment was appropriate.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

ST. PAUL INS. CO. and Therapy Institute *v.* Florence Cortroneo DESOTA

CA 89-242 782 S.W.2d 374

Court of Appeals of Arkansas
Division I
Opinion delivered January 10, 1990

Anderson & Kilpatrick, by: *Randy P. Murphy*, for appellant.

Whetstone and Whetstone, by: *Gary Davis*, for appellee.

JAMES R. COOPER, Judge. The appellee in this workers' compensation case was employed as a housekeeper by the appellant Central Arkansas Radiation Therapy Institute from March 1985 to February 1987. She injured her right shoulder while attempting to move a vending machine on March 27, 1985. On May 16, 1986, she sustained a chemical burn to her foot when she spilled some floor wax stripping solution. In June 1987 she was treated for an abdominal infection which required surgery. After a hearing on her claim for workers' compensation benefits stemming from the abdominal infection, the administrative law judge found that her abdominal infection was not causally related to her foot injury. However, in an opinion filed March 28, 1989, the Workers' Compensation Commission reached a different conclusion, finding that a causal relationship did exist between the appellee's abdominal infection and foot injury. The Commission did not award benefits, but instead remanded the case to the

administrative law judge for a determination of the extent of benefits to which the appellee would be entitled. From that decision comes this appeal. We dismiss.

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). An order which is remanded to the administrative law judge for the taking of additional evidence and which does not award compensation or monetary benefits is not a final order. *Baldor Electric Co.* v. *Jones*, 29 Ark. App. 80, 777 S.W.2d 586 (1989). As in *Baldor Electric Co., supra*, the Commission in the case at bar made findings only with respect to the issue of causation without determining questions relating to the amount and duration of compensation, such as healing period, disability, or reasonable medical expenses. Because the order appealed from is not final and appealable, we dismiss on our own motion. *See id.*

Dismissed.

JENNINGS and ROGERS, JJ., agree.

Marvin PINKSTON *v.* GENERAL TIRE & RUBBER COMPANY

CA 89-23 782 S.W.2d 375

Court of Appeals of Arkansas
Division II
Opinion delivered January 10, 1990

Sam Boyce, for appellant.

Bill Walmsley, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from the Workers' Compensation Commission. At the hearing before the administrative law judge, it was stipulated that appellant sustained a compensable back injury on July 19, 1982, and that benefits had been and were continuing to be paid for that injury. The issue was whether the claimant was entitled to medical benefits and temporary total disability for each of three subsequent incidents which occurred in 1986.

The first of these incidents occurred about 9:00 a.m. on January 13, 1986. Appellant testified he got out of the bathtub and, while drying off, lifted his left leg and his back "went out." He said he did not slip in the tub and, in fact, was not even in the tub when the pain hit. He further testified that he had been working the 3-11 p.m. shift but nothing had happened at work the previous day to cause his problem. Dr. Dennis Davidson, appel-

lant's family doctor, stated in a January 29, 1986, letter that this incident "represents merely a flareup of his old work related injury and is not a new injury sustained at home."

The administrative law judge held that the incident was a recurrence of appellant's July 1982 injury, and since appellant was off work more than seven days as a result of his 1982 injury, the law judge ordered appellee to pay temporary total disability benefits for the period appellant was disabled from January 13 through January 16, 1986. The full Commission agreed that this incident was a recurrence of the original 1982 injury and that appellant was entitled to medical benefits associated with the recurrence. However, it reversed the decision of the law judge awarding temporary total disability benefits for the period of January 13 through January 16 because that period of time did not exceed seven days. The Commission pointed out that Ark. Code Ann. § 11-9-501(a) (1987) provides that compensation to the injured employee shall not be allowed for the first seven days' disability. The Commission then explained its decision as follows:

> In this case the claimant was disabled for only four days, not seven days. Therefore, he is not entitled to additional temporary total disability benefits. Although claimant contends that the four days he was off work as a result of this injury should be added to his prior dates of disability in order to meet the requirements of the statute, we cannot agree with that interpretation of the statute. Adopting that construction of the statute would circumvent the purpose and intent of the seven day waiting period set forth in the Workers' Compensation Act. Although the result may be harsh, this is clearly the intent of the law. In fact, this statute provides that even individuals who have suffered a compensable injury may not be entitled to temporary total disability benefits. For instance, an individual who has a work-related injury requiring hospitalization but is able to return to his job within seven days receives no temporary total disability benefits. Clearly, if that individual is not entitled to temporary total disability benefits, a claimant should not be able to piecemeal assorted dates of disability together in order to obtain temporary total disability benefits in clear contravention of the law. Therefore, although the result may be harsh we reverse the decision of

the Administrative Law Judge finding that the claimant was entitled to temporary total disability benefits from January 13, 1986, through January 16, 1986.

The second incident occurred on May 14, 1986. Appellant testified that on this day he hurt his back when preparing to cut a piece of angle iron which weighed approximately two hundred pounds. It fell off the saw and, in order to keep it from hitting his foot, he caught it. He said he had not been having back trouble immediately prior to this incident, and Dr. Davidson's office notes of May 15, 1986, state that appellant "rehurt his back last night." Dr. Davidson's diagnosis was a "re-exacerbation of back pain with strain and sprain." A week of bed rest was prescribed and appellant was released to return to work on May 22.

Citing *Black* v. *Riverside Furniture Co.*, 6 Ark. App. 370, 642 S.W.2d 338 (1982), and 4 Larson, *Workmen's Compensation Law* § 95.23, the administrative law judge held that because there was an unusual strain or exertion which aggravated the preexisting condition, the disability was the result of an aggravation (new injury). The Commission agreed that this incident constituted an aggravation of appellant's previous injury and because Ark. Code Ann. § 11-9-501(a) (1987) provides that compensation shall not be allowed for the first seven days' disability, the Commission held there were no temporary total disability benefits due for this new injury which occurred on May 14, 1986.

The third incident occurred on June 23, 1986, while appellant was moving a file cabinet and its contents, which amounted to a total weight of approximately 200 pounds. As he was placing the cabinet on a dolly, the appellant felt a pain in his back. Dr. Davidson characterized this incident as a "re-exacerbation of chronic lumbar strain." Again appellant was treated conservatively and after a week of bed rest, he returned to work. The law judge held that this incident was a recurrence of the May 14 injury; therefore, he combined the days of incapacity resulting from the May 14 and June 23 incidents and ordered that appellee pay the appropriate amount of temporary total disability resulting from the two incidents. The Commission, however, held that the third incident was not a recurrence but an aggravation, and since appellant was not disabled for seven days as a result of the

June 23 incident, he was not entitled to temporary total disability benefits.

In *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983), this court considered the distinction between a recurrence and an aggravation in the context of which of two compensation carriers, if either, had liability. We concluded:

> [I]n all of our cases in which a second period of medical complications follows an acknowledged compensable injury we have applied the test set forth in *Williams [Aluminum Co. of America* v. *Williams*, 232 Ark. 216, 335 S.W.2d 315 (1960)]—that where the second complication is found to be a natural and probable result of the first injury, the employer remains liable. Only where it is found that the second episode has resulted from an independent intervening cause is that liability affected.

7 Ark. App. at 71.

Considering the three 1986 incidents in light of the test set out in *Aluminum Co. of America* v. *Williams, supra*, we must conclude that there is substantial evidence to support the Commission's holding that the first incident was a recurrence, since it was a natural and probable result of the first compensable injury, and that the second and third incidents each constituted a new injury (an aggravation) resulting from an independent intervening cause. However, we cannot agree with the Commission's conclusion that because appellant was not absent from work for *seven* days after the recurrence which resulted from the January 13, 1986, incident, he cannot recover temporary total disability for the *four* days he was disabled as a result of the incident. Arkansas Code Annotated Section 11-9-501(a) (1987) provides:

> Compensation to the injured employee shall not be allowed for the first seven (7) days' disability resulting from injury, excluding the day of injury. If a disability extends beyond that period, compensation shall commence with the ninth day of disability. If a disability extends for a period of two (2) weeks, compensation shall be allowed beginning the first day of disability, excluding the day of injury.

Although most states have waiting periods during which compen-

sation is not payable, our research has disclosed no case in which the court has considered the effect of the waiting period on a recurrence of disability after the initial waiting period has been satisfied. In several cases the courts have examined whether the term applied to calendar days or working days and in that context the court in *Phoenix Hosiery Co.* v. *Buzek*, 242 N.W. 135 (Wis. 1932), quoted from a report of a special committee on industrial insurance, submitted to the Governor and Legislature of Wisconsin on January 10, 1911, which stated:

> The object of this is to prevent malingering. A man receiving a slight injury that might disable him for three or four days, might pretend to be disabled for a week in order to receive the first week's indemnity. But it is assumed that he would not lay up for four weeks in order to get this first week's indemnity. This preserves to those who are seriously injured, the right to receive their compensation from date of the injury. As medical and surgical treatment are furnished in all cases it seems only fair that in minor cases not causing disability for a week, compensation should not be recovered.

242 N.W. at 136.

It has been held that when the language of a statute is clear, resort to statutory construction "crutches" is inappropriate. *Patrick* v. *State*, 265 Ark. 334, 576 S.W.2d 191 (1979). However, when statutory construction is necessary, the legislative intent behind the wording used must be determined. *Amason* v. *City of El Dorado*, 281 Ark. 50, 661 S.W.2d 364 (1983). In *City of North Little Rock* v. *Montgomery*, 261 Ark. 16, 546 S.W.2d 154 (1977), the Arkansas Supreme Court said:

> We have held that "[T]he meaning of a statute must be determined from the natural and obvious import of the language used by the legislature without resorting to subtle and forced construction for the purpose of limiting or extending the meaning. **** It is our duty to construe a legislative enactment just as it reads." *Black* v. *Cockrill*, Judge, 239 Ark. 367, 389 S.W.2d 881 (1965). We have also said "[I]n construing statutes in the absence of any indication of a different legislative intent, we give words their ordinary and usually accepted meaning in common

> language." *Phillips Petroleum* v. *Heath*, 254 Ark. 847, 497 S.W.2d 30 (1973).

261 Ark. at 18. *See also, Second Injury Fund* v. *Yarbrough*, 19 Ark. App. 354, 721 S.W.2d 686 (1986).

Under Ark. Code Ann. § 11-9-501(a) (1987), no compensation for temporary total disability is provided for one who receives a minor injury which disables him for less than seven days. However, after the first seven days of disability, excluding the day of injury, disability compensation is allowed—beginning with the ninth day of disability; and if the disability extends for a period of two weeks, compensation shall be allowed beginning with the first day of disability, excluding the day of injury. Thus, our statute very clearly makes no mention of reinstating the waiting period after a recurrence of disability. Since a recurrence is not a new injury but simply another period of incapacitation resulting from a previous injury, we have concluded that under the language of our statute the waiting period applies only to the first seven days' disability from injury. When one receives a serious injury, for which he is disabled longer than the seven-day waiting period, and recovers adequately enough to return to work, but subsequently suffers a recurrence of his disability from the original compensable injury, imposing an additional waiting period would serve only to penalize the injured employee. This would be harsh and would be contrary to the requirement that the Workers' Compensation Act be liberally construed in favor of the claimant. *See* Ark. Code Ann. § 11-9-704(c)(3) (1987) (not to be confused with § 11-9-704(c)(4) which provides that *evidence* is to be weighed impartially without giving the benefit of the doubt to any party).

Therefore, we hold that the Commission erred in refusing to allow the appellant compensation for the four days—January 13, 1986, through January 16, 1986—that he was disabled as a result of the incident which occurred on the morning of January 13, 1986, and which resulted in a recurrence of his July 1982 injury.

We affirm the Commission's refusal to allow compensation for the days appellant was disabled as a result of the incident occurring on May 14, 1986, and the incident occurring on June 23, 1986. We agree that the Commission was correct in refusing disability for those days because we affirm the Commission's

findings that the incidents that occurred on those days were new injuries and not recurrences, and neither injury resulted in disability for more than seven days.

Affirmed in part; reversed in part; and remanded for proceedings in keeping with this opinion.

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

Jerry HICKS and Mildred L. Hicks *v.* Paul F. FLANAGAN, Barbara Sue Flanagan, Larry Smith and Mrs. Larry Smith

CA 89-338 782 S.W.2d 587

Court of Appeals of Arkansas
Division II
Opinion delivered January 17, 1990

Batchelor & Batchelor, by: *Fines F. Batchelor, Jr.*, for appellants.

James C. Haaser, for appellees.

GEORGE K. CRACRAFT, Judge. Jerry and Mildred Hicks appeal from a decree of the Crawford County Chancery Court quieting appellees' title to a disputed strip of land. We find sufficient merit in one aspect of the appeal to warrant modification and affirm the decree as modified.

The parties are adjoining property owners. Appellees Flanagan own lots three and four of Block AD, Galloway Addition to the City of Alma. Appellees Smith are in possession of this property and are purchasing it from the Flanagans under an installment land contract. Appellants own lots five and eight, the first of which adjoins appellees' property on the south. These properties were separated for at least forty years by a fence running east and west. Appellees' property and appellants' lot five are bound on the east by a dedicated, but unopened, alley which runs north and south. The alley lies between appellants' lots five and eight and borders lot eight on the west. It was not disputed that appellees and their immediate predecessors considered the fence to be the correct boundary between the properties, and have exercised dominion over the disputed strip since 1946.

When appellants purchased their property in 1985, a survey established that the true boundary between the properties was approximately eleven feet north of the existing fence. When appellees Smith refused to remove the fence, appellants brought this action for an order compelling them to remove it. Appellants alleged that appellees' fence encroached not only upon their lots, but extended into the alley owned by the city on which appellees were maintaining a barn. Appellants additionally sought an order requiring appellees to remove the encroachment from the alley. The chancellor found that appellees had acquired title as against appellants to the entire disputed strip by adverse possession, including that part located in the alley.

Appellants first contend that the chancellor erred in finding that appellees had acquired title to their property by adverse possession. In order to establish title by adverse possession, appellees had the burden of proving that they had been in possession continuously for more than seven years and that their possession was visible, notorious, distinct, exclusive, hostile, and with the intent to hold adversely against the true owner. *Clark* v. *Clark*, 4 Ark. App. 153, 632 S.W.2d 432 (1982). The proof required as to the extent of possession and dominion may vary according to the location and character of the land. It is ordinarily sufficient that the acts of ownership are of such a nature as one would exercise over his own property and would not exercise over that of another, and that the acts amount to such dominion over the land as to which it is reasonably adapted. *Cooper* v. *Cook*, 220

Ark. 344, 247 S.W.2d 957 (1952); *Clark* v. *Clark, supra.*

Appellants do not contend that appellees were not in open possession, exercising exclusive dominion over the property, but argue that appellees' possession was without the requisite intent to hold adversely to the true owner. They first argue that appellees' possession could not be considered adverse because on cross-examination appellees and two of their immediate predecessors testified that they had no intention of claiming anyone else's property and intended to claim only what was their own. Appellants argue that this testimony mandates a finding that appellees' possession was neither hostile nor under claim of right. *See Terral* v. *Brooks*, 194 Ark. 311, 108 S.W.2d 489 (1937). We disagree.

The record indicates that appellees and their predecessors had openly and visibly occupied the property up to the fence for over forty years before this litigation was commenced. Appellees' predecessor, Mary Teague, testified that the existing fence was in the same location as the one that existed when she purchased the property in 1946, and that she continually maintained the property up to that fence. She testified that she thought that her property extended up to the fence and that she claimed to the fence. She stated that she had used the driveway located on a part of that strip during the entire period of her ownership, and that she had maintained a garden on the disputed area for several years.

Appellee Paul Flanagan testified that he purchased the property from Ms. Teague in 1963, and that the present fence is in the same location as it was when he purchased it. He stated that he thought that he owned all of the property up to the fence, and that he took care of it, mowed it, and maintained flower beds on it. Appellee Larry Smith testified that he and his wife continued to exercise dominion and control over the area after they came into possession of the property under the contract of sale with Flanagan.

Although appellees and their predecessors did state that they had no intention of taking property which did not belong to them, it was undisputed that they honestly believed that their property existed up to the fence and that they claimed ownership of it. In *Rye* v. *Baumann*, 231 Ark. 278, 329 S.W.2d 161 (1960),

the supreme court noted that an honest claimant, unless previously warned, might not think to qualify his answers so as to claim what he considered to be his own, but would state that he claimed only his own, at which point his claim would disappear. In arriving at the intent of a disseisor, the court considered it "better to weigh the reasonable import of his conduct in the years preceding the litigation rather than rely on one remark made during the stress of cross-examination." 231 Ark. at 281, 329 S.W.2d at 164. When the evidence tends to show that the possession has all the qualities of an adverse holding, it may be presumed that the possession is adverse, absent evidence to the contrary. *Rossner* v. *Jeffery*, 234 Ark. 723, 354 S.W.2d 705 (1962).

In *Terral* v. *Brooks, supra*, the court declared that where one takes possession of the land of another intending to claim only to the true boundary, that possession is not adverse, but if acting on a mistake as to the true boundary, he takes possession of the land of another *believing it to be his own*, the result is different. In such circumstances, the intent to retain possession under an honest belief of ownership is adverse possession. *See also Barclay* v. *Tussey*, 259 Ark. 238, 532 S.W.2d 193 (1976).

Appellants also argue that appellees' possession could not be adverse because they and their predecessors occupied the status of grantor in possession and that their possession therefore was presumptively permissive. *See Pinkert* v. *Polk*, 220 Ark. 232, 247 S.W.2d 19 (1952). We cannot agree. While the record does reflect that prior to 1940 Ms. Annie Shull owned all four lots, there is no evidence that the present fence line was established by her before her grant to the appellants' predecessors. The record discloses that Ms. Shull conveyed lots three and four to one J. O. Murphy in 1940, and that Murphy conveyed the lots to Mary and Carl Teague in 1946. Neither Ms. Shull nor Mr. Murphy testified. While Ms. Teague testified that the fence was in existence when she purchased the property in 1946, there is no evidence that it was built during the common ownership of Ms. Shull.

In any event, that fact, if proven, would not mandate a different result. It is a rule of general application that where a grantor remains in possession there is a presumption that he does

so in subordination to his grant and not in hostility to it. There is, however, an exception to the rule where the occupancy continues unexplained for an unreasonable length of time. Under those circumstances the presumption is gradually overcome by the lapse of time. *Davis* v. *Burford*, 197 Ark. 965, 125 S.W.2d 789 (1939) (possession for twenty-three years); *St. Louis Southwest Railway Co.* v. *Fulkerson*, 177 Ark. 723, 7 S.W.2d 789 (1928) (possession for thirty-nine years); *Tegarden* v. *Hurst*, 123 Ark. 354, 185 S.W. 463 (1916) (possession for fourteen years). Here, the possession continued for a period in excess of forty years.

For the same reason, we find no merit in appellants' argument that appellees failed in their burden of proof by not offering evidence of an intent to hold adversely by the first of their predecessors who made entry into the disputed strip. As the action of the last three owners in appellees' chain of title had all of the qualities of an adverse holding, appellees' holding is presumed adverse, absent evidence to the contrary. *See Rossner* v. *Jeffery, supra.*

Whether possession is adverse to the true owner is a question of fact. *Sharum* v. *Terbieten*, 241 Ark. 57, 406 S.W.2d 136 (1966). Although we review proceedings in chancery cases *de novo* on the record, we do not reverse the decision of a chancellor unless his findings are clearly against the preponderance of the evidence. *Clark* v. *Clark, supra.* From our review of the record, we cannot conclude that the chancellor's finding that appellees' continued possession was with the requisite intent and under claim of right is clearly against the preponderance of the evidence.

We do agree, however, that the chancellor erred in finding that appellees had acquired title by adverse possession as against appellants to that part of the adjoining alley on which appellees' barn is located.

Appellants sought an order requiring appellees to remove the barn. The chancellor held that, although appellees could not adversely claim the alley against the City of Alma, they could, and did, adversely possess the alley against appellants in this case. In reaching this conclusion, the chancellor relied on *Town of Madison* v. *Bond*, 133 Ark. 527, 202 S.W. 721 (1917). The chancellor's reliance on this case is misplaced. *Bond* must be

read in the light of its own facts, which are clearly distinguishable from those present here. For many years, our law permitted the statute of limitations to run against cities, towns, and municipalities. *City of Fort Smith* v. *McKibbin*, 41 Ark. 45 (1883). This rule was changed, however, by an act of the 1907 General Assembly. The act provided that no title or right to occupancy of streets, alleys, or public parks could be acquired by adverse possession against the rights of the public or municipalities. Ark. Code Ann. § 14-301-113 (1987). The act, however, contained a proviso that it not apply to any possession commenced prior to its enactment. In *Bond*, the possession of an alley was commenced in 1905 and it was determined that the 1907 act could have no application. It is now well established that possession commenced after that date can never ripen into title against the public or a municipality. *Wood* v. *Haas*, 229 Ark. 1007, 320 S.W.2d 655 (1959); *City of Magnolia* v. *Burton*, 213 Ark. 157, 209 S.W.2d 684 (1948). Here, there is no evidence that possession of the disputed tract by appellees' predecessors commenced prior to the effective date of the act, and, therefore, *Bond* can have no application.

This does not mean, however, that there was error in the court's failing to grant appellants' prayer for an order requiring appellees to remove the obstruction from the alley. First, the City of Alma was not a party to this action. Second, it is well settled that an abutting landowner is not entitled to seek abatement of an encroachment onto a public street or alley in his own right, except on allegation and proof that he has suffered special damage as a result of the encroachment, which was not common to the public in general. *Mergenschroer* v. *Ashley*, 244 Ark. 1238, 429 S.W.2d 802 (1968); *Adams* v. *Merchants & Planters Trust Co.*, 226 Ark. 88, 288 S.W.2d 35 (1956). Here, appellants proved no special damage, and the court specifically found that appellants had never intended to make any use of the alley. The existence of the barn, therefore, did not specially affect them.

The decree is modified to quiet title in appellees only to those lands described in the decree which lie on part of lots five and eight in block AD, Galloway Addition to the City of Alma, and to exclude any lands lying within the platted alley lying between those two lots. The decree is affirmed in all other respects.

Affirmed as modified.

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

Wilma Jean AUSTIN *v.* HIGHWAY 15 WATER USERS ASS'N

CA 89-81 782 S.W.2d 585

Court of Appeals of Arkansas
Division I
Opinion delivered January 17, 1990

William W. Benton, P.A., for appellant.

Ramsay, Cox, Bridgforth, Gilbert, Harrelson & Starling,

by: *John D. Davis*, for appellee.

JUDITH ROGERS, Judge. The appellant, Wilma Jean Austin, appeals a decision of the Workers' Compensation Commission, which held that she had failed to prove by a preponderance of the evidence that the decedent suffered a compensable injury as a result of his work for the appellee, Highway 15 Water Users Association. We find there is substantial evidence to support the Commission's decision and accordingly affirm.

The record reveals that Hulon Rupert Austin, the decedent, was a supervisor for the appellee. His job duties included checking wells, checking oil in pumps, setting water meters, reading water meters and laying and repairing water lines. On March 7, 1986, Austin and a co-worker, James McGriff, proceeded to Pansey to do cover-up work on some pipe that had been laid the previous evening. As they arrived, Austin parked the truck approximately two to three hundred yards from the pipe, while McGriff unloaded a ditch witch from a trailer behind the truck. Austin cranked the empty trailer up four to five inches in order to unhook the trailer hitch from the truck. He then drove to the job site where McGriff was already working. McGriff testified that when he looked up from where he was working, he saw Austin lying on the ground. Austin died at the job site and the Cleveland county deputy coroner was contacted.

The evidence in the record concerning the cause of death was extracted from the testimony of Billy Rhodes and Dr. Richard Justiss. Billy Rhodes, the Cleveland county deputy coroner, opined that the decedent's death, as listed on the death certificate, was the result of a myocardial infarction. Rhodes testified, however, that he had no medical school training, and had taken only an emergency medical technician course. Further, Rhodes admitted that he merely *guessed* at the cause of death.

> Q: Now, you're not certain that MI was the cause of death, are you?
>
> A: That's just my opinion.
>
> Q: I believe on the telephone you told me that it was basically just a guessing game?
>
> A: It is.

In addition, the deputy coroner did not examine the decedent's medical records, or talk with his treating physician or his wife prior to making his determination as to the cause of death.

Dr. Richard Justiss, the decedent's treating physician, testified that under the circumstances of this case, there were four likely causes of death. Those causes included myocardial infarction, cardiac arrhythmia, stroke, and pulmonary embolus.

In an opinion rendered on November 7, 1988, the Commission concluded that there was insufficient credible evidence proving the decedent suffered a compensable injury. The Commission noted that although the deputy coroner may be qualified under the statutes to list a cause of death on a death certificate, his opinion is not conclusive. Thus, the Commission concluded and we agree, that because one is a deputy coroner, that does not, in and of itself, prove one is qualified to assess the cause of death for workers' compensation purposes. We have consistently held that questions of credibility and the weight to be given the evidence are exclusively within the province of the Commission. *Roberts-McNutt, Inc.* v. *Williams*, 15 Ark. App. 240, 691 S.W.2d 887 (1985).

In its opinion, the Commission stated "the fact that Dr. Justiss is a trained medical professional and is unable to state the claimant's cause of death is particularly significant when his experience and qualifications are compared to the qualifications of the deputy coroner who has no medical training." We agree. Although it is true that a medical opinion does not have to be expressed as a medical certainty, there must be other supplementary evidence supporting that conclusion. *Pittman* v. *Wygal Trucking Plant*, 16 Ark. App. 232, 700 S.W.2d 59 (1985). In this case, the Commission determined that the appellant offered insufficient supplementary evidence supporting the conclusion that the decedent's death was caused by his employment.

Since there is no clear evidence as to the cause of death, for us to find this claim compensable, we would have to engage in speculation and conjecture which is not a substitute for credible evidence, no matter how plausible. *See Dena Const. Co.* v. *Herndon*, 264 Ark. 791, 575 S.W.2d 151 (1979). To find this claim compensable could set the dangerous precedent of finding a claim compensable simply because the claimant died at work.

Such has never been the intent of the workers' compensation law and workers' compensation was never intended by our legislature or the courts of this state to become a general insurance policy.

After a careful and thorough consideration of the record in this case, we find there is substantial evidence to support the Commission's decision that the appellant failed to prove the decedent suffered a compensable injury as a result of his work with the appellee.

AFFIRMED.

COOPER and JENNINGS, JJ., agree.

Terry URQUHART *v.* STATE of Arkansas

CA CR 89-108 782 S.W.2d 591

Court of Appeals of Arkansas
Division I
Opinion delivered January 17, 1990

Cross, Kearney & McKissic, by: *Othello C. Cross*, for appellant.

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

JUDITH ROGERS, Judge. The appellant, Terry Urquhart, appeals his conviction of delivery of a controlled substance (cocaine) for which he received a sentence of ten years in the Arkansas Department of Correction and a fine of $5,000. For reversal, he raises the following three issues: (1) the trial court erred in denying appellant's motion to dismiss based upon the invalidity of the arrest warrant; (2) the trial court erred in improperly limiting appellant's cross-examination of the state's witness, Officer Robert Thomas, as permitted under Rule 608(b) of the Arkansas Rules of Evidence; and (3) the trial court erred in failing to suppress the in-court identification based upon no physical description being supplied either to the state or appellant prior to trial. We find merit in the second issue raised by the appellant, and accordingly we reverse and remand.

The record reveals that the appellant's arrest and subsequent conviction stemmed from a drug "sting" operation in Pine Bluff. The operation was conducted by the local police department and involved the use of an undercover police officer, Robert Thomas, who was associated with the Drug Task Force from El Dorado. Officer Thomas testified that he, accompanied by a confidential informant, made a purchase of cocaine from the appellant for $150 on September 17, 1987. At trial, the state only offered the testimony of Officer Thomas and a chemist from the State Crime Laboratory, Kim Brown, who related that the substance in question that was tested was cocaine.

As his second point on appeal, the appellant argues that the trial court erred by not allowing him to cross-examine Officer Thomas concerning certain alleged instances of misconduct pursuant to Rule 608(b) of the Arkansas Rules of Evidence. We agree.

Rule 608(b) provides in part as follows:

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

In interpreting this rule, the supreme court has adopted a threefold test for admissibility: (1) the question must be asked in good faith; (2) the probative value must outweigh its prejudicial effect; and (3) the prior conduct must relate to the witness's truthfulness. *Mackey* v. *State*, 279 Ark. 307, 651 S.W.2d 82 (1983). The latter prong of the test has been taken to mean a lack of veracity rather than dishonesty in general. *McKinnon* v. *State*, 287 Ark. 1, 695 S.W.2d 826 (1985); *Rhodes* v. *State*, 276 Ark. 203, 634 S.W.2d 107 (1982).

In the case at bar, the substance of the proffered inquiry involved two instances in which Officer Thomas had allegedly made false statements, to a captain of the Pine Bluff Police Department in his initial interview, and to a deputy prosecuting attorney there concerning ownership of a firearm. Records from the Pine Bluff Police Department were also proffered revealing that each occurrence resulted in disciplinary action.

It is clear from the proffered evidence that the intended questioning was being pursued in good faith. Also, it is without question that these instances of misconduct involving the giving of false statements are related to the witness's veracity, and were thus probative of his capacity for truthfulness as required by the rule. Our supreme court has looked to the decisions of the federal courts when construing Rule 608(b). *See McKinnon* v. *State, supra; Rhodes* v. *State, supra.* In *United States* v. *Fortes*, 619

F.2d 108 (1st Cir. 1980), the court said:

> A witness' response to a question whether he told the truth on a previous occasion could well be probative of his character for truthfulness or untruthfulness. And, when a case turns to a large extent on the credibility of defendant's accuser, broad cross-examination of that principal witness should be allowed. Still, the district court is not bound to allow examination into every incident, no matter how remote in time and circumstance, that may possibly bear upon the witness' veracity. In reviewing the trial judge's exercise of discretion, one factor to be considered is the extent to which the excluded question bears upon character traits that were otherwise sufficiently explored. The court need not permit unending excursions into each and every matter touching upon veracity if a reasonably complete picture has already been developed.

Id. at 118 (citations omitted). *See also United States* v. *Cole*, 617 F.2d 151 (5th Cir. 1980) (inquiry concerning the submission to a former employer of a false excuse for being absent from work permissible).

As was recognized by the court in *Rhodes* v. *State, supra*, this witness's "credibility was a key to the state's case and it was crucial to the appellant's case that he be allowed to conduct as full an impeachment of the witness's credibility as the rules of evidence allow." Under the facts of this case, we therefore conclude that the appellant should have been allowed to pursue this line of questioning, and that the trial court abused its discretion by limiting cross-examination on this issue. However, in so holding, we do note that the rule expressly prohibits the introduction of extrinsic evidence to prove such misconduct, even if the witness denies the event. *See Rhodes* v. *State, supra.*

We will address the remaining issues to the extent that they are likely to arise on remand. First, the appellant contends that the trial court erred in denying his motion to dismiss based on the alleged invalidity of the warrant issued for his arrest. We cannot agree with this contention as an illegal arrest alone does not provide grounds for dismissal. An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction. *United States* v. *Crews*, 445 U.S.

463, 474 (1980). An invalid arrest may call for the suppression of a confession or other evidence but it *does not entitle* the defendant to be discharged from the responsibility for the offense. *Clark* v. *State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989), *citing Pipes* v. *State*, 22 Ark. App. 235, 738 S.W.2d 423 (1987) (emphasis supplied).

Assuming *arguendo* that the arrest warrant was invalid, our analysis would then proceed to a determination of whether in any event there was probable cause to effect a warrantless arrest. *See* e.g. *Davis* v. *State*, 293 Ark. 472, 739 S.W.2d 150 (1987); *Allen* v. *State*, 277 Ark. 380, 641 S.W.2d 710 (1982). For even if the arrest warrant must fail, an arrest itself is valid if it is otherwise supported by probable cause. *Davis* v. *State, supra.*

Probable cause to arrest without a warrant exists when the facts and circumstances within the officer's collective knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed by the person to be arrested. *Rose* v. *State*, 294 Ark. 279, 742 S.W.2d 901 (1988). Given that Officer Thomas purportedly made a direct purchase of a controlled substance from the appellant, we conclude that there was probable cause for his arrest, even in the absence of a valid arrest warrant.

As his final issue, the appellant argues that the trial court erred in failing to suppress Officer Thomas' in-court identification of the appellant as no physical description was supplied prior to trial. It is the appellant's contention that such evidence was inadmissible because Officer Thomas did not provide, or his reports did not contain, a physical description of the alleged offender. We take part of his argument to mean that the absence of a description rendered the identification "unreliable."

The cases referred to us by the appellant all involve the exclusion of in-court identifications based on suggestive pre-trial identification procedures. These references are inapplicable to the case at bar as the record does not indicate that such a pre-trial procedure was utilized. Instead, the record reflects that the officer's identification was based upon his independent recollection of the event in question. The subsequent in-court identifica-

tion without a written record of the suspect's physical description did not necessarily render it unreliable. Even assuming that the reliability of the in-court identification was at issue, based upon the absence of a description of the offender, under these circumstances we regard this not as a matter of admissibility but as one of the weight and credibility to be given to the witness's testimony. This, of course, is a subject that can be adequately tested on cross-examination. Inasmuch as the appellant has cited no authority for the proposition that the lack of a physical description is a bar to identification testimony, we find no error in this regard. *See Bonds* v. *State*, 296 Ark. 1, 751 S.W.2d 339 (1988).

REVERSED and REMANDED.

COOPER and JENNINGS, JJ., agree.

Robert ECKELS *v.* ARKANSAS REAL ESTATE COMMISSION and Les Huff

CA 89-145 783 S.W.2d 864

Court of Appeals of Arkansas
Division II
Opinion delivered January 24, 1990

[redacted]

[redacted]

Dooley Law Office, by: *Edwin G. Dooley, Jr.*, for appellant.

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

JAMES R. COOPER, Judge. This appeal results from the action of the Arkansas Real Estate Commission revoking the appellant's real estate license and awarding Les Huff and Nathan Huff damages in the total amount of $8,286.40, jointly. The appellant alleges that the circuit court erred in dismissing his petition for review and raises four points on appeal. We find the decision of the commission was supported by substantial evidence and affirm.

The Arkansas Real Estate Commission, on the complaint of Les Huff and on its own motion, charged the appellant with violation of the Arkansas Real Estate License Laws and commission regulations based upon certain misrepresentations in selling Sugar Mountain Estates. In January 1982, and in April 1982, Les Huff, Nathan Huff, and Michael Deane contracted through Tom Sinclair, salesman for Rocking EZ Real Estate Agency, to purchase four parcels of land from Sugar Mountain Estates. Sugar Mountain Estates was a partnership owned by the appellant, Robert Eckels, and by George Wattles. The appellant is also Rocking EZ Real Estate Agency's principal broker. The real estate sales and escrow agreements entered into by the parties

provided in part:

> IV. SELLER COVENANTS: Seller covenants and agrees:
>
> A. That Seller has a title insurance policy and the policy contains only the usual and customary exceptions as to unrecorded liens, or future taxes, and subject to lien on the entire tract on which the tract described in Section 1 of this contract and on which tract the Escrow Agent has a release deed on file which the Escrow Agent is authorized to deliver to the Buyer upon Buyer's payment in full of this contract.
>
> B. To execute and deposit with *Eckels, Inc. Escrow Agent*, a warranty deed conveying a good and marketable title to said lands unto Buyer free of all liens and encumbrances subject and except the following [not applicable].

Despite the language in the agreements representing that the escrow agent had a release deed on file and the agreement that the seller would deposit a warranty deed with the escrow agent, none of these documents were available at the time the Huffs and Deane purchased their lots in January and April of 1982. The appellant had been in the process of acquiring the property comprising Sugar Mountain Estate from Morgan Maxfield; however, Mr. Maxfield had died in September 1981 without having conveyed title to the property to the appellant. The Huffs and Deane, unaware that the deeds and title insurance policies provided for by the agreements were unavailable, began making their payments under these agreements to the appellant. Subsequently, Les Huff was notified to make all future payments to George Wattles pursuant to a decree entered by the Carroll County Chancery Court on November 15, 1983, which awarded the appellant's undivided one-half interest in Sugar Mountain Estates to Mr. Wattles. Appellee Huff continued making his payments under the agreement to Wattles for approximately three more years.

On May 30, 1984, Mr. Maxfield's estate sued for foreclosure on the property comprising Sugar Mountain Estates and was granted a judgment of $10,519.49, plus costs and attorney's fees, in a decree of foreclosure on July 10, 1984. Les Huff and Nathan

Huff then filed a complaint in Carroll County Chancery Court against the following persons:

> SUGAR MOUNTAIN ESTATES, a Partnership; ROBERT L. ECKELS a/k/a LEWIS ECKELS, GEORGE M. WATTLES and MARGARET L. WATTLES, Husband and Wife, individually and partners and SUGAR MOUNTAIN ESTATES: VOWELL AND ATCHLEY, Attorneys at Law, a Partnership, as Escrow Agents and Agents for SUGAR MOUNTAIN ESTATES and GEORGE M. WATTLES and MARGARET L. WATTLES.

The complaint is not included in the record of this case, but an order in the record, dated July 23, 1986, states that the plaintiffs had not obtained service upon defendants George Wattles, Margaret Wattles, and Sugar Mountain Estates, and service was therefore insufficient to obtain personal jurisdiction on these defendants. The order states that the court declined to dismiss the Huffs' complaint. The appellant states in his brief that the Huffs subsequently took a non-suit against the defendants.

A disciplinary hearing was held before the Arkansas Real Estate Commission on June 6, 1988, and the commission determined that the appellant had violated the real estate license laws and commission regulations by making certain misrepresentations; specifically, that release deeds were being held by the escrow agent; and by not obtaining the release deeds and warranty deeds as the agreements provided. The commission concluded that the appellant's conduct was improper, fraudulent, or dishonest and violated Ark. Code Ann. Section 17-35-309(10) (1987) and that the appellant was unfit to act as a real estate broker. The commission voted to immediately revoke the appellant's license and awarded Les Huff and Nathan Huff $8,286.40, jointly. The appellant petitioned the circuit court for review and, after review, the decision of the commission was affirmed.

In reviewing the actions of the Arkansas Real Estate Commission, the circuit court's review of the evidence is limited to a determination of whether there was substantial evidence to support the action taken and, on appeal to this court, our review is similarly limited to a determination of whether the action of the commission is supported by substantial evidence. *Arkansas Real*

Estate Comm'n v. *Hale*, 12 Ark. App. 229, 232-33, 674 S.W.2d 507, 509 (1984); *see also Arkansas Real Estate Comm'n* v. *Harrison*, 266 Ark. 339, 343, 585 S.W.2d 34, 36 (1979). Substantial evidence has been defined as valid, legal and persuasive evidence that a reasonable mind might accept as adequate to support a conclusion and force the mind to pass beyond conjecture. *Arkansas Real Estate Comm'n* v. *Hale*, 12 Ark. App. at 233, 674 S.W.2d at 509.

The appellant first argues that the appellee Arkansas Real Estate Commission did not have jurisdiction to discipline him regarding his transaction with Les Huff. He contends that, because he was not acting in the capacity of a real estate broker, but was selling property which he owned, he is exempted from the requirements of the commission's laws. Arkansas Code Annotated Section 17-35-101 (1987) defines a "Real estate broker" for the purposes of showing who is required to be licensed under the Real Estate License Law. Section 17-35-102 (d) (1987) exempts from these requirements an owner who personally sells or leases his own property.

In *Black* v. *Arkansas Real Estate Comm'n,* 275 Ark. 55, 626 S.W.2d 954 (1982), the Supreme Court held that, in certain situations, the Arkansas Real Estate Commission has the authority to act on complaints filed against a broker, even though the transaction complained of does not require the broker to be licensed. There, the appellant realtor appealed an action of the commission suspending his license for six months, contending the commission did not have jurisdiction to suspend his license because he was selling his own property and that his actions were therefore exempt from regulation by the commission. In upholding the commission's exercise of jurisdiction, the Court held that it was clear that the appellant had committed acts which would be in violation of the licensing statute, if the acts the appellant performed required a real estate license. The remaining issue was whether the commission had the authority to govern licensed salesmen and brokers who were acting on matters which do not require a license. The Court concluded that in certain situations the commission has such authority, stating:

> [T]he Commission admits that appellant was not acting as a salesman or broker at the time he sold the lots in question.

> The Commission's order is based primarily upon a claim of his making substantial misrepresentation or false promises concerning the building of the road in the subdivision and the reliance of the purchasers that appellant's actions were sanctioned by the Real Estate Commission. These are grounds which may give rise to revocation or suspension and need not be made while the person is in fact acting as a broker or salesman.
>
> One of the purposes set forth in the act is to "safeguard the interests of the public." We have held that statutes enacted for the benefit of the public should be liberally construed to effectuate the purpose of the act. *Laman* v. *McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968).
>
> . . . .
>
> In the present case it is obvious that appellant could have performed these very same transactions had he possessed no license at all. However, since the transactions dealt with real estate and most of the sales were initiated in his real estate office where his broker's license was prominently displayed, we think the purchasers were entitled to rely upon appellant to act in the manner in which a broker or salesman should act. Almost every purchaser of a lot in this subdivision indicated they relied upon the fact that appellant was a real estate broker. There is, of course, substantial evidence to support the finding of the Commission that appellant misrepresented matters and made false promises.

275 Ark. at 59-61, 626 S.W.2d at 957.

This Court followed the *Black* holding in *Arkansas Real Estate Comm'n* v. *Hale*, 12 Ark. App. 229, 232, 674 S.W.2d 507, 509 (1984), when we sustained the commission's order suspending the broker licenses of the appellees. The appellees had contended that, because they were not employed by the buyers, they were under no duty to deal fairly with all the parties to a transaction involving dealings with land which the appellees purported to own. We responded:

> [I]n *Black* v. *Arkansas Real Estate Commission*, 275 Ark. 55, 626 S.W.2d 954 (1982), the Arkansas Supreme

> Court held that where a broker sells his own land but conducts the transaction in his real estate office where his license is prominently displayed, the Commission has the authority to discipline him although he is performing acts which do not require a license. Here, the appellees took out the advertisement under the name of their real estate company and executed the offer and acceptance in their office, where, by law, they must display their licenses. It is clear from the Edgars' testimony, they were relying upon the appellees knowledge as real estate brokers in purchasing the land without consulting an attorney or another person knowledgeable in such matters.

Arkansas Real Estate Comm'n v. *Hale*, 12 Ark. App. at 232, 674 S.W.2d 509.

Relying upon our holding in *Hale*, the appellant here asserts that, before the commission could discipline him, the commission had to prove that, in purchasing his property, not only did Les Huff rely on the fact that appellant was licensed as a real estate broker, *but also* that the sale took place in his real estate office. The appellant, however, is reading our decision too literally. In *Hale*, we followed the holding in *Black, supra.* It is clear from reading *Black* that the fact that the transaction took place in the broker's office was merely evidence to be considered in determining whether the injured parties relied on the seller's status as a broker. That fact was not held to be a prerequisite to proving reliance.

In the case at bar, Les Huff admitted that the transaction was not closed in the appellant's real estate office and that he never met the appellant. He stated that the salesman with whom he did business, Tom Sinclair, told him the appellant was the person behind Rocking EZ Real Estate and that he assumed the appellant and Eckels, Inc., were the same thing. He further testified that, in agreeing to the purchase, he relied on the fact that the appellant was a licensed broker, owned the property being sold, and was acting as the escrow agent. We hold that there was sufficient evidence of Les Huff's reliance on the appellant's status as a broker in entering into the purchase agreement, and we sustain the commission's exercise of jurisdiction.

For his second point, the appellant contends that the com-

mission erred in awarding damages to Nathan Huff because he was not a party before the commission. The proceeding was commenced when the appellees, Les Huff and the Arkansas Real Estate Commission, charged the appellant with violation of the Arkansas Real Estate License Law. After the commission met and determined to revoke the appellant's license, a Recovery Fund Hearing was held pursuant to Ark. Code Ann. Section 17-35-401 (1987), *et seq.* The purpose of this hearing is to determine if an aggrieved party has suffered any damages as the result of a licensee's violation of a provision and, if the commission finds damages have been sustained, to direct the licensee to pay such damages to the aggrieved party or parties.

During the recovery fund proceeding, Les Huff testified that he, his cousin, Nathan Huff, and Michael Deane purchased the four parcels from Sugar Mountain Estates and pooled their money to make the installment payments on this property. He stated that they conducted their purchase as a partnership, but that the partnership had essentially been dissolved and he was the only one carrying it on. A bill of sale from Michael Deane was admitted into evidence, conveying all of his interest in Sugar Mountain Estates to Les Huff. Les Huff also introduced into evidence an affidavit signed by Nathan Huff, which gave him permission and authority to represent Nathan Huff's claim against the appellant before the commission. The appellant objected to anyone being made an additional party; however, his objection was not ruled upon. As noted earlier, in its Recovery Fund Order, the commission awarded damages of $8,286.40 to Les Huff and Nathan Huff, jointly.

The appellant relies on Ark. Code Ann. Section 16-61-112(a) (1987), which requires that the assignor be made a party as plaintiff or defendant when the assignment is not authorized by statute, in asserting that Nathan Huff was a necessary party to the appellees' complaint before the commission. While the appellant is correct that Nathan Huff would have been a necessary party in a suit for damages in circuit court, the appellees' action here involves a complaint before the Arkansas Real Estate Commission, which is governed by the rules of the Arkansas Administrative Procedures Act.

Arkansas Code Annotated Section 17-35-309

(1987), provides that the commission may, upon its own motion, investigate the actions of any real estate broker, and section 17-35-310 (Supp. 1989) provides that, before a license can be suspended, the commission shall set the matter for a hearing and afford the applicant or licensee an opportunity to be heard in person or by counsel and to offer oral testimony, affidavit, or depositions in reference thereto. These statutes allow the commission to charge a broker with violations of the real estate laws and do not require that a complaint must first be filed by an injured person. Moreover, section 17-35-406(a) (Supp. 1989) provides that "[i]n *any* disciplinary hearing before the commission . . . the commission shall then determine the amount of damages, if any, suffered by the aggrieved party or parties . . . [and] then direct the licensee to pay that amount to the aggrieved party or parties." (Emphasis added.) This section does not require the injured party to first file a complaint with the commission before the party is entitled to damages.

The Arkansas Supreme Court stated in *Black* v. *Real Estate Comm'n*, 275 Ark. at 59, 626 S.W.2d at 957, that one of the stated purposes of the act is to safeguard the interests of the public, "[and] that statutes enacted for the benefit of the public should be liberally construed to effectuate the purpose of the Act." Based on its interpretation of Section 17-35-406, the commission awarded Nathan Huff damages jointly with Les Huff; we do not find this award to be clearly erroneous. The interpretation of a statute by an administrative agency, while not conclusive, is highly persuasive and should not be overturned unless it is clearly wrong. *Arkansas Contractors Licensing Bd.* v. *Butler Construction Co.*, 295 Ark. 223, 225, 748 S.W.2d 129, 130 (1988).

We also disagree with the appellant's argument that Nathan Huff's claim was barred by the statute of limitations because he did not file his affidavit with the commission until more than five years after he signed the purchase agreements. *See* Ark. Code Ann. Section 16-56-111 (1987). The period of limitations for contracts runs from the point at which the cause of action accrues, rather than from the date of the agreement. *Rice* v. *McKinley*, 267 Ark. 659, 662, 590 S.W.2d 305, 307 (Ark. App. 1979). The question here is when did the cause of action accrue.

> [W]here . . . the parties have entered into an agreement which requires a series of mutual acts, some unilateral, some bilateral in character and have left the time of those acts open-ended, and where one contrives to receive the benefits of the agreement, and make lease payments annually thereunder, the cause of action does not accrue until one party has by word or conduct indicated to the other a repudiation of the agreement.

267 Ark. at 663, 590 S.W.2d at 308. In the case at bar, it appears that the earliest event which would have alerted Nathan Huff that his agreement was being breached by the appellant, setting in motion the statute of limitations, was when he received notice that an order of the Carroll County Chancery Court had awarded all of the appellant's interest in Sugar Mountain Estates to George Wattles. This order was not entered by the court until November 15, 1983, and was within five years of the date that Nathan Huff's affidavit was filed with the commission.

The appellant asserts for his third point that the doctrine of election of remedies barred the appellee Les Huff from filing a complaint before the commission. The appellant contends that, when Les Huff filed a complaint against him and the other defendants in chancery court, he elected a certain remedy and the fact that he subsequently took a non-suit to this proceeding does not prevent the doctrine of election of remedies from barring his complaint before the commission. "[I]f a plaintiff files an action to enforce one remedy and dismisses it without prejudice, he is thereafter barred from pursuing an action seeking enforcement of an inconsistent remedy." *Talley* v. *Blackmon*, 271 Ark. 494, 496, 609 S.W.2d 113, 115 (Ark. App. 1980); *see also Roy* v. *Notestine*, 216 Ark. 447, 451, 226 S.W.2d 66, 68 (1950).

We are unable to address the merits of this argument because the complaint Les Huff filed in chancery court against the appellant is not a part of the record in this case. The burden is upon the appellant to bring up a record sufficient to demonstrate that there was error below. *McLeroy* v. *Waller*, 21 Ark. App. 292, 296, 731 S.W.2d 789, 791 (1987); Ark. R. Civ. P. 6.

For his final point, the appellant contends that there is no nexus between his violation of the Arkansas Real Estate License

Laws and the loss sustained by Les Huff and Nathan Huff. The appellant argues that the violations the commission found he committed were not the direct cause of Les Huff's and Nathan Huff's damages, and furthermore, the Huffs waived their right to proceed against him when they began making their payments to George Wattles, pursuant to the chancery court order awarding all of the appellant's interest in Sugar Mountain Estates to Mr. Wattles.

Waiver has been defined as the voluntary abandonment or surrender by a capable person of a right known to him to exist, with the intent that he shall forever be deprived of its benefits, and it may occur when one, with full knowledge of the material facts, does something which is inconsistent with the right or his intention to rely upon it. *Ray Dodge, Inc.* v. *Moore*, 251 Ark. 1036, 1039, 479 S.W.2d 518, 521 (1972). The Supreme Court in *Dodge* went on to state that:

> [I]n order to invoke the rule of waiver in such cases the affirmance of the contract must be equivalent to ratification and that it is essential that it be shown that the defrauded party intentionally condoned the fraud, affirmed the contract and abandoned his right to recover damages for loss resulting from the fraud.

Id. at 1040, 479 S.W.2d at 521.

There is no evidence in the record that Les Huff or Nathan Huff knew that the warranty deeds or release deeds were not being held in escrow at the time they began making payments to Mr. Wattles pursuant to the court order. Les Huff testified that he entered into the agreement with the appellant based on the language in the agreement covenanting that the escrow agent, Eckels, Inc., had a release deed on file from the mortgagee and that the seller agreed to place a warranty deed in escrow conveying good and marketable title. Les Huff stated that Rocking EZ Real Estate's agent, Tom Sinclair, assured him that the release deeds and warranty deeds were available. Les Huff admitted that he never asked to see these release deeds or the title insurance policies and that no representations were made to him concerning these documents prior to his purchase except for the written language in the agreement, which he read before signing. Tom Sinclair stated that he realized after he sold the property

that the appellant did not have the release deeds, and it was shortly afterward that he filed all the escrow agreements with the circuit court and quit the appellant's employment. Mr. Sinclair stated that he was selling the property on behalf of Sugar Mountain Estates and that the appellant was the owner. He also stated that he made sure the purchasers read the agreements before they were signed.

Arkansas Code Annotated Section 17-35-406 (Supp. 1989) provides that, in order to award damages under the recovery fund, the commission shall first determine if a violation has occurred and, if so, then determine the amount of damages. The commission found that the appellant made substantial misrepresentations to Les Huff and Nathan Huff when he provided in the sales and escrow agreements that the escrow agent, Eckels, Inc., had the release deeds from the mortgage holder and the warranty deeds signed by the appellant and that, as a result of these misrepresentations, Les Huff and Nathan Huff were damaged jointly in the amount of $8,286.40. The findings of the commission are supported by substantial evidence and, therefore, we affirm. *Arkansas Real Estate Comm'n* v. *Hale*, 12 Ark. App. at 232-33, 674 S.W.2d at 509.

Affirmed.

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

Larry HUCKABEE *v.* STATE of Arkansas

CA CR 89-131 785 S.W.2d 223

Court of Appeals of Arkansas
Division I
Opinion delivered January 24, 1990

Stephen E. Walsh and *John Burris*, for appellant.

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

JAMES R. COOPER, Judge. The appellant was charged with second degree murder in the shooting death of his wife. After a jury trial, the appellant was convicted of the lesser-included offense of manslaughter and sentenced to ten years in the Arkansas Department of Correction. On appeal he argues that the trial court erred in refusing to grant his motion for a new trial and that the trial court erred in allowing the State to cross-examine him about prior bad acts. We find merit in the appellant's first argument and reverse and remand for a new trial.

At a hearing on the appellant's motion for a new trial, J.R. Mayer, an investigator for the Randolph County Sheriff's Office, testified that he was a witness for the State at the appellant's first trial. According to Mayer, after the jury had begun deliberations, a juror left the jury room and asked him if the jury could have the

statement of Aubrey Huckabee. Aubrey Huckabee is the appellant's brother and was present the night the appellant's wife was shot and killed.

Mayer testified as follows:

> The juror asked me a question and I said, "Just a minute", because I had no knowledge of the question that he asked me. About that time, the Judge came out, Judge Erwin, and that question was answered for him and he returned to the jury room.

The record does not reveal the substance of the judge's answer.

On appeal, the appellant argues that the trial court erred in denying his motion for a new trial because there was no compliance with Ark. Code Ann. § 16-89-125(e) (1987). That section states:

> (e) After the jury retires for deliberation, if there is a disagreement between them as to any part of the evidence, or if they desire to be informed on a point of law, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the counsel of the parties.

This statute is mandatory. *Rhodes* v. *State*, 290 Ark. 60, 716 S.W.2d 758 (1986). Noncompliance with the statute gives rise to a presumption of prejudice and the State has the burden of overcoming the presumption. *Tarry* v. *State*, 289 Ark. 193, 710 S.W.2d 202 (1986).

The State argues that there is nothing in the record to indicate what the trial judge told the juror, and therefore the appellant has failed in his duty to bring up a record sufficient to demonstrate error. However, according to *Tarry, supra*, the State has the burden of proving that the communication was not prejudicial, and in the present case, the State had the same opportunity that the appellant had to call witnesses and demonstrate that there was no prejudice.

Although we recognize that the Supreme Court's 1986 ruling in *Tarry* is not consistent with the line of cases beginning with *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984) and

continuing through the recently-decided case of *Bonds* v. *State*, 298 Ark. 630, 770 S.W.2d 136 (1989), which require that the appellant demonstrate prejudice, it is clear that the Supreme Court has chosen to apply the earlier rule which presumes prejudice with respect to errors resulting from noncompliance with Ark. Code Ann. § 16-89-125(e) (1987). *See Tarry*, 289 Ark. at 196 and 198.

We also find no merit to the State's contention that § 16-89-125(e) did not come into effect because the juror did not indicate that there was a disagreement as to evidence or that they wished to be informed on a point of law. According to Officer Mayer's testimony, at least some members of the jury wanted the statement of one of the witnesses who testified. We hold that there was sufficient evidence to show that the jury had some question as to this evidence and we hold that the statute did come into effect.

The State also requests that we overrule *Tarry* and *Rhodes*, because the presumption of prejudice is contrary to the previously mentioned rule that prejudice must be demonstrated. However, we do not have the authority to overrule *Tarry* and *Rhodes*, which are Arkansas Supreme Court cases. The appellant filed this case with this Court. The cover of the State's brief states that the case is "In the Arkansas Court of Appeals" but the jurisdictional statement indicates that the case falls within the jurisdiction of the Supreme Court. However, the State has not filed a motion requesting certification to the Supreme Court. We will, in proper cases, certify cases to the Supreme Court on our own motion; however, we do not find that to be appropriate in this case. This case does not require certification because we are applying the statute to the facts in this case, as the statute was interpreted by the Supreme Court just three years ago.

Furthermore, we are not persuaded by the State's assertion that the Supreme Court's interpretation is unjust. The purpose of the statute is to prevent exactly what happened in this case. As the State points out in its brief, it is not known exactly what the trial judge told the juror, but according to the testimony, however, he answered the question. Had the statute been followed we would have before us a record of the conversation and both attorneys would have had an opportunity to object if they deemed it necessary. However, because the statute was not followed, we

only have Officer Mayer's testimony as to what occurred. As we noted above, the State had equal opportunity to rebut the presumption of prejudice and, having failed to do so, the State cannot now complain that the result is unjust. We therefore reverse and remand for a new trial.

The appellant's second argument concerns questions the State asked him regarding prior bad acts. Since we are remanding for a new trial, we address the issue because it is likely to occur on retrial.

The appellant testified in his own behalf. He stated that on the evening of April 29, 1988, he and his brother, Aubrey, went to the "state line" and drank beer. They returned to the appellant's home at approximately 11:30 p.m. and his wife began heating up supper for them. She then went into the bedroom, and the appellant followed. He stated that he sat down on the bed next to his wife and reached up for his holster, which had a gun in it. As he was sitting down again the gun discharged. According to the appellant, his wife "began hollering," and when he turned around he got his feet tangled, fell, and the gun discharged again. The appellant stated that he and his wife were not arguing, that he loved his wife, and that the shooting was accidental.

On cross-examination, the State asked the appellant if he had in the past picked up the dining room table and broken it over his wife's back. The appellant objected to the question, asserting that it was not relevant. The trial court overruled the objection, and the appellant denied hitting his wife with the dining room table. The State then asked the appellant if he pushed or slapped his wife when he was drinking, if his wife left him because he had beaten her, and if he had threatened to kill her. The appellant denied all these acts. On appeal, the appellant argues that the trial court erred in allowing him to be questioned about prior acts of violence towards his wife. We disagree.

Evidence of prior wrongs or acts is not admissible to prove the character of the defendant in order to show that he acted in conformity therewith; however, it may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or lack of mistake or accident. Ark. R. Evid. 404(b). To be admissible under this rule, the evidence must be independently relevant and its probative

value must substantially outweigh the danger of unfair prejudice. *Crutchfield* v. *State*, 25 Ark. App. 227, 763 S.W.2d 94 (1988). In light of the fact that the appellant testified that his wife's shooting was accidental, we agree with the trial court's ruling that the evidence was relevant to show intent and lack of accident, and that any prejudice was outweighed by the probative value.

Reversed and remanded.

JENNINGS and ROGERS, JJ., agree.

ARKANSAS STATE HIGHWAY COMMISSION *v.* PHILRITE DEVELOPMENT, INC., Philip S. Jones, Sr., Marguerite Jones, Julie Jones Randall, Philip S. Jones, Jr., James T. Jones & Shelby G. Jones, Mortgagees; Peoples Bank & Trust Co., Mortgagee

CA 89-190 782 S.W.2d 595

Court of Appeals of Arkansas
Division I
Opinion delivered January 24, 1990

Robert L. Wilson and *Ted Goodloe*, for appellant.

Gary Isbell and *Ted Sanders*, for appellee.

JOHN E. JENNINGS, Judge. This eminent domain case was tried to a jury on September 20, 1988. The jury returned a verdict in favor of the landowners for $130,000.00. According to appellant, a post-trial hearing was held on the issue of the proper interest rate in "November or December" of 1988. On December 15, 1988, the court signed and filed a judgment in the case. On January 25, 1989, appellant filed a motion to set aside the judgment and on February 3, 1989, appellant filed a motion to extend its time for appeal under Rule 4(a) of the Arkansas Rules of Appellate Procedure.

The trial court held a hearing on the post-trial motions and denied them. The argument on appeal is that the trial court abused its discretion in refusing to extend the time for filing the notice of appeal. We find no error and affirm.

Prior to 1986, the trial court had no authority to extend the time for filing the notice of appeal. *See* Reporter's Notes to Rule 4, paragraph 3. In 1986, the Supreme Court amended Rule 4(a) of the Rules of Appellate Procedure to provide, in part:

> Except as otherwise provided in subsequent sections of this rule, a notice of appeal shall be filed within thirty (30) days from the entry of the judgment, decree or order appealed from. . . . Upon a showing of failure to receive notice of entry of the judgment, decree or order from which appeal is sought, the trial court may extend the time for filing the notice of appeal by any party for a period not to exceed sixty (60) days from the expiration of the time otherwise prescribed by these rules.

The amendment is explained in a Reporter's Note:

> Rule 4(a) is amended to empower the trial court to extend the time for filing a notice of appeal when the party has not received notice of the entry of the judgment or order from which he seeks to appeal. The amendment represents a narrow exception to the rule that the filing of a notice of appeal is jurisdictional and, unless timely filed, there can be no appeal. The change was deemed necessary to ensure fairness when counsel has not received notice of the entry of the judgment or other appealable order. Although under longstanding Arkansas custom opposing counsel have been given an opportunity to approve a judgment or order prepared by opposing counsel, circumstances have arisen where counsel did not receive that opportunity and did not otherwise receive notice that a judgment had been entered.

(Citations omitted.)

In an affidavit filed with the motion to extend appeal time, counsel for appellant stated that he did not receive a copy of the "entered judgment" and "a search of the files has failed to locate the judgment." At the post-trial hearing the court heard the testimony of Debbie Beech, a Baxter County Clerk. She testified that the trial judge brought her the judgment together with a postage-prepaid highway department envelope. She testified that the judge asked her to file the judgment and mail copies. She said that she put a copy of the judgment in the envelope and placed it in the outgoing-postage box in the courthouse. She also testified that she always sees to it that both attorneys are notified when a judgment is entered. In a discussion with the court and opposing counsel, the attorney for the appellant said, "It's entirely possible that it got opened up at the Highway Department. I have no idea."

At the conclusion of the hearing, the court said, "I'm not convinced a copy wasn't mailed and I don't have any assurance here that the Highway Commission did not receive it."

The trial court clearly found that there had been no "showing of failure to receive notice of entry of the judgment," and that finding of fact is adequately supported by the record. Under the language of the rule, as amended, such a showing is a

prerequisite to the trial court's exercise of discretion to extend the time for appeal. Absent such a showing, the trial court does not have discretionary authority to extend the appeal time. In the case at bar, because the trial court found adversely to appellant on the factual issue of receipt of the judgment, the court lacked authority to extend the time for filing of a notice of appeal.

At the post-trial hearing, the trial judge expressed his opinion that the appeal was without merit and indicated his disapproval of the apparent policy of the appellant to appeal every case in which it has received an adverse decision. Appellant argues that these statements evidence an abuse of discretion, but as we have said, once the court determined that there had not been a showing of failure to receive notice, the court was without discretion to extend the time for appeal.

Appellant also contends that the trial judge abused his discretion in not setting the judgment aside. Because this contention is not supported by persuasive authority or convincing argument, we need not address it. *Wye Community Club, Inc.* v. *Harmon*, 26 Ark. App. 247, 764 S.W.2d 55 (1989).

Affirmed.

COOPER and ROGERS, JJ., agree.

Eligie Edward PARDON *v.* Juanita PARDON

CA 89-248 782 S.W.2d 379

Court of Appeals of Arkansas
Division II
Opinion delivered January 24, 1990

Griffin, Rainwater & Draper, P.A., by: *Gary M. Draper*, for appellant.

Gibson & Deen, by: *Charles S. Gibson*, for appellee.

MELVIN MAYFIELD, Judge. In this appeal, the appellant contends that the chancellor abused his discretion in awarding child support retroactively.

On April 5, 1988, appellee Juanita Pardon filed a petition for change of custody alleging that since the parties' divorce their minor child, David, had moved into her home and desired to be placed in her custody. The appellee also asked that the appellant be required to pay a reasonable amount for David's support and benefit.

At a hearing held January 25, 1989, appellee testified that David was 16 years old and had been with her for eleven months during which time she had received no support from appellant. Appellee also testified that she ran a bait shop and florist shop; that she was having a hard time making it financially; that her oldest son, Alan, has had to stay out of school to work and help her pay the bills; and she had to borrow money.

The appellant testified that he had provided the home and support for David until he left to live with his mother. Although there was evidence that appellant's gross pay for 1988 was $30,000.00, appellant testified he was not doing so well financially because he had remarried; had to completely rebuild his life; and had to start all over buying appliances and clothing.

The appellant argues that the chancellor abused his discretion when he ordered child support retroactive to April 5, 1988, instead of ordering the support to commence as of January 25, 1989, the date of the hearing. Appellant cites *Franklin* v. *Franklin*, 25 Ark. App. 287, 758 S.W.2d 7 (1988), and *Stracener* v. *Stracener*, 6 Ark. App. 1, 636 S.W.2d 877 (1982), in support of his argument.

In *Stracener*, the parties entered into a settlement agreement which was approved by the trial court and made a part of its divorce decree. The agreement contained a provision requiring the husband to pay his wife $400.00 per month alimony "as long as she remains single and living as a single person." There was evidence that on April 1, 1981, the divorced wife allowed a man to move into her home and live with her under circumstances that violated the requirement that she live "as a single person." The former husband stopped making the alimony payments and at a hearing on September 22, 1981, the trial court held that the alimony obligation stopped as of April 1, 1981. This court affirmed the trial court's holding in spite of the argument that the trial court had remitted past due payments. In *Franklin*, the trial court awarded alimony to begin as of the date of the court's letter opinion, although the court's decree was not entered until later. This court affirmed, saying the date the alimony began was "a decision within the broad discretion of the chancellor."

The *Stracener* and *Franklin* cases show that the date alimony begins and stops will depend upon the circumstances of the case and the discretion of the chancellor. In 27C C.J.S. *Divorce* § 684 (1986), it is stated:

> The commencement date of an award of child support is a matter within the discretion of the trial court. It has been held proper to make child support payable from the date of the divorce or dissolution decree or from the date of the order or decree granting child support.
>
> In an appropriate case, it is within the discretion of the court to make an order for child support retroactive to an earlier date where it appears that the needs of the child existed as of that date. However, it has been held that child support payments may not be ordered to commence earlier than the date the divorce action was commenced.
>
> Thus, in various instances it has been held proper for the court to fix the effective date of an order of child support from the date of filing of the petition or complaint, or from the date of the trial, or from the date of the parties' separation.

In the instant case, the evidence is clearly sufficient to

establish that the appellant's minor child left his father's house to live with his mother approximately eleven months before the hearing in this case. As the hearing was held on January 25, 1989, this means that the child began living with his mother in February of 1988. On April 5, 1988, after the child had lived with her for over a month, the mother filed a petition in which she requested that the father be required to pay a reasonable amount for the support and benefit of the child. Under the circumstances in this case, we find no abuse of discretion in the chancellor's ordering child support payments retroactive to the date of the filing of the mother's petition.

Affirmed.

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

Rodney Frances PHARO *v.* STATE of Arkansas

CA CR 89-6 783 S.W.2d 64

Court of Appeals of Arkansas
En Banc
Opinion delivered January 24, 1990
[Rehearing denied March 14, 1990.*]

*Cooper, J., would grant rehearing.

Law Office of Ronald E. Bumpass, by: *Laurie A. Hanson*, for appellant.

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

JUDITH ROGERS, Judge. The appellant, Rodney Frances Pharo, was initially charged by information with criminal attempt to commit murder in the first degree, a violation of Ark. Code Ann. §§ 5-3-201 (1987) and 5-10-102 (Supp. 1987). The appellant was found guilty by a jury of battery in the first degree, a violation of Ark. Code Ann. § 5-13-201 (Supp. 1987). From this conviction, the appellant received a ten year sentence and a $5,000 fine. On appeal, the appellant raises the following three issues for reversal: (1) that the trial court's ruling excluding expert testimony on the physiological effects of alcohol consumption was a violation of the "due process" clause of the Fourteenth Amendment; (2) that the trial court's ruling denying a jury instruction regarding battery in the third degree was error; and (3) that the prosecutor's comments on the appellant's exercise of his post-*Miranda* right to remain silent was a violation of the Fifth and Fourteenth Amendments. We find no reversible error and affirm.

The record reveals that the appellant was employed as an area superintendent for Texas Contractors at the Fayetteville Sewage Treatment Plant construction site. The appellant regularly carried a gun while on the job as it was customary for him to transport the payroll. After work on the evening of January 27, 1988, the appellant frequented three clubs in the Fayetteville

area. Over the course of the evening, the appellant consumed an excessive amount of alcohol. As he was leaving the last club the appellant was involved in an exchange which resulted in the bouncer, David Smart, being shot in the abdomen.

The appellant argued below, and now on appeal, that the shooting was accidental. The appellant contends that the exchange between himself and Smart did not reach volatile proportions, that there were no threats or raised voices, and that after the shooting, the appellant appeared to be stunned and confused.

The appellant's first argument is that the trial court erred in excluding expert testimony as to the physiological effects of alcohol consumption. The appellant sought to introduce the testimony of Carol Tucker, as an expert in the field of alcoholism, who would testify that the appellant did not possess the requisite mental state for the crime charged. The appellant argues that the exclusion of the witness deprived him of "due process" of law citing *In re Winship*, 397 U.S. 358 (1970), which held that the "due process" clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. The appellant's argument is that by excluding testimony that would tend to negate the specific intent requirement, the state was effectively relieved of its burden of proving this element of the offense beyond a reasonable doubt. The trial judge denied the admission of said evidence citing the recent supreme court decision of *White* v. *State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

The appellant contends that the trial court misapplied the *White* case because the court failed to make a distinction between voluntary intoxication as a defense and *evidence* of voluntary intoxication to negate the existence of a specific element of a crime. The appellant's argument mirrors the common law rule that evidence of voluntary intoxication, while no excuse for a crime, could be admitted to show the defendant was incapable of forming the specific intent necessary for the crime. This rule was discussed in *White* where the court overruled the holding in *Varnedare* v. *State*, 264 Ark. 596, 573 S.W.2d 57 (1978). The court in *Varnedare* had stated that by amending § 41-207 to remove self-induced intoxication as a statutory defense, the legislature, in effect, reinstated any prior Arkansas common

law on the subject. The court in *White* stated that "we are now convinced that our court was wrong in *Varnedare* when we held that the common law defense of voluntary intoxication was reinstated." By saying the common law defense had not been reinstated, the court in *White* effectively held that voluntary intoxication is no longer available as a defense or admissible for the purpose of negating specific intent. Inasmuch as the appellant sought to introduce this testimony to show that he lacked the requisite mental state for the crime charged, this position is contrary to the holding in *White*. We believe the trial court properly applied the rationale of the *White* case to the facts of the case at bar and did not err in excluding this testimony.

The appellant contends that the trial judge erred in denying his request that the jury be instructed on battery in the third degree. The state argues that since the appellant did not prepare and offer a proper written instruction on battery in the third degree and have it placed in the records, he is precluded on appeal from a decision on the merits. In order to properly preserve an objection to the court's failure to give an instruction, the appellant must proffer the requested instruction. *Peoples Bank & Trust Co.* v. *Wallace*, 290 Ark. 589, 721 S.W.2d 659 (1986); *Henry* v. *State*, 18 Ark. App. 115, 710 S.W.2d 849 (1986). This procedure expedites trial and facilitates compliance with the Arkansas Constitution, Art. 7 § 23, and Ark. R. Crim. P. 33.3, which make it mandatory that the trial judge, when requested by a party or a juror, deliver to the jury a typewritten copy of the oral instructions given by the judge. *Id.*; *Willett* v. *State*, 18 Ark. App. 125, 712 S.W.2d 925 (1986). In this case the text of the proposed instruction does not appear in the abstract or in the transcript. In *Green* v. *State*, 7 Ark. App. 175, 646 S.W.2d 20 (1983), we held that where a requested instruction does not appear in either the abstract or the transcript, we would not consider it error for the refusal to give the instruction. Therefore, we find no error on this issue.

The appellant's third contention is more troublesome. The appellant argues that the prosecutor's comments upon his post-arrest silence constitute prejudicial error. The appellant cites *Doyle* v. *Ohio*, 426 U.S. 610 (1976), for the proposition that the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving *Miranda* warnings, violated the "due

process" clause of the Fourteenth Amendment. As the court explained in *Doyle*:

> When a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.

Our supreme court has discussed and made reference to the rationale of the *Doyle* decision in concluding that the prosecution is on dangerous ground and courting prejudicial error when any reference is made concerning an accused's election to remain silent. *See Jarreau* v. *State*, 291 Ark. 60, 722 S.W.2d 565 (1987); *Stephens* v. *State*, 290 Ark. 440, 720 S.W.2d 301 (1986); *Hobbs* v. *State*, 277 Ark. 271, 641 S.W.2d 9 (1982).

In the case at bar, the following colloquy occurred on cross examination of the appellant:

> Q: Okay. You told them exactly what happened?
>
> A: I assume I have the right to a defense. I don't have to give the evidence that's going to convict me of the crime until I got a defense.
>
> Q: Well, did you tell them about that?
>
> A: I didn't tell the police department nothing. I have a right not to.
>
> . . . .
>
> Q: Did you ever tell them it was an accident that you shot this person?
>
> A: I just told you that they said I had a right to remain silent and I chose the right to remain silent.
>
> Q: So therefore you did . . .
>
> A: Is that wrong?

Q: Not mention to them that it was an accidental shooting?

A: If I chose the right to remain silent, I don't have to mention to them that. That's my legal right.

. . . .

Q: Did you at any point in time tell the police that the shooting was accidental?

A: No.

Q: Did you tell the police that you were in such a daze that you didn't even realize that you'd shot somebody?

A: No.

Q: Did you ever tell the police that you didn't even know the person and couldn't identify him if you saw him again, the person that you might have shot?

A: No.

Q: Did you ever tell the police that you were so intoxicated that you didn't know what you were doing on that night?

A: No.

. . . .

Q: But you never thought about going to the police station the following day, did you?

A: Not when I found the gun in my pocket and the hole.

Q: There was nothing stopping you, was there, Mr. Pharo, on that next day instead of going down to the hospital going down to the police station and bringing the jacket and gun and saying, "Hey, I must have shot somebody. I'm sure sorry about it."?

A: Yes, the thing that was stopping me, the intelligence enough to know that I ought to talk to a lawyer before I go to the police department.

Q: Didn't you think the police would believe you?

A: Well, I'm here now to tell what happened. You don't believe me now so what would make you think the police

> would believe me?
>
> Q: You think this jury's going to believe you today, so why didn't you think the police and prosecutor might have believed you back on January 28?
>
> A: It's a simple fact . . . .

We do not disagree with the appellant's contention that the prosecutor's repetitive comments implicated the exercise of his right to remain silent, and was thus clearly in error. However, we do not believe this constitutes reversible error for the following reasons: (1) the appellant did not object at the first opportunity; (2) the appellant did not request or receive a definitive ruling on his objection; and (3) the appellant neither requested nor received any curative relief.

Initially, we note that the appellant did not make a timely objection to the prosecutor's comments regarding the exercise of his right to remain silent. 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 objection must be timely, affording the trial court an opportunity to correct the asserted error. *Clark* v. *State*, 26 Ark. App. 268, 764 S.W.2d 458 (1989); *see also, Gustafson* v. *State*, 267 Ark. 830, 593 S.W.2d 187 (1980).

In *Hill* v. *State*, 285 Ark. 77, 685 S.W.2d 495 (1985), a case remarkably similar to the present case, the appellant's objection concerning his right to remain silent was held untimely as the impermissible questioning had been asked in various forms without an objection. Although admittedly the questioning in this case was more extensive than that in *Hill*, and it does without a doubt constitute error, the appellant failed to object at a time when perhaps the error could have been avoided, or the prejudice removed. We have consistently held that "we require a timely objection made at the time the alleged error occurs, so that the trial judge may take such action as is necessary to alleviate any prejudicial effect on the jury." *Gustafson, supra.*

In addition, we note that in Arkansas our courts do not have a "plain error" rule. As stated in *Wicks* v. *State*, 270 Ark.

781, 606 S.W.2d 366 (1980):

> Some courts, especially the federal courts, have a "plain error" rule, under which plain errors affecting substantial rights may be noticed although they were not brought to the attention of the trial court. Federal Rules of Criminal Procedure, Rule 52(b); *State* v. *Meiers*, 412 S.W.2d 478 (Mo., 1967). In Arkansas, however, we do not have such a rule. *Smith* v. *State*, 268 Ark. 282, 595 S.W.2d 671 (1980). To the contrary, in hundreds of cases we have reiterated our fundamental rule that an argument for reversal will not be considered in the absence of an appropriate objection in the trial court.

In the absence of a "plain error" rule, it is incumbent upon an appellant to make a timely objection in the trial court to preserve the issue on appeal. In the case at bar, the appellant failed to object at the first opportunity, thereby allowing repeated questioning on this subject.

Secondly, the appellant neither requested nor received a definitive ruling on his objection. The objection and ruling were as follows:

> *MS. HANSON*: Your Honor, I'm going to object to this line of questioning. I think it's argumentative. And I believe it goes to the perview [sic] of Mr. Pharo's right to remain silent.
>
> *THE COURT*: Well I think the problem is we're beginning to get a little argumentative and repetitious. We've covered this pretty much.

The trial court's ruling only addressed the argumentative aspect of the appellant's objection. The appellant never requested or received a ruling regarding the exercise of his right to remain silent. The burden of obtaining a ruling is upon the movant and objections and questions left unanswered are waived and may not be raised on appeal. *Williams* v. *State*, 289 Ark. 69, 709 S.W.2d 80 (1986); *Young* v. *State*, 14 Ark. App. 122, 685 S.W.2d 823 (1985). In addition, one final question was asked of the appellant at which time he again failed to object.

Furthermore, the appellant failed to request any curative relief. Apparently, the appellant was satisfied with the trial judge's ruling since he failed to seek any curative relief and subsequently failed to object during closing argument when further comment was made. Since the appellant requested neither an admonition nor a mistrial, no reversible error occurred. *Vick* v. *State*, 299 Ark. 25, 770 S.W.2d 653 (1989); *Jurney* v. *State*, 298 Ark. 91, 766 S.W.2d 1 (1989); *Daniels* v. *State*, 293 Ark. 422, 739 S.W.2d 135 (1987). Where the appellant was given all the relief he requested, he has no basis upon which to raise the issue on appeal. *Mitchell* v. *State*, 281 Ark. 112, 661 S.W.2d 390 (1983).

After a careful and thorough consideration of the record and briefs filed by both parties, we find no reversible error in the points raised on appeal. We therefore affirm the appellant's conviction of battery in the first degree.

AFFIRMED.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. I agree with the majority opinion with the exception of its holding concerning the appellant's post-arrest silence. I dissent on that point because I believe that the merits of the appellant's argument should be addressed and this case should be reversed and remanded. While it is clear that the objection by the appellant's attorney was too late, I believe that the appellant himself raised an adequate objection.

In order to preserve an issue for appeal, a timely objection, made at the first opportunity, must be made. *Robinson* v. *State*, 278 Ark. 576, 648 S.W.2d 444 (1983). In the present case, immediately after the first question concerning his silence, the appellant asserted that he had a right not to talk to the police until he had an attorney. An objection must also be made to the trial court with sufficient clarity to give the trial judge a fair opportunity to discern and consider the argument. *Abernathy* v. *State*, 278 Ark. 250, 644 S.W.2d 590 (1983). After the first question, the prosecutor continued to question the appellant as to why he did not tell the police that the shooting was an accident. The appellant continued to reply that he "chose his right to remain

silent," and that he did not have to "talk to them." Although the appellant's remarks were not artful, a reading of the record makes it plain that the appellant did assert his right to remain silent and did not intend to directly answer the prosecutor's questions. The issue was placed squarely before the trial court. Furthermore, I believe that the appellant did obtain a ruling to his objection when, after fifteen such questions and answers, the trial court ordered the appellant to give a more responsive answer to the State's questions.

Because we do not have a "plain error" rule in the State, we place upon defendants the heavy burden of requiring an objection before an alleged error will be reviewed. Although I agree with the rule in its general principles; I do not believe that it should be construed so rigidly that this appellant, who valiantly attempted to register his objection while his attorney stood idly by, is summarily denied appellate review of an error which the majority concedes is prejudicial.

I am not unmindful of the general rule that a client is bound by the actions his attorney takes at trial. *See* 7A C.J.S. *Attorney and Client*, § 208 (1980). However, counsel's decisions regarding trial strategy may not be binding where there are exceptional circumstances, or evidence of fraud, gross negligence, or incompetence on the part of the attorney. C.J.S., § 208, *supra.*

Clearly the case at bar constitutes exceptional circumstances. The appellant raised the fact that he had a right to remain silent fifteen times before being ordered by the trial court to be more responsive. The State then asked nine more questions regarding what he told the police before the appellant's attorney finally objected. The State asked three more questions on this subject and then referred to it again during closing arguments. Given the appellant's numerous attempts to object to the improper questioning and given the repetitiveness of the State's questioning, I believe that an exceptional circumstance has arisen in which we should recognize the appellant's objection for appellate review purposes.

Furthermore, I assert that this State has placed a duty on defendants to make their own objections known when counsel has failed to object. It has been said many times that ineffective assistance of counsel cannot be raised for the first time on appeal,

see Orsini v. *State*, 287 Ark. 456, 701 S.W.2d 114 (1985), and it is unlikely that a defense attorney will object on the basis that his own assistance was ineffective. This leads me to conclude that the defendant himself must take affirmative steps in order to preserve the issue for appeal; by hiring new counsel to file a post-trial motion or to raise the issue himself during trial.

This duty to object does not apply only to allegations of ineffective assistance of counsel. In *Dyas* v. *State*, 260 Ark. 303, 539 S.W.2d 251 (1976), the last names of the trial judge and the prosecutor were the same. On appeal, the appellant asserted that the trial judge should have recused because of his relationship with the prosecutor. In refusing to address the issue because it was not raised on appeal the Supreme Court noted that the attorneys had refused the trial judge's offer to disqualify himself and that the appellant failed to object. In another case, *Irons* v. *State*, 272 Ark. 493, 615 S.W.2d 374 (1981), there was an unreported bench conference immediately following the jury selection. After discussing the fact that the appellant had not demonstrated how he was prejudiced, the court noted that the appellant had not objected below.

In both *Dyas* and *Irons*, the defense attorneys took actions which the defendant later complained of on appeal. In both cases the Supreme Court mentioned the lack of an objection, and inferred that had the appellant himself objected the alleged error would have been addressed. I maintain that *Irons*, *Dyas* and the present case constitute exceptional circumstances in which the appellant himself must register his own objection to preserve the error for appellate review. Where counsel, for whatever reason, fails to object, it is clear that the only way appellate review can be had is to recognize an objection made by the defendant himself.

In closing I would note that the majority concedes that the questioning by the State constituted prejudicial error, and with that conclusion I concur. *Doyle* v. *Ohio*, 426 U.S. 610 (1976). To hold otherwise would render the right to remain silent meaningless because the State could, as it did in this case, use the defendant's post-arrest silence to imply that the defendant was hiding his guilt. I would recognize the appellant's objections and reverse and remand on the merits of this issue.

Charles D. GRAYSON *v.* STATE of Arkansas

CA CR 89-156 783 S.W.2d 75

Court of Appeals of Arkansas
Division I
Opinion delivered January 31, 1990

Michael L. Allison, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with DWI, second offense. He was convicted of that offense after a jury trial on November 3, 1988, and sentenced to seven days in the county jail, one year suspension of driving privileges, fined $500.00, assessed court costs of $275.00, and

ordered to complete an alcohol education program. From that decision, comes this appeal.

The appellant contends that the evidence was insufficient to support his conviction. Additionally, the appellant asserts error based on the evidence that no breathalyzer test was administered, and that the arresting officer offered the appellant a blood alcohol test at the appellant's expense. We affirm.

We do not address the appellant's contention that the evidence was insufficient to support his conviction because he waived this point by failing to renew his motion for a directed verdict at the close of the case. *Houston* v. *State*, 299 Ark. 7, 771 S.W.2d 16 (1989); Ark. R. Crim. P. 36.21(b).

Next, the appellant asserts that he was entitled to a blood alcohol test at the State's expense. There is evidence to show that the appellant was arrested for DWI after his vehicle crossed the center line, causing Officer Lannie Wortman of the Morrilton Police Department to swerve his patrol car to avoid a collision. Officer Wortman stopped the appellant's auto and administered field sobriety tests, which the appellant failed. Officer Wortman formed the opinion that the appellant was intoxicated and transported him to the police station. No breathalyzer test was administered to the appellant at the police station because the machine was broken. However, Officer Wortman informed the appellant that he could have a blood alcohol test at his own expense.

The appellant contends that he was not afforded the opportunity to have a breathalyzer test, and that he was therefore entitled under Ark. Code Ann. § 5-65-203 (1987) to a blood alcohol test free of charge. We do not agree. Arkansas Code Annotated § 5-65-204(e) (1987) provides that the person tested may have a chemical test administered to him *in addition* to any test administered at the direction of a law enforcement officer. Subsection (e)(2) of the statute provides that the results of a chemical test taken at the direction of a law enforcement officer are inadmissible if the person tested is not advised of his right to, and assisted in obtaining, an additional test. The statutory remedy for a person who is not afforded the opportunity to obtain an additional test is therefore exclusion of any chemical test taken at the direction of law enforcement officers. The appellant in the

case at bar was given no chemical test by law enforcement officers, and no chemical test results were admitted into evidence against him. "It naturally follows that appellant, in not having any test results introduced into evidence against him, was not deprived of the right the statute cited is intended to insure." *Fletcher* v. *City of Newport*, 260 Ark. 476, 541 S.W.2d 681 (1976). More recently, the Arkansas Supreme Court has held that neither due process nor Ark. Code Ann. § 5-65-204(e) (1987) requires that a person be informed of his right to an additional test unless he is given a test at the direction of a law enforcement officer. *Patrick* v. *State*, 295 Ark. 473, 750 S.W.2d 391 (1988). We affirm.

Affirmed.

JENNINGS and ROGERS, JJ., agree.

Terry PIKE *v.* STATE of Arkansas

CA CR 89-2 783 S.W.2d 70

Court of Appeals of Arkansas
Division I
Opinion delivered January 31, 1990

Gregory E. Bryant, for appellant.

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

JOHN E. JENNINGS, Judge. Terry Pike was convicted of possession of a controlled substance (cocaine) and was sentenced to ten years imprisonment. Prior to trial, Pike filed a motion to suppress, contending that the search warrant issued in the case was invalid. After a hearing, the trial court denied the motion. The sole issue on appeal is whether this was error. We hold that it was not and affirm.

Jeff Baker, a North Little Rock Police Officer, was both the investigating and arresting officer. He also signed the affidavit for the search warrant and executed the warrant. In the affidavit Baker stated that he had reason to believe that "on the premises described as being located at 28 Granite Mountain, Little Rock, Pulaski County, Arkansas further being described as being a one story building gray in color, with the numerals 28 located on the building, there is now being concealed a certain controlled substance, to-wit cocaine. . . ." The affidavit further stated that Baker had received information from a confidential informant that a man was selling cocaine from the residence at 28 Granite Mountain in Little Rock; that the confidential informant was furnished money with which to buy drugs; that Baker saw the informant enter the residence at 28 Granite Mountain; that Baker saw the informant leave thereafter; and that subsequently the informant handed him cocaine, which the informant said he bought from a man in the residence.

The search warrant which was subsequently issued authorized a search "at 28 Granite Mountain Circle, Little Rock, Pulaski County, Arkansas, further described as being a one-story gray building with the numerals 28 located on the building."

At the hearing on the motion to suppress, Officer Baker testified that "Granite Mountain" was a housing project. He testified that when he executed the warrant he found the appellant and cocaine in the residence. He said that on the day the informant made the controlled buy, he saw the informant go into "a gray building marked #28." He testified that the street that leads into Granite Mountain is Granite Mountain Circle and that

that was the only street sign he observed while going into the complex. He testified that the building he searched was the one that he saw the informant enter. He admitted that the address of the building he searched was 28 Pasadena, rather than 28 Granite Mountain Circle. He said that Pasadena "forks off of" Granite Mountain Circle. He testified that there was only one building in the housing project that had the number 28 on it. The appellant testified that there was also a 28 Granite Mountain Circle, a 28 California and a 28 Richmond in the "Granite Mountain area."

The Fourth Amendment to the United States Constitution provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched. . . ." Appellant argues that the warrant must be held invalid here because of the incorrect address, relying on *Perez* v. *State*, 249 Ark. 1111, 463 S.W.2d 394 (1971). In *Perez*, a police officer's affidavit seeking a search warrant recited that he had been told by a confidential informant "that Jack Eaton has in his possession [illegal drugs] concealed in his apartment located at the corner of Curl Street and Washington Street in Hot Springs, Arkansas. . . ." The search warrant authorized the search of "Curl Street Apartments at Curl and Washington Streets." The supreme court noted these facts:

> There was no evidence that appellant had ever been known as Jack Eaton. The Curl Street Apartments consisted of seven apartments in the same one-floor structure and an additional apartment in an adjoining structure. The apartments in the same unit were numbered one through seven. Apartment 6 was rented to appellant under the name Jack Perez. No unit in these apartments had ever been rented to a person named Jack Eaton, and the manager of the apartments had never heard of anyone by that name.

The court in *Perez* held the warrant invalid under the general rule that "a warrant for search of a subunit is not valid if it does not describe the subunit to be searched but merely refers to the larger multiple occupancy structure." The court also said that search warrants and supporting affidavits should not be subjected to a "hypercritical view" in determining whether or not they meet constitutional requirements and that the sufficiency of the description to permit identification of the premises with certainty

by appropriate effort and inquiry must be decided upon the facts and circumstances prevailing in the particular case. *See also Watson* v. *State*, 291 Ark. 358, 724 S.W.2d 478 (1987).

The rule applied in *Perez* is not applicable here. The facts in the case at bar are much more similar to those in *Lyons* v. *Robinson*, 783 F.2d 737 (8th Cir. 1985). In *Lyons* a police officer had obtained information from a confidential informant that Lyons was selling drugs from his home. The affidavit, and the search warrant, incorrectly listed the place to be searched as "325 Atkinson Street." Lyons' house was actually at 325 Short Street, on a corner lot where Short and Atkinson intersect. The warrant also described the place to be searched as "a single residence with silver siding with red trim located on the south side of Atkinson Street." The court held the warrant valid and said that it was not significant that the warrant incorrectly listed Lyons' address. Citing *United States* v. *Gitcho*, 601 F.2d 369 (8th Cir. 1979), *cert. denied*, 444 U.S. 871 (1979), the court said:

> The test for determining the sufficiency of the description of the place to be searched is whether the place to be searched is described with sufficient particularity as to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched.

Lyons at 738.

The court continued:

> Thus, where a search warrant contained information that particularly identified the place to be searched, the court has found the description to be sufficient even though it listed the wrong address. In this case, the warrant listed the residence to be searched as "325 Atkinson Street" whereas the residence was actually located at 325 Short Street. But it is clear that in the circumstances the error in the warrant was not misleading or confusing. Atkinson and Short Streets intersect in front of Lyons' house. Sgt. Gibson obviously mistakenly read the street sign. In addition, the warrant provides an accurate physical description of the premises. Moreover, where the same officer both applied

> for and executed the warrant a mistaken search is unlikely. Therefore, we find the warrant description sufficient and the warrant valid. [Citations omitted.]

Similarly, in the case at bar Pasadena and Granite Mountain Circle were intersecting streets. Officer Baker testified that the only street sign he saw was for Granite Mountain Circle and that the building searched was the only one in the housing project with the number 28. He was the officer who both applied for and executed the warrant. The warrant here contained additional language describing the building to be searched. And the officer also had had the premises under surveillance. *See United States* v. *Gill*, 623 F.2d 540 (8th Cir. 1980).

Under these circumstances we hold that the incorrect address was not a fatal defect in the warrant.

Affirmed.

ROGERS, J., agrees.

COOPER, J., concurs.

JAMES R. COOPER, Judge, concurring. I concur in the majority opinion, except I do not agree that the fact that the same officer executed the affidavit and served the search warrant has any relevance. I do not agree that the "particularity" requirement of the Fourth Amendment to the United States Constitution can be satisfied, even in part, by reference to the identity of the executing officer.

Emma B. SMITH *v.* STATE of Arkansas

CA CR 89-154 783 S.W.2d 72

Court of Appeals of Arkansas
Division I
Opinion delivered January 31, 1990

James R. Clouette, for appellant.

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

JUDITH ROGERS, Judge. The appellant, Emma B. Smith, was charged by information with first degree murder in connection with the stabbing death of Savannah Hester. After a bench trial, the appellant was found guilty of second degree murder, a violation of Ark. Code Ann. § 5-10-103(a)(1) (Supp. 1989), and was sentenced to a twenty year term of imprisonment. On appeal, the appellant challenges the sufficiency of the evidence with regard to her second degree murder conviction, and further contends that she was justified in employing the use of deadly force against the victim. We disagree and affirm.

The test for determining the sufficiency of the evidence is whether there is substantial evidence to support the verdict. *Ricketts* v. *State*, 292 Ark. 256, 729 S.W.2d 400 (1987). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Harris* v. *State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985). A defendant's intention, being a subjective matter, is ordinarily not subject to proof by direct evidence, but must rather be established by circumstantial evidence. *Taylor* v. *State*, 28 Ark. App. 146, 771 S.W.2d 318 (1989).

A person commits murder in the second degree if he knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life. Ark. Code Ann. § 5-10-103(a)(1) (Supp. 1989). A person acts knowingly with respect to his conduct or the attendant circumstances when he is aware that his conduct is of that nature or that such circumstances exist. Further, a person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

See Ark. Code Ann. § 5-2-202(2) (1987). Under this statute, the state had to prove that appellant acted with an awareness of her conduct, the relevant attendant circumstances and that her conduct was practically certain to cause the death of the victim. *Heard* v. *State*, 284 Ark. 457, 683 S.W.2d 232 (1985).

In her challenge to the sufficiency of the evidence, appellant does not deny that she stabbed Ms. Hester, which resulted in her death. Instead she contends that the evidence supports a finding of guilt only to the offense of manslaughter, based on the premise that she caused Ms. Hester's death "while under the influence of extreme emotional disturbance for which there is reasonable excuse." *See* Ark. Code Ann. § 5-10-104(a)(1) (1987).

Dr. Bennet G. Preston, a forensic pathologist, testified that Ms. Hester had been stabbed four times and had died as a result of these multiple stab wounds. A witness for the state, Everett Mack, related that he saw the two women arguing on appellant's front porch. He said that Ms. Hester did hit the appellant, but that she was stabbed by the appellant after Ms. Hester had turned to leave the porch. Mack also said that Ms. Hester was unarmed. Officer Greg Siegler of the Little Rock Police Department testified that after he had advised appellant of her rights, she told him she had stabbed Ms. Hester because Hester had tried to take her drink. Officer Siegler also stated that he found no weapon near the body.

In her defense, the appellant claimed that the killing was justified. The appellant presented testimony that she was an old, disabled woman who was frequently teased and subjected to abuse by members of the community, and who had been the victim of previous robberies. Appellant testified that Ms. Hester had pulled at her purse and had hit her, and that she was frightened by the strange behavior exhibited by Ms. Hester when the incident occurred.

Arkansas Code Annotated § 5-2-607(a)(2) (1987) provides that a person is justified in using deadly force upon another person if he reasonably believes that the other person is using or is about to use unlawful deadly force. The statute requires that there be a reasonable belief that the situation necessitates the defensive force employed, and the defense is available only to one who acts reasonably. *Barker* v. *State*, 21

Ark. App. 56, 728 S.W.2d 204 (1987). The defense of justification, being largely a matter of the defendant's intent, is essentially a question of fact to be decided by the trier of fact, in this case the trial court, which was not required to believe the testimony of the appellant. *See Taylor* v. *State*, *supra.*

Viewing the testimony in the light most favorable to the state, and considering the number and extent of the wounds inflicted upon the victim, the fact that the victim was unarmed and leaving when she was stabbed, the appellant's statement given to Officer Siegler, and that the appellant was apparently uninjured, we cannot say that there is no substantial evidence to support the trial court's finding that appellant was guilty of second degree murder.

In its brief, the state has asked us to overturn our recent decision in *Doby* v. *State*, 28 Ark. App. 23, 770 S.W.2d 666 (1989), stating that it is a departure from the rule announced in *Williams* v. *State*, 24 Ark. App. 118, 748 S.W.2d 355 (1988). The state then maintains that we need not address the merits of the issue presented as it is being raised for the first time on appeal because the appellant failed to move for a directed verdict at trial.

Citing Ark. R. Crim. P. 36.21(b), in *Doby* we held that a defendant is not required to request a directed verdict in a bench trial to preserve the question of the sufficiency of the evidence on appeal. Rule 36.21 was amended to include subsection (b) by the supreme court's Per Curiam of January 25, 1988, with an effective date of March 1, 1988. The Reporter's Note states that the amendment was designed to bring the criminal rules in alignment with the civil rules of procedure. Under the civil rules, specifically Ark. R. Civ. P. 50(a), in a non-jury trial it is not necessary to move for a directed verdict in order to preserve the question of the sufficiency of the evidence. *See Sipes* v. *Munro*, 287 Ark. 244, 697 S.W.2d 905 (1985); *Bass* v. *Koller*, 276 Ark. 93, 632 S.W.2d 410 (1982). In *Bass* v. *Koller*, *supra*, the court stated:

> This is the first time we have been called upon to rule as to whether Rule 50(a) is applicable to a non-jury trial. We are of the opinion that the rule means exactly what it says. Prior to the adoption of this rule there was a requirement that the matters stated in Rule 50(e) applied both to a jury

> and non-jury trial. Therefore, we hold that the rule applies only to trials held before a jury. In specifically stating that the rule applies to a jury trial, the rule by implication excludes cases tried to the court without a jury. Therefore, the doctrine of *expressio unius est exclusio alterius* applies. We hold that the appellants did not waive the right to question the sufficiency of the evidence in this case.

Id. at 96, 632 S.W.2d at 412. Similarly, Rule 36.21(b) speaks only in terms of trials held before a jury; thus the maxim *expressio unius est exclusio alterius* is equally applicable here. Contrary to the state's suggestion, even if this court agreed with the state's position, after March 1, 1988, this argument is no longer available.[1] Therefore, we reaffirm our decision in *Doby*, *supra*, with regard to this issue.

AFFIRMED.

COOPER and JENNINGS, JJ., agree.

Thomas D. RACE d/b/a Race Carpet and Vinyl *v.* NATIONAL CASHFLOW SYSTEMS, INC., d/b/a Timepay Consumer Financial Services

CA 89-281 783 S.W.2d 370

Court of Appeals of Arkansas
Division I
Opinion delivered February 7, 1990
[Rehearing denied March 14, 1990.]

[1] We note that the trial in *Williams* v. *State*, *supra*, was held a year before the effective date of the amendment to Rule 36.21, while the trial in *Doby* v. *State* was held after the effective date.

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

Peel and Eddy, by: *James S. Dunham*, for appellee.

GEORGE K. CRACRAFT, Judge. Thomas Race appeals from a judgment entered in Pope County Circuit Court, contending that the case should be reversed due to the court's abuse of discretion in the jury selection process. We disagree.

This was an action brought by appellee, National Cashflow Systems, Inc., to collect a debt allegedly owed to them by appellant. The complaint alleged that appellant had entered into an installment sale financing contract with appellee in which appellee agreed to finance appellant's sales and appellant agreed to guarantee all such financing contracts by repurchasing or replacing any contract in default. It further alleged that a sale made by appellant and financed by appellee was in default, and appellee sought judgment for the indebtedness.

On the day of trial, prior to the selection of the jury, counsel for appellee informed the court that there were five persons on the jury list who had outstanding, delinquent accounts with appellee and that within the last four months appellee had taken action against some of them, one of whom had subsequently filed bankruptcy. The court, at the request of appellee and over appellant's objection, ordered that those names be removed from the list of potential jurors. The judge announced that he was excusing these prospective jurors because he did not want to subject them to the embarassment of having to admit in open

court that they were delinquent debtors, actively pursued by creditors. At the court's direction, none of the five persons excused were told that their names were removed and they remained seated with the panel. During voir dire, the panel was asked whether any of them were involved with appellee or its representatives. Only one person, who was not one of the five previously excused, answered affirmatively.

Later, outside the presence of the jury, appellant was permitted to make a record of his objection and a representative of appellee testified to those facts regarding the excused jurors as previously recited to the court. Eighteen names were then drawn from the reduced panel and each party was permitted to exercise three peremptory challenges. The jury returned a verdict in favor of appellee.

Arkansas Code Annotated § 16-31-103 (1987) provides that the trial court may excuse any person from serving as a petit juror when, in the opinion of the court, there is any reason why his interests, or those of the public, will be materially injured by his attendance. The exercise of that authority rests within the sound discretion of the trial court, and it may be, and often is, exercised without affording trial counsel the right to voir dire the juror where there is no deliberate exclusion of a large class of eligible jurors. *Collins* v. *State*, 271 Ark. 825, 611 S.W.2d 182 (1981); *Miller* v. *State*, 269 Ark. 341, 605 S.W.2d 430 (1980).

In his sole point for reversal, appellant contends that the trial court erred in excluding the five prospective jurors. Appellant advances several arguments why the court should not have excused jurors on the morning of trial at the request of one litigant over the objection of another, and argues that to do so under these circumstances was an abuse of discretion and prejudicial error warranting reversal. We do not address these arguments because, if there was error in the court's action, we cannot conclude that it was prejudicial. Appellant has not demonstrated that the court's action excluded a large class of potential jurors, that the remaining jurors were not representative of the community, or that the jurors selected to try the case were other than fair and impartial.

Prejudice is not presumed simply because error might have occurred. The basic issue we decide is not whether we approve or disapprove of the procedure followed in the jury

selection, but whether there was prejudicial error. *Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984). We find none.

Affirmed.

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

Glenda Faye ROACH *v.* STATE of Arkansas

CA CR 89-140 783 S.W.2d 376

Court of Appeals of Arkansas
En Banc
Opinion delivered February 7, 1990
[Rehearing denied March 14, 1990.]

Morris & Hodge, by: *Henry C. Morris*, for appellant.

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

JAMES R. COOPER, Judge. The appellant was convicted by a jury of driving while intoxicated, fourth offense, a felony in violation of Ark. Code Ann. § 5-65-103 (1987), and she was sentenced to one year in the Arkansas Department of Correction. On appeal, the appellant argues that the trial court erred in refusing to grant her motion for a directed verdict because the evidence was insufficient to support her conviction. We agree that the evidence is insufficient to support the verdict and we reverse and dismiss.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. In determining the issue of sufficiency of the evidence, we view the evidence in the light most favorable to the appellee, and the judgment must be affirmed if there is substantial evidence to support the finding of the trier of fact. *Deshazier* v. *State*, 26 Ark. App. 193, 761 S.W.2d 952 (1989). A person commits the offense of driving while intoxicated if he operates or is in physical control of a motor vehicle while intoxicated. Ark. Code Ann. § 5-65-103(a) (1987).

The record reveals that John Watson, an Arkansas State Police Trooper, was checking a report he received about stolen jewelry in the City of Nashville. He was accompanied by Nashville Police Officer Larry Yates. While in the car they heard tires squealing and as they approached the intersection of Fourth and Bishop Streets in Nashville, they saw the appellant in her car on the shoulder of the road. Trooper Watson testified that there were black skid marks on the road and that the appellant was sitting in the car "with the motor revved." The officers approached the car and removed the appellant from it. Trooper Watson testified that the appellant was unsteady on her feet, her speech was slurred, and she was in an emotional state, "bawling all the time." He also stated that there was no odor of alcohol, but

that the appellant appeared to be intoxicated and he took her to the police station. She had two bottles of prescription pills in her possession, which appeared to have been filled the previous day. According to the trooper's testimony, one of the bottles was almost empty and the other bottle was half full. Trooper Watson testified that he did not recall what kind of pills were in the prescription bottle and that, prior to trial, he had called a pharmacist, but that he did not recall what the pharmacist told him. No other evidence was introduced concerning the contents of the bottles or the label on the bottles of pills and neither the bottles nor the pills were introduced into evidence.

Officer Yates testified that the appellant seemed to be "under the influence of something," and that she was nervous, jittery, and so unstable on her feet she had to lean against the car and be escorted to the police car. He also stated that no field sobriety tests were performed and that she was not requested to provide either a blood or urine sample.

At the close of the State's case, the appellant moved for a directed verdict, arguing that the State had not shown that the appellant was intoxicated from the ingestion of either alcohol or a controlled substance. The trial court denied the motion, submitted the case to the jury, and the appellant was found guilty. While the jury was deliberating the issue of punishment, the appellant again asked the judge to enter an order of acquittal based on the fact that there was no evidence that the appellant had taken the pills or that the pills were a controlled substance. After the jury announced the one year sentence, the appellant again requested that the verdict be set aside. After a lengthy discussion with the attorneys, the trial court indicated that it was not going to set aside the verdict but it did request briefs on the issue. At the subsequent sentencing hearing, the trial court refused to set aside the verdict.

The State argues that the appellant has not preserved the issue for appeal because she did not obtain a ruling on her motions for directed verdicts. We find no merit to the State's argument; the trial judge clearly ruled against the appellant's timely motions. We do not find a waiver of an alleged error merely because the trial judge delayed his ruling in order to have briefs submitted.

We concur with the appellant's argument that the evidence is insufficient to support the verdict. The affidavit for the arrest warrant states that the appellant "was intoxicated by drugs." The State stipulated that alcohol was not involved and the jury instructions only referred to intoxication by alcohol or controlled substances. Furthermore, the jury verdict specifically stated that it found the appellant guilty of "Driving While Under the Influence of A Controlled Substance." A controlled substance is a drug, substance, or its immediate precursor listed in Schedules I through VI of the Controlled Substances List promulgated by the Board of Health. Ark. Code Ann. § 5-65-102(2) (Supp. 1989).

To convict the appellant of driving while intoxicated the State had to prove: 1) that the appellant was driving or in actual physical control of a motor vehicle, *Roberts* v. *State*, 287 Ark. 451, 701 S.W.2d 111 (1985); 2) that the appellant's driving skills were sufficiently impaired to create a substantial danger to herself and others, *Oliver* v. *State*, 284 Ark. 413, 682 S.W.2d 745 (1985), and; 3) that the impaired driving skills were the result of the ingestion of a controlled substance. *See* Ark. Code Ann. § 5-65-102(1) (Supp. 1989). In the present case the proof may be fairly said to show that: 1) the appellant operated or was in control of a motor vehicle; 2) that she was physically impaired; 3) that her reactions, motor skills and judgment were altered and that she constituted a danger to herself and other persons. We also think it fair to say that the jury could conclude, without resort to speculation or conjecture, that the appellant took some of the pills. However, the State has not shown that the pills in the prescription bottles contained a controlled substance. In its brief the State asserts that there was evidence that the appellant admitted that she had ingested some of the pills. We have carefully reviewed the record, and although the prosecutor argued to the judge during the trial that the appellant ingested the pills in a statement given to the officers, her statement was not offered into evidence, she did not testify, and the police officers did not testify that the appellant made such an admission. There is no direct evidence that she ever took any of the pills outside of the remarks of the prosecutor and arguments advanced by counsel in the course of trial are not evidence. *See Combs* v. *State*, 270 Ark. 496, 606 S.W.2d 61 (1980); AMCI 101(e).

The prosecution bears the burden of proving, beyond

a reasonable doubt, every element of the crime charged. *Varnedare* v. *State*, 264 Ark. 596, 573 S.W.2d 57 (1978). The jury concluded that the appellant was intoxicated by a controlled substance; however, because there is no evidence whatsoever that the pills were a controlled substance, the jury was left to speculation and conjecture.

Reversed and Dismissed.

ROGERS, J., dissents.

JUDITH ROGERS, Judge, dissenting. I can agree with the majority that there was no direct evidence introduced conclusively showing that the pills were, positively, a controlled substance. However, I differ with the majority's conclusion that, absent such direct proof, there was no substantial evidence to sustain the jury's verdict. Based on the evidence as a whole, I believe that a question of fact was raised for the jury to determine, and that there was sufficient circumstantial evidence from which this fact could reasonably be inferred. While it is true that the prosecution bears the burden of proving every element of the offense beyond a reasonable doubt, it has never been a requirement that each element must be established by direct proof.

Guilt need not always be proven by direct evidence. *Booth* v. *State*, 26 Ark. App. 115, 761 S.W.2d 607 (1989). Even circumstantial evidence may be sufficient to sustain a conviction as it may constitute substantial evidence, and whether the circumstantial evidence excludes every other reasonable hypothesis is for the fact-finder to determine. *Gardner* v. *State*, 296 Ark. 41, 754 S.W.2d 518 (1988). The fact that some evidence may be circumstantial does not render it insubstantial — the law makes no distinction between direct evidence of a fact and evidence of circumstances from which a fact can be inferred. *Wilson* v. *State*, 277 Ark. 43, 639 S.W.2d 45 (1982). The jury is permitted to draw any reasonable inference from circumstantial evidence to the same extent that it can from direct evidence. *Payne* v. *State*, 21 Ark. App. 243, 731 S.W.2d 235 (1987).

Here, there was testimony that the pill bottles were mostly empty, although both prescriptions had been filled just the previous day. There was further testimony adduced concerning the appellant's behavior, revealing that her speech was slurred,

she had to be assisted in walking, she was hysterical, and that no sobriety tests were administered because the officers felt she was in no condition to perform them. Based on this evidence, the majority has concluded that the evidence was sufficient to show that she was physically impaired, and that her reactions, motor skills and judgment were altered such that she constituted a danger to herself and other persons. Further, the majority seems to agree that the evidence supports a finding that the appellant ingested the pills contained in the bottles. Based on these very facts, I do not think that her behavior was so wholly unexplained that the jury was left to speculation and conjecture when determining her guilt or innocence. A directed verdict is proper only when no fact issue exists, and on appeal we view the evidence in the light most favorable to the appellee, and the case is affirmed if there is substantial evidence to support the jury's verdict. *Wilson* v. *State*, 10 Ark. App. 176, 662 S.W.2d 204 (1983). In my view, the circumstantial evidence in this case undoubtedly raised a question of fact for the jury to determine, and would, in turn, constitute substantial evidence to support the verdict. Although I am not suggesting that the state not be held to its burden of proof, it cannot be said that the evidence, albeit circumstantial, was insufficient as a matter of law.

Lisa Holbird DEES *v.* STATE of Arkansas

CA CR 89-79 783 S.W.2d 372

Court of Appeals of Arkansas
Division II
Opinion delivered February 7, 1990

Douglas, Hewett and Shock, by: *Charles M. Duell*, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant was convicted of robbery and sentenced to five years in the Arkansas Department of Correction. On appeal, she argues that (1) the trial court erred in refusing to suppress statements she made to police while in custody, and (2) the court erred in denying her motion for continuance for time to obtain the presence of an out-of-state witness. We affirm.

The evidence shows that on March 21, 1988, Fort Smith police officers were called to appellant's house where a shooting had taken place. Appellant's mother and a police officer had been shot. Officer Clay Thomas asked appellant, who was a witness to the incident, to accompany him to the police station to make a statement about the shooting. At that point appellant was not a suspect in the shooting incident or any other crime and she was not under arrest; she was merely a witness to the shooting. Appellant was, however, informed of her Miranda rights and she signed the waiver form.

Although the time sequence surrounding appellant's interrogation is somewhat unclear, Officer Thomas began taking a tape recorded statement from the appellant at approximately 1:00 p.m. While Thomas was questioning appellant about the shooting, he received information from other detectives that appellant's sister, Penny, who was also being interviewed, had implicated the entire family in a number of recent robberies. Thomas then questioned appellant about the robberies, but she denied any knowledge of them. About 3:00 p.m., Officer Thomas took appellant to her home to get her six-year-old daughter. They did not find her there, so they went to the child's school; however, the juvenile authorities had already picked up the child in anticipation that no one else would do it, and the appellant was later informed that this had occurred.

After they returned to the police station, the appellant admitted that her mother had committed several of the robberies and that appellant had driven the vehicle. This statement was typed, the appellant signed it, and she was arrested. The following day, appellant gave another signed statement which gave more details of the robberies.

Counsel for appellant made a motion to suppress appellant's statements on the basis that they were illegally obtained. After a hearing, the trial court denied the motion. On appeal, it is argued that the court erred in refusing to suppress appellant's statements because they resulted from an unlawful seizure in violation of appellant's Fourth Amendment rights of the United States Constitution and violated Arkansas Rule of Criminal Procedure 2.3. Appellant contends she was seized from her home without being told that she did not have to accompany the officer to the

police station and that reading her the Miranda rights did not cure the seizure. Although the officer testified that appellant was not under arrest, appellant contends she was "in custody" as defined in *United States* v. *Mendenhall*, 446 U.S. 544 (1980). She points out that she has only a tenth-grade education; that she was very emotional after her mother was shot; that she was not told she was free to leave; that Officer Thomas never let her out of his sight; and that she was even accompanied to the toilet by a policewoman.

It is well established that one is not under arrest simply because he voluntarily accompanies police officers to the station for questioning. *See Morales* v. *New York*, 396 U.S. 102 (1969); *United States* v. *Bailey*, 447 F.2d 735 (5th Cir. 1971); *Dillon* v. *State*, 454 N.E.2d 845 (Ind. 1983); *State* v. *Coy*, 234 Kansas 414, 672 P.2d 599 (1983); *State* v. *Thibodeaux*, 414 So.2d 366 (La. 1982); *State* v. *Barker*, 53 Ohio St. 2d 135, 372 N.E.2d 1324 (1978); and *People* v. *Wipfler*, 68 Ill. 2d 158, 368 N.E.2d 870 (1977). *See also Owens* v. *State*, 283 Ark. 327, 675 S.W.2d 834 (1984), where the Arkansas Supreme Court said that one who voluntarily accompanies an officer cannot claim he was coerced. 283 Ark. at 331. A person has not been seized within the meaning of the Fourth Amendment until, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *United States* v. *Mendenhall*, 446 U.S. 544 (1980). *Mendenhall* also said: "Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed." *Id.* at 555.

In reviewing a trial judge's decision on a motion to suppress, the appellate court makes an independent determination based upon the totality of the circumstances but will reverse the trial court's ruling only if that ruling was clearly against the preponderance of the evidence. *Cooper* v. *State*, 297 Ark. 478, 763 S.W.2d 645 (1989); *Campbell* v. *State*, 294 Ark. 639, 746 S.W.2d 37 (1988).

Under the totality of the circumstances in the instant case, we cannot hold that appellant was illegally seized or that she

was even in custody until after she made her incriminating statements. In his testimony, Officer Thomas made it clear that when he first came into contact with appellant, she was not under arrest or suspicion. He testified that she voluntarily accompanied him to the police station to make a statement as a witness to the shooting incident at her house. The record shows that before the officer took any statement from appellant he told her she was not a suspect in the shooting incident or any other crime and that she was not under arrest. The officer testified that at no time did he use force or coerce appellant in any way; that she was free to go at any time prior to her confession; that she was advised of her Miranda rights and voluntarily waived them; and that at no time did appellant ask to leave or request the presence of an attorney.

The appellant also contends that it is undisputed that there was a violation of Arkansas Criminal Procedure Rule 2.3. To place this rule in proper perspective, we need to first look at Rule 2.2. That rule provides that a law enforcement officer may request a person to respond to questions, to appear at a police station, or to comply with any other reasonable request but "no law enforcement officer shall indicate that a person is legally obligated to furnish information or to otherwise cooperate if no such legal obligation exists." Rule 2.2 ends with this sentence: "Compliance with the request for information or other cooperation hereunder shall not be regarded as involuntary or coerced solely on the ground that such a request was made by a law enforcement officer." Turning now to Rule 2.3, we note it provides that if an officer acting pursuant to "this rule" requests a person to come to or remain at a police station, prosecuting attorney's office or other similar place, "he shall take such steps as are reasonable to make clear that there is no legal obligation to comply with such request."

Considering the language in Rules 2.2 and 2.3, we cannot agree with appellant that it is "undisputed" that Rule 2.3 was violated. In deciding whether Officer Thomas took "such steps" as were "reasonable" to make clear that there was no legal obligation for appellant to accompany him to the police station, we have to consider the officer's testimony that he told appellant that she was not a suspect in the shooting incident or any other crime and that she was not under arrest. As the brief for the state contends: "Rule 2.3 does not require the recitation of magic

words." Taken in context with Rule 2.2, we think under all the circumstances in evidence here there was an issue of fact as to whether Officer Thomas took "such steps" as were "reasonable" to make it clear that appellant had no legal obligation to comply with the request that appellant go to the police station with the officer. Thus, we do not reverse the trial court on this point.

Appellant has also argued that the totality of the circumstances surrounding her statements show they were not freely and voluntarily given and were taken in violation of her Fifth Amendment rights. Since the evidence will support a finding that the statements were, in fact, voluntarily given, it clearly appears that this argument assumes that appellant was illegally detained. This is an assumption to which we do not agree. As discussed above, the evidence supports a finding that appellant went to the police station voluntarily; that she was read the Miranda warning and it was only after Officer Thomas was advised of the statement made by appellant's sister that the questioning of appellant centered on the robberies; that at this time the officers had information amounting to probable cause to hold appellant; and, therefore, she was not illegally detained when she made the statements admitting her part in the crime for which she was convicted. Since appellant's suppression argument is based upon the contention that she was illegally detained, it is not necessary to discuss *Brown* v. *Illinois*, 422 U.S. 590 (1975), relied upon by appellant for the contention that her inculpatory statements were not admissible because they were tainted by police illegality.

Appellant also argues that the court abused its discretion in denying her motion for a continuance to enable her to locate a missing out-of-state witness. Appellant argues that she subpoenaed a witness to one of the robberies who could have provided exculpatory evidence. Although the beginning of the trial was delayed for several hours while the court got in touch with an Oklahoma sheriff and attempted to get the witness to court, the witness could not be located and did not appear at trial.

A motion for continuance is addressed to the sound discretion of the trial court. Its action will not be reversed absent a clear abuse of that discretion amounting to a denial of justice, and the burden is on the appellant to demonstrate such abuse. In

considering whether the court's discretion has been abused in a particular case, the circumstances of the case must be examined with emphasis on the reasons presented to the judge at the time. *Kellensworth* v. *State*, 278 Ark. 261, 644 S.W.2d 933 (1983).

The record shows that diligent effort had been made by both defense counsel and the prosecution to locate this witness. Her husband had expressed "some reluctance" to being involved in the case, according to defense counsel, and there is no indication that extra time would have resulted in the production of the witness. Under the circumstances, we cannot say that the trial court abused its discretion in refusing the continuance. Moreover, we note that the statement of this witness was introduced into evidence without objection.

Affirmed.

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

Juanita J. MOSLEY, Widow of William C. Mosley, Deceased *v.* McGEHEE SCHOOL DISTRICT and State of Arkansas, Public Employees Claims Division

CA 89-106 783 S.W.2d 871

Court of Appeals of Arkansas
En Banc
Opinion delivered February 7, 1990

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

Jerry G. James, Public Employee Claims Division, Arkansas Insurance Department, for appellee.

MELVIN MAYFIELD, Judge. The appellant, Juanita J. Mosley, appeals the decision of the Workers' Compensation Commission denying her claim for benefits in connection with the death of her husband, William C. Mosley. On appeal, appellant raises seven issues for reversal. Her contentions are as follows: (1) that the Commission erred in not addressing a challenge to the "temporality rule" although it was not advanced before the administrative law judge; (2) that the "temporality rule" is void and unlawful; (3) that the "temporality rule" is so vague that its application results in arbitrary, capricious and discriminatory denials of meritorious claims; (4) that the Commission erred in allegedly giving no weight to the testimony of twenty-one witnesses; (5) that Act 10 of 1986 creates an irreconcilable conflict with the doctrine of liberal construction; (6) that section 10.2 of Act 10 of 1986 is an unconstitutional intrusion upon the separation of powers doctrine; and (7) that there is insufficient evidence to support the decision of the Commission.

The record reveals that William C. Mosley was sixty years old at the time of his death, and had been married to appellant for thirty-seven years. For sixteen years, he had been the principal of the McGehee Junior High School. Mr. Mosley took the Functional Academic Skills Test on March 23, 1985, arriving home around 6:30 p.m. Mr. Mosley and his wife went to Kentucky Fried Chicken and Wal-Mart before returning home for the evening. After an uneventful evening and a good night's sleep,

Mr. Mosley and his wife awoke around 7:00 or 8:00 a.m. They spent the morning drinking coffee and reading the morning newspapers. Between 10:30 and 11:00 a.m., appellant heard her husband cough. She went into the den and found him sitting upright in his recliner with no pulse. Mr. Mosley was pronounced dead at the local hospital at 11:45 a.m. It was appellant's contention below, and now on appeal, that the stress and anxiety of the Arkansas Teacher Competency Test precipitated her husband's death which occurred the morning following the test. Appellees' position is that Mr. Mosley's death did not arise out of and in the course of his employment and that it was not causally related to his employment.

At the March 25, 1988, hearing before the administrative law judge, it was stipulated that appellant is the decedent's widow and is dependent upon him within the meaning of the Workers' Compensation Act. The administrative law judge in rendering his opinion found the heart attack suffered by Mr. Mosley on March 24, 1985, did not arise out of and in the course of his employment with appellee. He also found appellant had failed to prove by a preponderance of the evidence a causal relationship between the decedent's employment and his heart attack. After a de novo review of the record, the law judge's decision was affirmed by the full Commission.

We do not reach the merits of the issues raised in this case because we have concluded that it must be remanded. In *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979), the Arkansas Supreme Court held that the Arkansas Workers' Compensation Commission must make findings of fact in sufficient detail that "the reviewing court may perform its function to determine whether the commission's findings as to the existence or non-existence of the essential facts are or are not supported by the evidence." 265 Ark. 507. We relied upon *Clark* in *Wright* v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986), where we reversed and remanded a Commission decision for its failure to make "specific findings" upon which it relied to reach its decision. We also cited Larson, *Workmen's Compensation Law* (1983), § 80.13, where it is pointed out that unless findings and supporting evidence are set out in the record of the Workers' Compensation Commission the review function of the court becomes meaningless. In the present case, the Commis-

sion made the following "Findings and Conclusions:"

> 1. That the heart attack suffered by the claimant on or about March 24, 1985, did not arise out of and in the course of his employment with the respondent.

The Commission then discussed the evidence in some detail and concluded:

> Thus, after according Dr. Rosenman's testimony the appropriate weight, and considering the testimony of Dr. Kizziar, the risk factors present in this case, and the time of the decedent's fatal heart attack in relation to the alleged stressful event, we find that the claimant has failed to prove a causal connection between the heart attack and the decedent's employment by a preponderance of the credible evidence of record.

However, before reaching that conclusion, the Commission cited two of its own opinions in previous decisions and said:

> Relying upon a publication of the American Heart Association as well as the medical testimony presented in those cases, the Commission held that in order to be compensable, a stress induced heart attack must have a close temporal relationship with the claimant's stressful event at work.

The Commission also stated that this court, in an unpublished opinion, had affirmed a Commission's previous decision in which the holding above quoted was made.

Rule 21 of the Arkansas Supreme Court and the Court of Appeals states that our opinions not designated for publication shall not be cited, quoted, or referred to by any court or in any argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as res judicata, collateral estoppel, or law of the case). However, we think this case is sufficiently related to state that our unpublished opinion, *Davis* v. *Cleburne County*, CA 87-396 (June 8, 1988), referred to by the Commission, did not approve the adoption by the Commission of a *rule* requiring a close temporal relationship between the heart attack and the stressful work events. To the contrary, our opinion stated that there was *evidence in the case*

"that stress was a contributing factor only when it occurred close in point of time to the attack."

From the record before us, we are unable to determine whether "close temporal relationship" as used in the Commission's opinion is a rule of law, a rationale for the Commission's decision, or one of the facts considered in reaching that decision. Therefore, since it is our duty to review the Commission's findings in this case and determine if those findings are supported by substantial evidence, we find it necessary to reverse the Commission's decision and remand this matter for the Commission to make a new decision upon the record already made setting out its findings of fact with sufficient clarity and detail that we may determine whether they are supported by substantial evidence in the record before us.

Reversed and remanded.

ROGERS, J., dissents.

JUDITH ROGERS, Judge, dissenting. The majority of this court in remanding this decision to the Commission stated that the findings of fact in this case were not made with sufficient clarity and detail so that a reviewing court could determine whether the findings are supported by substantial evidence. I disagree. I submit that the findings of fact are sufficiently detailed to enable this court to determine that the Commission's decision is supported by substantial evidence.

First, the Commission recognized that the decedent's genetic factors and personal habits increased the risk of a heart attack. As the Commission specifically found, the decedent suffered from systematic hypertension and hyperlipidemia, smoked cigarettes prior to his heart attack in 1972; and had a positive family history of heart disease, including four or five brothers who died of heart attacks at relatively young ages. The findings and conclusions of the Commission specifically stated that "in addition to these risk factors the evidence indicates that the claimant's fatal attack did not occur until almost one full day after the alleged stressful event." The Commission would not have used the words "in addition" unless they considered other factors besides the timing of the attack and the alleged stressful event.

Furthermore, in a detailed and lengthy opinion of ten pages, the Commission discussed the expert testimony of Dr. Ray Rosenman and Dr. James C. Kizziar. It would not be necessary to have ten pages of findings and conclusions if the opinion of the Commission was based merely upon the timing of the heart attack. Dr. Rosenman, testifying on behalf of the appellant, opined that the decedent's heart attack was caused by the secretion of excess catecholamines which was triggered by the stress of the competency exam. Dr. Kizziar took issue with Dr. Rosenman's assessment as Dr. Kizziar stated there was no evidence that catecholamine levels could reach a level sufficient enough to produce a heart attack. In any event, there was no evidence that the decedent's catecholamine level was excessive.

It is well settled that the Commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. *Wasson* v. *Losey*, 11 Ark. App. 302, 669 S.W.2d 516 (1984). The testimony of medical experts is an aid to the Commission in its duty to resolve issues of fact. It has a duty to use its experience and expertise in translating that testimony into findings of fact. *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). It is the responsibility of the Commission to draw inferences when the testimony is open to more than a single interpretation, whether controverted or uncontroverted; and when it does so, its findings have the force and effect of a jury verdict. *Clark* v. *Peabody Testing Serv.*, 265 Ark. 489, 579 S.W.2d 360 (1979).

The Commission stated that it had weighed the conflicting medical evidence and had determined that Dr. Kizziar's opinion was entitled to greater weight. The Commission attributed more credence to Dr. Kizziar's opinion because it concluded Dr. Rosenman had based his opinion on numerous factual assumptions that were not in the record. For instance, the Commission found that the decedent's catecholamine level was never measured; therefore, the Commission concluded Dr. Rosenman's opinion that the decedent's level was excessive, assumed facts which were not in evidence. Dr. Kizziar testified that even if the decedent's catecholamine level had increased as a result of the exam, the level was short-lived. Dr. Kizziar related that after an event, the catecholamine level dissipates and the body returns to normal in an average of fifteen minutes.

In addition, Dr. Rosenman assumed the decedent had a poor night's sleep following the exam. However, contrary to this assumption, the appellant testified that the decedent had a "normal night's sleep." The Commission noted that Dr. Rosenman had simply guessed that the decedent had a poor night's sleep. In fact, the Commission stated that after a further review of Dr. Rosenman's deposition, they found he had engaged in further speculation as to the decedent's physical and mental condition following the exam.

Therefore, after a thorough and detailed discussion of its findings, the Commission concluded:

> Thus, after according to Dr. Rosenman's testimony the appropriate weight, and considering the testimony of Dr. Kizziar, the risk factors present in this case, and the time of the decedent's fatal heart attack in relation to the alleged stressful event, we find that the claimant has failed to prove a causal connection between the heart attack and the decedent's employment by a preponderance of the credible evidence of record.

The issue is not whether this court would have reached the same result as the Commission or whether the evidence would have supported a finding contrary to the one made. The question here is solely whether the findings made by the Commission are supported by substantial evidence. *Morrow* v. *Mulberry Lumber Co.*, 5 Ark. App. 260, 635 S.W.2d 283 (1982). We may reverse the Commission's decision only when we are convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Tuberville* v. *Int'l Paper Co.*, 28 Ark. App. 196, 771 S.W.2d 805 (1989). I am convinced that fair-minded persons could have reached the same conclusion arrived at by the Commission, and would find substantial evidence to support the Commission's decision that the appellant failed to establish a causal connection between the decedent's heart attack and his employment.

I do not conclude, as has the majority, that we are unable to determine in what capacity "close temporal relationship" was used, be it a rule, rationale or a factor. It appears to me that "close temporal relationship," as addressed in the Commission's deci-

sion, was only one of many factors considered in the determination that the appellant failed to prove a causal connection between the heart attack and the alleged stressful event.

However, since the majority is concerned with the treatment of the "temporality rule," I would submit that the Commission's decision to forgo a discussion of the legality of the "temporality rule" was discretionary. Rule 25 of the Rules of the Commission, provides that "[a]ll *legal* and factual issues should be developed at the hearing before the administrative law judge or single Commissioner. The Commission may refuse to consider issues not raised below" (emphasis added). Although this court might have allowed consideration of this issue, the Commission did not violate Rule 25. Rule 25 does not preclude the Commission from reviewing issues not appealed from or not raised at the administrative law judge level *if it so chooses. American Transp. Co.* v. *Payne*, 10 Ark. App. 56, 661 S.W.2d 418 (1983) (emphasis added). In its opinion, the Commission made reference to this argument by stating, "this issue was not raised before the administrative law judge before and, therefore, is not properly before this Commission." I find no indication the Commission has failed to apply Rule 25 in an impartial manner.

There is ample evidence in the record upon which the Commission could have arrived at the conclusion that the appellant failed to prove a causal connection between the heart attack and the alleged stressful event. Therefore, I would affirm the Commission's decision, as being supported by substantial evidence.

Edith CURRY *v.* FRANKLIN ELECTRIC

CA 89-440 783 S.W.2d 76

Court of Appeals of Arkansas
En Banc
Opinion delivered February 7, 1990

Zan Davis, for appellant.

Michael W. Alexander, for appellee.

Youngdahl & Youngdahl, P.A., by: *Thomas H. McGowan*, for amicus curiae Arkansas AFL-CIO.

PER CURIAM. The Arkansas AFL-CIO has filed a motion for permission to file an amicus curiae brief in the above styled case. Rule 19 of the Rules of the Arkansas Supreme Court and Court of Appeals provides that a motion to file an amicus curiae brief should state the reasons why such a brief is thought to be necessary. Because the AFL-CIO motion filed in the instant case does not conform to the above stated requirement of Rule 19, the motion is denied.

MAYFIELD, J., concurs.

JENNINGS, J., dissents.

MELVIN MAYFIELD, Judge, concurring. The majority of the court has today denied the motion of the Arkansas AFL-CIO to file an amicus curiae brief in the above styled case. I concur in that decision based upon the reasoning stated below.

In *Holiday Inn and U.S. Fire Insurance Company* v. *Coleman*, 29 Ark. App. 157, 778 S.W.2d 649 (1989), I concurred in part and dissented in part to a per curiam opinion in which the court allowed the Arkansas Self Insurers Association and the Arkansas Hospital Association to file amicus curiae briefs. I

concurred in granting the motion of the hospital association because it stated that a brief would be filed which would argue a point that the appellant insurance company had no direct interest in arguing. Thus, it was alleged that without the hospital association's brief it was not likely that any party would discuss a specific issue that the association alleged was of legal significance and public interest.

I dissented, however, from the action of the majority of the court allowing the Arkansas Self Insurers Association to file an amicus curiae brief because that association had stated no reason why the point it wished to discuss would not be adequately argued by the named parties in the case. Rule 19 of the Arkansas Supreme Court and the Court of Appeals provides that a motion for permission to file amicus curiae briefs should "state the reasons why such a brief is thought to be necessary." Thus, I dissented because the self insurers association's request did not meet the provisions of Rule 19.

In the instant matter, the request made by the Arkansas AFL-CIO does not state any reasons why it is thought that an amicus curiae brief by that association would be necessary. Not only that, but the motion does not give any indication of what point would be argued if the motion were to be granted. Recently we allowed the ALF-CIO to file an amicus curiae brief in another case pending in this court but that motion, in my opinion, substantially complied with Rule 19.

JOHN E. JENNINGS, Judge, dissenting. In *Holiday Inn and U.S. Fire Insurance Company* v. *Coleman*, 29 Ark. App. 157, 778 S.W.2d 649 (1989), we permitted a number of organizations to file amicus curiae briefs in a workers' compensation case. In doing so we followed the policy announced by the Arkansas Supreme Court in *Ferguson* v. *Brick*, 279 Ark. 168, 649 S.W.2d 397 (1983), i.e., that permission to file an amicus brief will be denied when the purpose is nothing more than to make a political endorsement of the basic brief and it is obvious that the moving party will discuss nothing of legal significance.

It is clear that we are now changing our policy in regard to amicus briefs. While I would agree that we are free to do so and that it is not absolutely necessary that our policy be identical to that adopted by the supreme court, I would adhere to our decision

in *Coleman*, and continue to follow the guidelines set out in *Ferguson*, in the interest of uniformity.

I respectfully dissent.

WESTERN SIZZLIN OF RUSSELLVILLE, INC.
v. DIRECTOR OF LABOR

E 88-66 783 S.W.2d 875

Court of Appeals of Arkansas
En Banc
Opinion delivered February 14, 1990

Peel and Eddy, by: *David L. Eddy*, for appellant.

Bruce H. Bokony, for appellee.

MELVIN MAYFIELD, Judge. Appellant, Western Sizzlin of Russellville, appeals a decision of the Board of Review holding that the claimant left her last work due to illness after making a reasonable effort to preserve her job rights.

The evidence showed that claimant, Nancy Myers, was frequently late to work, or absent from her work. On June 5, 1987, she was given a written warning which stated:

> Late for work Fri. A.M.
>
> Nancy has been late or has missed work several times in the past 3 weeks.
>
> This should be considered her final warning. Any more unexcused absences will result in termination.

This warning was signed by Mark Bazyk, appellant's owner, and Nancy Myers.

On August 22, 1987, another written warning was issued for substandard work and failing to show for her shift. This warning states it is claimant's last warning, if she cannot work when scheduled, she will no longer "work here." Claimant's last scheduled work was August 25, 1987, but she did not show up.

Claimant testified she did not show up or call in on August 25 because she was abusing a drug called "Dilaudid" and did not know what was going on. Two weeks later, she was taken to a detox clinic by her sister. Claimant testified she did not notify appellant of what was going on because she thought she had lost her job. She said she was in very bad shape because of the effects of the drug and really did not care whether she lost her job or not. She also admitted that she had missed work back in April; that this was also drug related; and that she had been given a warning at that time not to miss another day within three to six months without calling in or giving notice.

Harold Litton, appellant's manager, testified that the claimant never came in or discussed her drug problem; that if she had called in or someone had contacted them and explained what was happening, they would have worked with her very hard. He said he would have considered giving her whatever time off was necessary to go through detox and then to return to work; however, she made no effort to get back to them until they got her

unemployment claim.

The Employment Security Division denied benefits finding claimant quit her work because of disability, but had not shown that she made reasonable efforts to preserve her job prior to leaving. This decision was reversed by the Appeal Tribunal which found that since the drug precluded claimant from thinking clearly about her situation, it would be an inequity to disqualify her for not calling her employer about her situation. "Therefore," it was concluded, "she left last work due to illness, after making a reasonable effort to preserve her job rights." The Board of Review affirmed and adopted the decision of the Appeal Tribunal.

For reversal, appellant makes two arguments. First, it argues that the claimant should not receive unemployment benefits for an inability to work caused by "self-induced drug addiction." However, we do not find it necessary to address that issue. Appellant's other argument is based upon its contention that the Board's finding that claimant made a reasonable effort to preserve her job rights is not supported by substantial evidence.

Arkansas Code Annotated § 11-10-513 (1987) (formerly Ark. Stat. Ann. § 81-1106(a) (Supp. 1985)) provides as follows:

> (a)(1) If so found by the director, an individual shall be disqualified for benefits if he, voluntarily and without good cause connected with the work, left his last work.
>
> (2) . . . .
>
> (b) No individual shall be disqualified under this section if, after making reasonable efforts to preserve his job rights, he left his last work due to a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification or if, after making reasonable efforts to preserve job rights, he left his last work because of illness, injury, pregnancy, or other disability.

Cases applying this statute have recognized that legislation providing for unemployment benefits is remedial in nature and should be liberally construed, but the cases have not rendered the statute meaningless. In *Gordos Arkansas, Inc.* v. *Stiles*, 16 Ark. App. 30, 696 S.W.2d 320 (1985), this court said:

> We are not unmindful of the policy announced in *Harmon* v. *Laney*, 239 Ark. 603, 393 S.W.2d 273 (1965), where it was stated: "Strict constructions which result in defeat of the intended purposes of the Act will not be sanctioned by this court." However, Ark. Stat. Ann. § 81-1106(a) clearly provides that an individual must make reasonable efforts to preserve his or her job rights in order to avoid disqualification for benefits. There is no evidence to support the Board's finding that appellee made reasonable efforts to preserve her job rights. Accordingly, we reverse and remand for the Board of Review to issue an order denying benefits to appellee because of her total failure to make reasonable efforts to preserve her job rights.

16 Ark. App. at 33. In *Daves* v. *Sears Roebuck & Co.*, 255 Ark. 723, 502 S.W.2d 106 (1973), the Arkansas Supreme Court affirmed the denial of benefits and said: "It is undisputed that appellant made no effort to preserve any job rights, such as a request for transfer to another department." And in *Timms* v. *Everett*, 6 Ark. App. 163, 639 S.W.2d 368 (1982), we said: "This court has held that an individual may preserve his job rights by requesting a leave of absence from his employer."

In the instant case, the claimant signed a form, submitted to the Employment Security Division for the purpose of obtaining unemployment compensation, in which she said it was necessary for her to quit her job because she was "addicted to Dilaudid for 8 months prior to quitting." The Appeal Tribunal's decision, adopted by the Board of Review, found that "claimant missed a considerable amount of time from work for this employer because she was abusing the drug, Dilaudid." The claimant admits that she was told in April that she should not miss work again without giving notice, and it is undisputed that on June 5, 1987, the claimant was given a written warning, which she signed, stating that any more unexcused absences would result in termination. Faced with the above circumstances, it is clear that making a reasonable effort to preserve her job rights would require more than simply waiting until she had to miss work again in August and then filing a claim for unemployment benefits.

Claimant argues, however, that since she had been "warned

that any further absence would result in termination" she was "not required to preserve her job rights when to do so would have been a futile gesture." *Graham* v. *Daniels*, 269 Ark. 774, 601 S.W.2d 229 (Ark. App. 1980), and *Oxford* v. *Daniels*, 2 Ark. App. 200, 618 S.W.2d 171 (1981), are cited as authority for claimant's argument. In *Graham*, the employee had asked for transfers to other areas of work but, even though his requests were granted, his asthmatic condition persisted and when his employer said there were no other jobs available the claimant quit. In *Oxford*, the employee was given a job which, because of physical handicaps, he could not perform. However, he had told the employer of his handicaps and had been informed that this was the only position available, and "they thought he could handle the job." The employee had to quit because of his disability, but he was allowed unemployment benefits because he "was entitled to believe that no other position would be available to him."

Obviously, the instant case is unlike either *Graham* or *Oxford*. Had the claimant here told her employer back in April or in June that she had a drug problem and wanted a leave of absence to go to a detoxification unit, she would be in position to claim she had made a reasonable effort to preserve her job rights. Or, if claimant had simply asked her employer to be indulgent in case she missed work because of her drug problem, there would be some evidence to cite in support of her claim that a reasonable effort to preserve job rights had been made. The owner of the business where claimant was employed testified that the claimant was a very good worker and that they try to work with their employees. He gave two examples where employees were given leave to take care of personal situations. But he was not aware of the claimant's problem and she had not even contacted them after she got through with her detox treatment. Here, as we said in *Gordos*, *supra*, the claimant "took no active steps to preserve her job rights." In *Shipley Baking Co.* v. *Stiles*, 17 Ark. App. 72, 74, 703 S.W.2d 465 (1986), we said:

> It is essential that the Board's findings of fact be supported by substantial evidence upon which a particular conclusion could reasonably have been reached. We are not at liberty to ignore our responsibility to determine whether the standard of review has been met.

In the instant case, we cannot hold that the Board of Review's finding that the claimant made a reasonable effort to preserve her job rights is supported by substantial evidence. Therefore, the decision of the Board is reversed and the claim for unemployment benefits is dismissed.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. Our function in Employment Security Division cases is to determine whether the record contains substantial evidence to support the decision reached by the Board of Review. *Swan* v. *Stiles*, 16 Ark. App. 27, 696 S.W.2d 765 (1985). The Board's findings are conclusive on appeal if supported by substantial evidence. *Cooney* v. *Daniels*, 270 Ark. 930, 606 S.W.2d 615 (Ark. App. 1980). Even where the evidence is undisputed, the drawing of inferences is for the Board, not the courts. *Willis Johnson Co.* v. *Daniels*, 269 Ark. 795, 601 S.W.2d 890 (Ark. App. 1980). We are not permitted to hear the case *de novo* by substituting our findings for those of the Board. *Id.*

The facts of this case are simple. The claimant testified that she had been warned that she would be terminated if she missed another day of work. Subsequently, she did miss another day of work because of drug addiction for which she was later treated in a clinic. She did not notify her employer that she would be unable to report for work because she was so disoriented by the drug that she did not know what was happening. There was no one with her that could have notified her employer.

The Board found that, because of the drug, the claimant could not think clearly and did not realize that she should notify her employer that she would be unable to report to work. The Board concluded that the claimant's drug abuse was an illness and that her efforts to preserve her job rights were reasonable under the circumstances.

I think it apparent that reasonable minds could conclude that a condition requiring clinical treatment and therapy is an illness. It seems equally apparent that failing to contact one's employer is all that can be reasonably expected of a person who is so disoriented that she does not know what day it is, or what is happening around her.

Our review should end at this point with affirmance. The majority, however, has departed from the substantial evidence standard of review and has, in effect, tried this case *de novo* and found that the claimant was not so disoriented by her addiction between June 5, 1987, and August 22, 1987, that she was unable to recognize the implications of her drug abuse with respect to her employment and communicate her problem to her employer. If this issue must be resolved before this case can be decided, we should remand it to the Board with directions to make the appropriate findings. *See Massey* v. *Barnes*, 1 Ark. App. 329, 615 S.W.2d 398 (1981). That is the exclusive province and function of the Board, which we may not usurp. *See Willis Johnson Co.* v. *Daniels*, *supra*. I dissent.

Lawrence FORD *v.* Margaret FORD

CA 89-194 783 S.W.2d 879

Court of Appeals of Arkansas
Division II
Opinion delivered February 14, 1990

David C. Shelton, for appellant.

A. Jan Thomas, Jr.; and *Sloan, Rubens, Peeples & Coleman*, by: *Kent J. Rubens*, for appellee.

JUDITH ROGERS, Judge. This appeal arises from a post-divorce action wherein the appellant was held to be responsible for the payment of alimony and accrued arrearages resulting from this obligation. On appeal, the appellant contends that the chancellor lacked the authority to modify the decree of divorce

and further claims error in the chancellor's award of judgment for the arrearages. We affirm the decision of the chancellor.

The parties were divorced by decree of April 4, 1984, after thirty-three years of marriage. The appellant had retired upon twenty-one years of service from the United States Air Force, effective December 24, 1965, and was receiving benefits therefrom. Paragraph XIII of the decree recited:

> That the Plaintiff, Margaret Ford, is awarded pursuant to the Uniformed Services Former Spouses Protection Act an amount equal to 1/3 (33.33%) of the disposable retired pay to which Defendant, Lawrence Ford, is entitled to receive for military service.

No appeal was taken from the decree. On September 22, 1986, appellee filed a Petition to Show Cause on grounds not pertinent to this appeal; however, in her motion, she requested disclosure of the amount appellant was then receiving in retirement benefits. Until that time, it appears that appellant had been making payments in compliance with this provision of the decree. In his response to appellee's petition, dated October 2, 1986, appellant alleged that his payments should be reduced because the sums attributable to his 40% disability upon retirement were not "disposable retired pay" under the Uniformed Services Former Spouses Protection Act. Appellant ceased making payments in November of 1986.

A hearing in which all issues were joined was held on August 5, 1987, before the same chancellor who rendered the decree of divorce. At that time, with reference to the Uniformed Services Former Spouses Protection Act, 10 U.S.C.A. § 1408 (1983), appellant argued that he was under no obligation to pay any funds or monies since his retirement pay was due to disability. The chancellor rendered his decision by letter of September 1, 1987, and found that the provision was intended as an award of alimony by which the retirement benefits received by appellant were used only as a measure for determining the specific, monthly amount appellee was entitled to receive. After various motions were filed by the parties, the Court issued a Memorandum Opinion on June 6, 1988, and from this opinion his rulings were reduced to order form and filed of record on February 8, 1989. The chancellor made the following findings pertaining to the award of alimony:

> 4. The Court by its Decree of April 4, 1984, awarded the Plaintiff a specific amount of money to be paid by Defendant; that the amount so awarded was to be equal to 1/3 of the income the Defendant derived from military retirement; that the verbiage contained in the Decree "pursuant to the Uniform Services Former Spouses Protection Act" was included, correctly or incorrectly, and approved by Defendant, as a means of determining the specific amount to be paid by Defendant and not as an award of 1/3 of his retirement benefits but of an amount equal to 1/3 of benefits received; that failure to denominate such award as "alimony" was and is of no consequence; that no appeal was taken from such award or objection made by Defendant, and he is not now in a position to object to an order made four (4) years previously.

The chancellor granted appellee judgment for $3,012 for past due arrearages, but did not hold appellant in contempt for the nonpayment of this obligation.

As his first issue on appeal, the appellant argues that the chancellor lacked the authority to modify the decree after ninety days pursuant to Ark. R. Civ. P. 60(b). It is the appellant's contention that the chancellor's order effectively modified the decree by changing this provision from a division of marital property to an award of alimony. We cannot agree.

Rule 60(b) of the Arkansas Rules of Civil Procedure limits a trial court's authority to modify a decree to a period of 90 days after it has been filed with the clerk. *Reves* v. *Reves*, 21 Ark. App. 177, 730 S.W.2d 904 (1987). However, this rule is not applicable where the court simply attempts to correct the record to more accurately reflect its original ruling. *McGibbony* v. *McGibbony*, 12 Ark. App. 141, 671 S.W.2d 212 (1984). Our appellate courts have long recognized the inherent power of the courts of this state to enter orders correcting their judgments where necessary to make them speak the truth and reflect actions accurately. *Id.* As revealed in his Memorandum Opinion and subsequent order of February 1989, we regard the chancellor's action as a clarification of the award that was originally intended, and not a modification of the decree. Other than his bare assertion that the provision was a division of his military retirement pay

upon divorce, appellant has presented no evidence demonstrating that the chancellor's interpretation is clearly erroneous. To the contrary, the record reflects that the parties were divorced after a lengthy marriage and the appellee testified that after the divorce she had to go back to school in order to support herself and their daughter. In addition, the amount appellee was to receive is indicative of this intent. The award was calculated as 1/3 of the amounts received, rather than the greater amount represented by 1/2 of a fractional share of the benefits, the method that is typically used when dividing retirement pay as a marital asset. Thus if this had been a division of property, the result would have been an unequal division; the decree is noticeably silent with regard to reasons supporting such a disposition as is required by Ark. Code Ann. § 9-12-315 (Supp. 1989). *See Harvey* v. *Harvey*, 295 Ark. 102, 747 S.W.2d 89 (1988).

One seeking the reversal of a chancellor's decree has the burden of demonstrating error in the chancellor's findings, and the appellate court will not reverse such findings unless they are clearly against the preponderance of the evidence. *Kibler* v. *Kibler*, 27 Ark. App. 77, 766 S.W.2d 938 (1989). Based on this record, we cannot say that the chancellor's interpretation of the decree is clearly wrong.

Secondly, appellant argues that the chancellor erred in awarding judgment to the appellee for arrearages. In making this argument, the appellant contends, as he did at the hearing, that he has no "disposable retired pay" according to the Uniformed Services Former Spouses Protection Act as his retirement was based on disability. We find no merit in this argument for the reason that the chancellor, in clarifying the decree, determined that the amount of alimony was based on the monthly income that appellant actually received as retirement pay. Appellant did not take an appeal from the decree, and acknowledged at the hearing that this was the amount he had been paying since the decree was entered. Thus, the interpretation of the court was consonant with appellant's conduct.

Not having appealed from the decision within the time permitted by law, the appellant is not now in a position to complain. *Best* v. *Williams*, 260 Ark. 30, 537 S.W.2d 793 (1976). When a judgment becomes final, it is protected by the common

law principle of *res judicata*, and the findings and orders of the decree cannot later be collaterally attacked, even if the judgment is erroneous. *Nelson* v. *Nelson*, 20 Ark. App. 85, 723 S.W.2d 849 (1987); *Gideon* v. *Gideon*, 268 Ark. 873, 596 S.W.2d 367 (Ark. App. 1980). A decree of alimony is *res judicata* on the circumstances prevailing at the time of the decree as to everything which might have been litigated when the divorce was granted. *Boyles* v. *Boyles*, 268 Ark. 120, 594 S.W.2d 17 (1980).

In this case, the decree was entered on April 4, 1984, and the appellant did not pursue this claim until late in 1986. There was no appeal from that decree which became conclusive except to the extent that changed conditions may have arisen. Neither we, nor the appellant, can now question the propriety of this award or the manner in which the amount of alimony was calculated.[1]

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

Bobby William THOMAS *v.* Ardle THOMAS, Executor

CA 89-371 784 S.W.2d 173

Court of Appeals of Arkansas
Division II
Opinion delivered February 21, 1990

[1] We are not unmindful of the Supreme Court's recent decision of *Mansell* v. *Mansell*, 109 S.Ct. 2023 (1989). However, we have respectfully determined that appellant is now precluded from raising these issues by reason of *res judicata*.

Kincaid, Horne, Trumbo & Hogue, by: *Curtis E. Hogue*, for appellant.

Boyce R. Davis Associates, by: *Boyce R. Davis*, for appellee.

JUDITH ROGERS, Judge. This appeal is from an order of the Washington County Probate Court admitting a lost will of Mrs. Sidra Thomas to probate. On February 26, 1988, Mrs. Thomas died and was survived by her husband, appellee, and her son, Bobby Thomas, appellant herein. In November 1988, appellee filed a petition seeking to have a copy of a will that had been

executed by Mrs. Thomas in 1986 probated and to be appointed as her executor. Mrs. Thomas' 1986 will provided that, upon her death, all her property was to pass to appellee, unless appellee had predeceased her, in which event her property was to pass to her son, appellant. Appellant objected to the copy of the 1986 will being probated and contended Mrs. Thomas died intestate. By an order dated June 5, 1989, the probate judge found the unsigned and undated will, sworn by attesting witnesses to have been executed May 1, 1986, should be admitted to probate as the lost will of Mrs. Thomas.

The single issue presented here is whether the probate judge erred in finding that appellee presented sufficient evidence to rebut the presumption that a will was revoked by the testator if the will was accessible to the testator and cannot be found after the testator's death. We hold the probate judge's finding that the evidence was sufficient to overcome this presumption is not clearly erroneous and affirm.

Arkansas Code Annotated Section 28-40-302 (1987) provides:

> No will of any testator shall be allowed to be proved as a lost or destroyed will, unless the provisions are clearly and distinctly proved by at least two (2) witnesses, a correct copy or draft being deemed equivalent to one (1) witness, and:
>
> (1) The will is proved to have been in existence at the time of the death of the testator; or
>
> (2) The will is shown to have been fraudulently destroyed in the lifetime of the testator.

There is a presumption that a testator destroyed a will executed by him during his lifetime, with the intention of revoking the same, if the testator retained custody of the will or had access to it, and the will cannot be found after the testator's death. *Wharton* v. *Moss*, 267 Ark. 723, 725, 594 S.W.2d 856, 857 (Ark. App. 1979). *See also Rose* v. *Hunnicutt*, 166 Ark. 134, 137, 265 S.W. 651, 652 (1924). The presumption a will is revoked is two-pronged, and in order to overcome this presumption, the proponent must first prove the execution of the lost will by the testator and then prove the will was not revoked by the testator.

Wharton, 267 Ark. at 725, 594 S.W.2d at 857.

It is undisputed that Mrs. Thomas executed the 1986 will prior to her death; however, appellant asserts the evidence is insufficient to find the will was in existence at the time of Mrs. Thomas' death. The burden was upon appellee to prove by a preponderance of the evidence that she did not revoke it during her lifetime. *Garrett* v. *Butler*, 229 Ark. 653, 657-58, 317 S.W.2d 283, 285 (1958).

Appellee testified that he and his wife went to their lawyer's office in 1986 to make out their wills and that, after they signed these wills, they took the originals home with them and placed them in a pasteboard box in his wife's bedroom, where they kept other documents. He testified that he never saw his wife's will again or looked for it until his son, appellant, asked to see it sometime after his wife's death and that, when they went to look for it, it was gone. Appellee testified that he was certain his wife had not revoked her will because, during their fifty-four years of marriage, he and his wife had worked together one hundred percent, they had discussed everything, and that she would not have done anything, including destroying her will, without first discussing it with him.

In *Garrett* v. *Butler*, *supra*, the appellant sought to have the probate judge's decision, admitting a lost will to probate, reversed, contending the appellee had not overcome the presumption that the lost will had been revoked. The supreme court responded:

> After careful consideration of the weight to be given to the facts and circumstances in this case as set forth above, we cannot say the trial court's finding is against the weight of the evidence. The proof is clear that Rev. Garrett made the will in question, and that he had good reasons for making appellee his chief beneficiary; that nothing occurred to change or alter those reasons; that he indicated to disinterested witness shortly before his death he expected appellee to have some control over his affairs after his death and; that there is a total absence of any testimony he tried or wanted to make any change in or revoke his will. There are also in the record other circumstances which the trial court had a right to consider. During Rev. Garrett's

> last illness many people had the opportunity to handle and destroy or misplace the will. One of these was the appellant, George Garrett, who was an interested party and who failed to testify.

Garrett, 229 Ark. at 657, 317 S.W.2d at 285.

Facts similar to those in *Garrett* exist in the case at bar. In trying to explain how his wife's will might have disappeared, appellee stated that, after his wife's death, his niece and appellant's wife came and cleaned his house without his permission and he did not know everything that went on. He stated the house was in perfect order at his wife's death "but after she passed away, I don't know what they went to carrying the stuff off." He testified that appellant and his wife lived across the street from him and had a key to his house and they would come in and out of the house all the time. He also testified that, since his wife's death, he has discovered some Indianhead pennies, silver dollars, $2.00 bills, and pocketknives, which she had been keeping, are missing. As in *Garrett*, *supra*, appellant here is an interested party, had the opportunity to destroy Mrs. Thomas' will, and failed to testify.

It was not necessary for the trial judge to determine what became of Mrs. Thomas' will; it was enough that he found that it was not revoked or cancelled by her. *Garrett*, 229 Ark. at 657, 317 S.W.2d at 285; *Bradway* v. *Thompson*, 139 Ark. 542, 561, 214 S.W. 27, 33 (1919). At the conclusion of trial, the probate judge stated that he believed appellee was attempting to be "just as honest as the day is long," and that he was convinced that, had Mrs. Thomas destroyed her will, she would have told the appellee about it. The judge also stated that he found appellee's testimony, that it was not unusual for the will to be missing because some other items were missing, to be true because there was no evidence to rebut appellee's testimony and because he found the appellee to be an honest man.

Probate cases are tried *de novo* on appeal, and this court does not reverse the findings of the probate judge unless they are clearly erroneous, giving due deference to his superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *Baerlocker* v. *Highsmith*, 292 Ark. 373, 374-75, 730 S.W.2d 237, 238 (1987).

Based upon the evidence, we find that the probate judge's conclusion that appellee overcame the presumption that Mrs. Thomas revoked her will by a preponderance of the evidence is not clearly erroneous.

Affirmed.

MAYFIELD and JENNINGS, JJ., agree.

Nancy POWELL *v.* James A. MILLER and Sue Ellen Miller, Husband and Wife

CA 89-222 785 S.W.2d 37

Court of Appeals of Arkansas
Division I
Opinion delivered February 28, 1990

Ball, Mourton & Adams, Ltd., A Professional Corporation, by: *Stephen E. Adams*, for appellant.

Wommack & Associates, P.A., by: *Kenneth L. Edwards, Jr.*, for appellees.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Washington County Chancery Court. Appellant, Nancy Powell, appeals from the December 19, 1988, decree wherein the chancellor found that appellees, James A. Miller and Sue Ellen Miller, own their land free and clear of any easement right on the part of appellant. We reverse and remand.

On September 1, 1972, appellant and her now deceased husband, together with Tommy L. Goodwin and Alice F. Goodwin, appellees' predecessors in title, purchased, as tenants in common of an undivided one-half each, a 25-acre tract of land in Washington County, Arkansas. On that same day the two couples divided the tract into what was approximately a northern half and a southern half and, appellant taking the southern tract and the Goodwins taking the northern one, each couple conveyed in fee simple to the other their interest in the other's respective tract of land.

Prior to the purchase and division of the 25-acre tract by appellant and the Goodwins, a survey of the property was done which showed the claimed easements. No record of the survey was ever filed with Washington County, but an easement was reserved in a mortgage given to First National Bank Fayetteville by the Goodwins in 1975.

On August 11, 1986, appellees purchased the northern tract

of land from the Goodwins. The warranty deed from the Goodwins to appellees contained this language: "Subject to, and having ingress and egress rights to the following 30 foot road easement, having its center-line described as follows, to wit . . . ."

Appellees, on June 19, 1987, initiated this action by filing a Petition to Quiet Title and Confirm Title to the property claimed as an easement by the appellant. On July 31, 1987, appellant filed a counterclaim to quiet and confirm title to the claimed easement in her own name and, in the alternative, to be granted an easement by necessity. On January 13, 1988, appellant filed a motion for summary judgment. The chancellor denied the motion, finding that there existed a genuine issue of material fact as to whether appellees had notice of the easement when they bought the property. A trial was held on December 1, 1988. The chancellor in his decree found that appellees had notice of the easement from language which was included in their deed and also found in their title insurance, that appellant had used appellees' tract for access to her own tract but had not established a passage-way or any other evidence of a prescriptive easement; and that because of the absence of evidence of either adverse holding or consistent use, the "subject to" language in the documents did not give appellant an easement. The chancellor also denied appellant's claim to an easement by implication and specifically held the following:

> 6. That there is no "way of necessity" to be determined by this Court, in that jurisdiction over a way of necessity is solely for the County Court and the County Judge. Therefore, the Counterclaim for a way of necessity is likewise overruled.

Appellant raises the following three points for reversal:

I.

THE TRIAL COURT ERRED IN NOT ENTERING JUDGMENT IN FAVOR OF THE APPELLANT BECAUSE THE ONE FACTUAL ISSUE HE FOUND TO BE IN DISPUTE IN THE MOTION FOR SUMMARY JUDGMENT, WAS WHETHER OR NOT THE APPELLEES HAD NOTICE OF THE EASEMENT, AND THIS ISSUE WAS

RESOLVED IN FAVOR OF THE APPELLANT AT THE TRIAL.

II.

THE TRIAL COURT ERRED IN FINDING THAT EVEN THOUGH APPELLEES HAD NOTICE OF AN EASEMENT ACROSS THEIR PROPERTY AND THAT THE APPELLANT, NANCY POWELL, DID IN FACT USE THE TRACT OF LAND IN ORDER TO OBTAIN ENTRY TO HER OWN TRACT OF LAND, THE APPELLANT HAD FAILED TO ESTABLISH THAT ANY CONSISTENT PATH WAS FOLLOWED AND THEREFORE THERE WAS NO EASEMENT ESTABLISHED BY THE APPELLANT OVER THE PREMISES.

III.

THE TRIAL COURT ERRED IN FINDING THAT THE CHANCERY COURT DID NOT HAVE JURISDICTION TO GRANT A WAY OF NECESSITY IN APPELLANT'S FAVOR.

We do not address appellant's first two points because we find merit in appellant's third point which requires reversal.

While the county court does have jurisdiction to create a way of necessity in the form of a public road, Arkansas Code Annotated Section 27-66-401 (1987), a landowner who is without legal access to his property and who once had a right of access or could have had a right of access via what was once part of his own land that now belongs to another, upon the showing of certain prerequisites, is entitled under common law as adopted in Arkansas to either an easement by necessity or an easement by implication. *Burdess* v. *United States*, 553 F. Supp. 646 (1982). Precedent establishes that determining a common law easement by necessity is a matter of equity within the jurisdiction of the chancery court. *See Kennedy* v. *Papp*, 294 Ark. 88, 741 S.W.2d 625 (1987); *Brandenburg* v. *Brooks*, 264 Ark. 939, 576 S.W.2d 196 (1979); *Mettetal* v. *Stane*, 216 Ark. 836, 227 S.W.2d 636 (1950); *Messer* v. *Houston*, 212 Ark. 349, 205 S.W.2d 467 (1947); *Boullioun* v. *Constantine*, 186 Ark. 625, 54 S.W.2d 986 (1932); *Arkansas Power and Light Co.* v. *Hilliard*, 185 Ark. 383, 47 S.W.2d 575 (1932); *Vassar* v. *Mitchell*, 169 Ark. 792, 276

S.W. 605 (1925).

Appellee asserts that jurisdiction to establish a way of necessity lies solely in the county court under Arkansas Code Annotated Section 27-66-401, and the chancellor is, therefore, correct in his ruling. Our constitution places jurisdiction of matters of equity in the courts of chancery, Ark. Const. art. 7, § 15. This jurisdiction cannot be enlarged or diminished by legislative action. *Patterson* v. *McKay*, 199 Ark. 140, 134 S.W.2d 543 (1939).

The statute on which appellee bases his argument provides for the situation where lands of any owner are so situated as to render it necessary to have a private road from such land to any public road over the lands of any other person and the other person refuses to allow that owner the private road. The statute states that it shall be the duty of the county court to appoint viewers to lay off the road, provided: the owner gives the required notice, petitions the court, shows necessity, shows that the person refuses to allow the road, and deposits with the clerk of the court sufficient money to pay certain costs and expenses. Regarding this statutory provision for obtaining a means of access to one's property, our supreme court in *Dowling* v. *Erickson*, 278 Ark. 142, 644 S.W.2d 264 (1983), stated, "An individual who is landlocked and proceeds under § 76-110 [now codified at Ark. Code Ann. § 27-66-401 (1987)] has no other alternatives available to him. If he were not granted access to his land under such a statute, he would have no remedy." This statute provides for any situation in which a landowner is landlocked. Before its enactment, those owners of landlocked property who could not establish entitlement to a common law easement were without means by which to gain access to their property.

Although a legislative body has the power to alter the common law, *Nietert* v. *Citizens Bank and Trust Company*, 263 Ark. 251, 565 S.W.2d 4 (1978), it is a principle of statutory construction that a statute will not be construed as overruling a principle of common law, "unless it is made plain by the act that such a change in the established law is intended." *White* v. *State*, 290 Ark. 130, 136, 717 S.W.2d 784, 787 (1986) (quoting *Starkey Constr., Inc.* v. *Elcon, Inc.*, 248 Ark. 958, 457 S.W.2d 509 (1970)). The language of the statute here does not indicate that it

was intended to overrule the common law remedy of granting a "way of necessity." Furthermore, it did not, as it could not, abrogate the jurisdiction conferred by our constitution to the chancery court to decide such matters of equity.

The prerequisites to the creation of an easement by necessity are: 1) the titles to the two tracts in question must have been held by one person; 2) the unity of title must have been severed by a conveyance of one of the tracts; 3) the easement must be necessary in order for the owner of the dominant tenement to use his land with the necessity existing both at the time of the severance of title and at the time of exercise of the easement. *Burdess*, 553 F. Supp. at 649-50. Although the chancellor here, believing jurisdiction to be in a different court, did not make a determination as to the proof of the prerequisites, our review of the record reveals that they were proved. We therefore reverse and remand for determination consistent with this opinion.

Reversed and remanded.

CRACRAFT and COOPER, JJ., agree.

HERMAN YOUNG LUMBER CO. and Commercial Union Ins. Co. *v.* Nora KOON and Donna Koon

CA 89-251 785 S.W.2d 44

Court of Appeals of Arkansas
Division I
Opinion delivered February 28, 1990

Chester C. Lowe, Jr., for appellant.

Zan Davis, for appellee.

JAMES R. COOPER, Judge. The appellees in this workers' compensation case are the widow and the surviving child of Gary Koon, who was killed on September 15, 1986, while employed as a log truck driver by the appellant lumber company. The decedent's death was accepted as compensable. At a hearing held on June 21, 1988, the appellees contended that the decedent's death was caused in substantial part by a safety violation and that a 25% penalty therefore should attach to all benefits paid in the claim. The appellees also contended that the decedent's average wage was $200.00 per week. The administrative law judge found in favor of the appellees on both issues and awarded benefits based on those findings. On *de novo* review, the Commission adopted the findings and conclusions of the administrative law judge. From that decision, comes this appeal.

For reversal, the appellants contend that the Commission erred in finding that the decedent's death was caused in substantial part by the employer's safety violation, and in finding that the decedent's weekly wage was $200.00 per week. We affirm.

We first address the Commission's finding that the decedent's death was caused in substantial part by his employer's violation of a safety provision, thereby giving rise to a 25% increase in compensation under Ark. Code Ann. § 11-9-503 (1987).[1] The asserted safety violation involved Arkansas Department of Labor Code Part 4, Rule 5(d), which requires that:

> All trucks transporting logs and/or lumber over the highways of the State shall be equipped with four standards, at least the height of the load. . . .

The record shows that "standards" are vertical stakes positioned along the length of a logging trailer so as to cradle and contain the load. The appellants do not contend that Rule 5(b) was not

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[1] Under prior law, the increase in compensation for injuries arising from safety violations was payable to the Second Injury Fund, whereas under current law the increase in compensation is payable to the claimant. Compare Ark. Code Ann. § 11-9-503 (1987) and Ark. Stat. Ann. § 81-1310(d) (Repl. 1976).

violated: they concede in their reply brief that the logs on the decedent's truck were stacked above the standards and that this constituted a violation of Rule 5(d). Instead, they argue that the evidence was insufficient to support a finding that the decedent's death was caused in substantial part by a safety violation because (1) the truck was not on a highway when the accident occurred; (2) there was evidence that the decedent was not required to unload the truck; and (3) there was evidence that the decedent had failed to take safety precautions which could have prevented the accident.

■ We find no merit to the appellant's first argument. Although the decedent's truck was not on the highway at the time of the accident, there was testimony that the truck was one which did operate on state highways, and the decedent's pay records indicate that he had been hauling logs from the DeWitt Refuge to Forrest City. Moreover, we think that Rule 5(d) clearly pertains to the safety of employees: Rule 5(a), (b), (c), and (d) deal with devices intended to prevent logs from falling off trucks, and Rule 5(e) and (f) require that the grade and condition of truck roads be such as to insure safe operation. Finally, the appellants concede in their reply brief that Rule 5(d) was violated.

■ Next, the appellants contend that the evidence shows that the decedent had begun to unload the truck when the accident occurred, and that Rule 5(d) is not applicable once the unloading process begins. However, the administrative law judge's opinion, adopted by the Commission, does not contain a finding that the decedent was unloading the truck when he was killed. Instead, the opinion merely notes that "it is unknown exactly what the claimant was doing at the time of his death." Although it appears from the evidence that the decedent had removed a binder and cable which helped secure the logs to the truck, Don Douglas, also an employee of the appellant logging company, testified that the removal of these devices was the driver's responsibility. Mr. Douglas also testified that log trucks were unloaded with a front-end loader, and there is no evidence that a front-end loader was found in the vicinity of the accident. We think that the Commission could reasonably conclude on this record that the decedent was merely carrying out his responsibility of removing the binder and cable when he was killed. We find no error on this point.

The appellants next contend that the evidence showed that the sole cause of the accident was the decedent's violation of three safety precautions, which they list as follows: (a) improper use of the binder; (b) pulling the cable over the top of the logs so as to draw the logs toward him, and (c) standing too close to the truck.

In determining the sufficiency of the evidence to sustain the findings of the Workers' Compensation Commission, we review the evidence in the light most favorable to the Commission's findings, and we must affirm if there is any substantial evidence to support them. *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984). We may reverse the Commission's decision only when we are convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Snow* v. *Alcoa*, 15 Ark. App. 205, 691 S.W.2d 194 (1985). Here, the Commission found that the decedent would not have been killed had the standards been of the proper height. Mr. Douglas testified that he had been employed by the appellant logging company on and off for seven years. He stated that he was assigned to the decedent's truck on the morning after the decedent was killed; that the truck had not been moved since the accident; that, with the exception of the logs which had fallen, the truck was still loaded; that the logs were stacked above the standards; and that one of the standards was approximately two feet too short. He also testified that it would be impossible for the logs to fall off the side of the truck if the load was below the standards, and he opined that the logs which fell off the truck in the accident came over the short standard. Given this testimony we think that reasonable minds could conclude that the decedent's death was caused, in substantial part, because the standards were not of the height which Rule 5(d) requires, and we hold that the Commission did not err in so finding.

The appellants next argue that the Commission erred in finding that the decedent's weekly wage was $200.00 per week. Arkansas Code Annotated § 11-9-518(a)(1) (1987) provides that:

> Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be

> computed on less than a full-time workweek in the employment.

In the case at bar the appellant employer filed an employee wage report with the Commission stating that the decedent's pay was based on regular wages, not piece work; that the decedent was paid $5.00 per hour; and that the decedent worked 40 hours per week. The record also contains a wage log for the decedent indicating that his regular scheduled workweek was 40 hours. The Commission found that the decedent's average weekly wage was $200.00. The appellants contend that the Commission erred in so finding, and that the average weekly wage should have been computed on the actual wages received by the decedent during the ten days he was employed by the appellant logging company.

In *Gill* v. *Arkansas Forest Products, Inc.*, 255 Ark. 951, 504 S.W.2d 357 (1974), the Arkansas Supreme Court was faced with a similar case involving the accidental death of a worker employed in the timber industry. Noting that there was no guarantee of a full workweek for timber industry employees because the work was subject to weather conditions and the timber supply, the Court held that the Commission properly computed weekly wages on the basis of a 40-hour week in which work was available. The case at bar is distinguishable from *Ryan* v. *NAPA*, 266 Ark. 802, 586 S.W.2d 6 (Ark. App. 1979), where the Court of Appeals held that there was substantial evidence to support the Commission's finding that the claimant was a part-time employee and was not required to work in excess of her normal four hours per day. The question in the case at bar is not whether the evidence would support a finding contrary to that made by the Commission, but whether there is substantial evidence to support the finding the Commission actually made. *Dillaha Fruit Co.* v. *LaTourrette*, 262 Ark. 434, 557 S.W.2d 397 (1977). We hold that there is substantial evidence to support the Commission's finding that the decedent's average weekly wage was $200.00 per week, and we affirm.

Affirmed.

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

Yolanda SIMS *v.* STATE of Arkansas

CA CR 89-122 786 S.W.2d 839

Court of Appeals of Arkansas
Division I
Opinion delivered February 28, 1990
[Rehearing denied March 28, 1990.]

Carolyn Lee Whitefield, for appellant.

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

JAMES R. COOPER, Judge. After a jury trial, the appellant was convicted of furnishing prohibited articles in violation of Ark. Code Ann. § 5-54-119 (1987), and was sentenced to five years in the Arkansas Department of Correction. On appeal she argues four points: 1) that it was error for the trial court to admit a bag of marijuana into evidence because the State failed to show a proper chain of custody; 2) that the trial court erred in denying her motion for a directed verdict; 3) that it was error for the trial court to permit the State to question her about her post-arrest silence; and 4) that the trial court erred in refusing to grant her motion for a new trial. We affirm.

The record reveals that the appellant went to the Hempstead County Jail to visit a man in custody there, Prentis Weston. The appellant was not permitted to see him, but a trustee was allowed to ask Mr. Weston if he needed anything and he conveyed the response to the appellant. The appellant left and returned shortly in the company of another woman. The appellant allegedly gave a bag of personal articles to Jenny Waller, an employee of the Sheriff's Department. According to Ms. Waller, she and Officer Ronald Wreyford inspected the articles. Officer Wreyford found cigarette rolling papers in between the pages of a package of writing paper and Ms. Waller found a small plastic bag of green vegetable matter, which was subsequently tested and found to be marijuana, in the bottom of a "Speed Stick" deodorant.

We will address the appellant's second argument first because a motion for a directed verdict is a challenge to the

sufficiency of the evidence. *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984). The appellant moved for a directed verdict at the close of the State's case, however, she failed to renew the motion at the close of the case. In order to preserve the issue of sufficiency of the evidence for appeal a directed verdict motion must be renewed at the close of the case. *Houston* v. *State*, 299 Ark. 7, 771 S.W.2d 16 (1989); Ark. R. Crim. P. 36.21(b) (amended by *per curiam* March 1, 1988). Therefore, we decline to consider this issue.

The appellant's first argument concerns the chain of custody of the small bag of marijuana found in the deodorant bottle. It is the appellant's contention that because there was no evidence as to when the bag was mailed from the sheriff's department to the State Crime Lab, or who received the package, the State failed to show a proper chain of custody. We disagree.

The purpose of establishing the chain of custody is to prevent the introduction of evidence which is not authentic, and to prove its authenticity the State must demonstrate a reasonable probability that the evidence has not been altered in any significant manner. *White* v. *State*, 290 Ark. 130, 717 S.W.2d 784 (1986).

> To allow introduction of physical evidence, it is not necessary that every moment from the time the evidence comes into the possession of a law enforcement agency until it is introduced at trial be accounted for by every person who could have conceivably come in contact with the evidence during that period. Nor is it necessary that every possibility of tampering be eliminated: it is only necessary that the trial judge, in his discretion, be satisfied that the evidence presented is genuine and, in reasonable probability, has not been tampered with.

(citations omitted) *Munnerlyn* v. *State*, 264 Ark. 928, 931, 576 S.W.2d 714, 716 (1979). The effect of minor discrepancies in the chain of custody are for the trial court to weigh. *White, supra.*

Ms. Waller testified that she inspected the deodorant, found the bag containing the marijuana, pulled it out, and handed it to Officer Wreyford. Officer Wreyford stated that he observed Ms. Waller inspect the deodorant, saw her remove the bag, and

immediately took it from her. He stated that he placed the bag in an envelope; sealed it; and placed his initials, a case number, and the date on it. Before mailing it to the crime lab, Officer Wreyford placed the bag in his locker, to which he had the only key. When it was returned to him from the crime lab he again placed it in his locker.

The date on the bag of marijuana was July 14, 1988, but the day it was confiscated was July 13, 1988. On cross-examination, Officer Wreyford explained that he probably made a mistake on the date. Although Ms. Waller stated at trial that the bag appeared to be the one she pulled from the deodorant, Officer Wreyford testified that he was positive it was the same bag.

Mary Buhler, a forensic chemist with the Arkansas State Crime Laboratory, testified that the evidence was received by the crime lab on January 19, 1989; that she checked it out of the evidence room on January 25, 1989; and that she tested the contents of the bag. When she received the envelope it had the initials RLW on it and the number E-1-88-037. These are the same numbers and initials which Officer Wreyford said he placed on the envelope. Mrs. Buhler stated that she placed the laboratory's case number on the envelope, 89-00612, taped it shut, put her initials on it, and returned it to the evidence room on the same day she checked it out.

We hold that the State did demonstrate a reasonable probability that the evidence had not been tampered with or altered in any significant manner and we find no error in the trial court's admitting it into evidence. *White, supra.*

For her third point, the appellant argues that the trial court erred in allowing the State to cross-examine her about her post-arrest silence. Over the appellant's objection, the following took place on cross examination.

> Q. Ms. Simms, at the time you were arrested by law enforcement officers, did you tell Sheriff Don Worthy what you have told the jury?
>
> A. No, sir.
>
> Q. Did you tell Mrs. Jenny Waller what you told the jury?

A. No.

Q. Did you, in fact, tell any Hempstead County Deputy sheriff's or law enforcement officer what you have told the jury?

A. No, sir.

The appellant also argues that this error was compounded when the State referred to her post-arrest silence during closing arguments.

No objection was raised concerning the remarks made by the State during closing arguments, and therefore we will not address the argument. In order to preserve an alleged error for appeal, an objection must be made. *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980). As for the questions during cross-examination, we find that, if they did constitute error, it was harmless. Where the defendant's silence is mentioned by the State, it is harmless error if there is no prosecutorial focus by repetitive questioning or arguing on a defendant's silence where the evidence of guilt is overwhelming. *Vick* v. *State*, 301 Ark. 296, 783 S.W.2d 365 (1990).

There was overwhelming evidence of the appellant's guilt. Although the appellant testified that she was not the one who brought the marijuana to the jail and that it must have been brought in by the lady who accompanied her. Ms. Waller testified twice that she was sure it was the appellant who had the deodorant when the two women entered the jail. Furthermore, the prosecutor asked only three questions during a lengthy cross-examination and did not return to this line of questioning. Under these circumstances, we find that the error was harmless. Even errors of constitutional proportions do not require reversal if they are harmless beyond a reasonable doubt. *Gage* v. *State*, 295 Ark. 337, 748 S.W.2d 331 (1988).

For her final argument, the appellant argues that the trial court erred in refusing to grant a new trial. On direct examination, the appellant indicated that it was the woman who accompanied her to the jail, Vercina Lindsey, who secreted the marijuana in the deodorant and carried it into the jail. The State attempted to call Ms. Lindsey as a rebuttal witness, but the trial court sustained the appellant's objection and refused to allow Ms.

Lindsey to testify because she was not a proper rebuttal witness. During closing argument the State remarked, "[T]he defendant comes in here and says, I didn't know . . . the other girl had it. Where is the other girl?" Later, the State again commented, "What if we could have had that second person that came with her to the jail here today?" The appellant only objected to the second remark, and requested that the trial court instruct the jury that Ms. Lindsey was present but not allowed to testify. She also requested that the State not go into the matter any further. The trial court overruled the appellant's objection, stating that it had already instructed the jury as to "what weight to place on closing arguments." The State then continued its closing argument and stated "You have heard the testimony of the defendant that there was no effort to find this second lady, even though she also testified that this lady was the defendant's husband's best friend's girlfriend."

The appellant based her motion for a new trial on these remarks made by the State. She argues that prejudice is apparent from the fact the jury questioned the judge about why Ms. Lindsey did not testify.

The decision whether to grant a new trial is left to the sound discretion of the trial judge and will not be reversed in absence of an abuse of discretion or manifest prejudice to the complaining party. *Foster* v. *State*, 294 Ark. 146, 741 S.W.2d 251 (1988). We find no error.

During closing arguments, the State is permitted to draw whatever inferences are reasonable from the evidence. *Wilburn* v. *State*, 292 Ark. 416, 730 S.W.2d 491 (1987). In light of the fact that it was the appellant's testimony that Ms. Lindsey put the marijuana into the deodorant and that it was the appellant's objection that prevented Ms. Lindsey from testifying, we do not think that the State's remarks were improper. It is not unreasonable to conclude that the appellant did not want Ms. Lindsey to testify because Ms. Lindsey would deny putting the marijuana in the deodorant. We cannot say that this suggestion by the State in closing arguments created manifest prejudice to the appellant.

Affirmed.

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

FIRST COMMERCIAL BANK, N.A. *v.* McGAUGHEY BROTHERS, INC. and J.C. McGaughey

CA 88-273 785 S.W.2d 236

Court of Appeals of Arkansas
En Banc
Opinion delivered February 28, 1990

Friday, Eldredge & Clark, by: *Michael G. Thompson* and *Guy A. Wade*, for appellant.

James A. McLarty, for appellees.

JOHN E. JENNINGS, Judge. Appellant, First Commercial Bank, brought suit against McGaughey Brothers, Inc., and, in the alternative, J.C. McGaughey, individually, on an instrument of guaranty, seeking judgment for $160,000.00. The guaranty agreement was signed by J.C. McGaughey as vice president for the corporation. A jury found no liability on behalf of either the corporation or Mr. McGaughey individually. We conclude that the case must be reversed and remanded.

This litigation stems from the financial problems experienced by the Village Creek and White River Levee District and the Mayberry Drainage District, two eastern Arkansas improvement districts. By 1983 the two districts owed approximately $1,300,000.00 to the Merchants and Planters Bank of Newport. For some time both districts had had trouble making payments of either principal or interest, and for several years the notes were annually renewed with the interest due being added to the amount of the new note.

The districts were merged in 1983 with a view towards annexing additional land in order to have a bond issue to pay for repairs to improvement district property. A subsequent annexa-

tion attempt failed.[1] Also by 1983, the Federal Deposit Insurance Corporation had required that the directors of Merchants and Planters Bank agree to demand that the loan be paid by the end of that year or else suffer a charge-off. The improvement district was advised that the loan had to be refinanced. Eventually the improvement district through its attorney, Fred Pickens, contacted First Commercial Bank about a loan. At the time, Mr. Pickens was also a member of the board of directors of Merchants and Planters Bank, as well as a member of the advisory board of the appellant bank. In December 1983, appellant agreed to loan the district $1,725,000.00 on condition that the district obtain sufficient individual guaranties to cover the amount of the note.

The district, through its commissioners, then approached various landowners whose farmland was benefited by the levees. McGaughey Brothers, Inc., owned several thousand acres of land which were so benefited.

In late 1983 two improvement district commissioners, William Pratt and John Conner, approached J.C. McGaughey seeking the guaranty of McGaughey Brothers, Inc., for a portion of the debt. At trial, both commissioners testified that Mr. McGaughey told them he did not have approval from his board of directors to sign for the corporation and that he either did not have authority, or doubted his authority, to sign on behalf of the corporation. Nevertheless J.C. McGaughey, as vice president for the corporation, did sign an agreement guarantying the repayment of $160,000.00 of the indebtedness.

At trial Mr. McGaughey admitted signing the guaranty ostensibly on behalf of the corporation, but contended that the commissioners were acting as agents for the bank in obtaining signatures to the guaranty agreement and thus their knowledge of Mr. McGaughey's statement concerning his lack of authority to bind the corporation should be imputed to First Commercial Bank. The trial court submitted the issue of agency to the jury, and the main issue on appeal is whether it was error to do so. We hold that the court should have ruled, as a matter of law, that the

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[1] *Williams* v. *Village Creek, White River and Mayberry Levee and Drainage District*, 285 Ark. 194, 685 S.W.2d 797 (1985); *Mayberry Drainage District* v. *Graham*, 289 Ark. 156, 711 S.W.2d 147 (1986).

commissioners were not the agents of First Commercial Bank.

The relation of agency is created 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. *Evans* v. *White*, 284 Ark. 376, 682 S.W.2d 733 (1985); *Crouch* v. *Twin City Transit, Inc.*, 245 Ark. 778, 434 S.W.2d 816 (1968); Restatement (Second) of Agency § 1 and comment a (1957). Ordinarily agency is a question of fact to be determined by the jury; but where the facts are undisputed, and only one inference can be reasonably drawn from them, it becomes a question of law. *Evans* v. *White*, 284 Ark. at 378; *Campbell* v. *Bastian*, 236 Ark. 205, 365 S.W.2d 249 (1963).

Courts which have considered the specific issue presented here have held that when a bank directs a borrower to obtain the signature of another on a personal guaranty as a condition of making a loan, the act of the borrower in obtaining the signature is one for his own benefit and the borrower is not the agent of the bank. *First National Bank of Denver* v. *Caro Construction Co., Inc.*, 211 Kan. 678, 508 P.2d 516 (1973); *CIT Financial Services, Inc.* v. *Gott*, 5 Kan. App. 2d 225, 615 P.2d 774 (1980); *Skrypek* v. *St. Joseph Valley Bank*, 469 N.E.2d 774 (Ind. App. 3 Dist. 1984).

In *Caro Construction*, Nicholas Caro was the president and sole stockholder of Caro Construction Co., Inc. The corporation had successfully bid on a contract to build a post office building in Golden, Colorado. Mr. Caro applied to First National Bank of Denver for a loan to finance construction. The bank approved the loan on the condition that the note be personally guaranteed by Mr. Caro and his ex-wife, Betty. Nicholas Caro obtained his ex-wife's signature and the loan was made. When the corporation defaulted on the obligation, the bank sued Nicholas and Betty individually. Betty's defense was that Nicholas made misrepresentations of fact to her in order to obtain her signature on the guaranty, and because he was an agent for the bank the misrepresentations would be chargeable to the bank under the doctrine of respondeat superior.

The Kansas Supreme Court, quoting *Swan Savings Bank* v. *Snyder*, 124 Kan. 827, 262 P. 547 (1928), said:

> One who desires to borrow money at a bank, or to renew an indebtedness he has there, and who goes to another to get him to sign the note with him in order that he can get the bank to accept it, acts for himself and does not act for the bank. . . . .

The Court in *Caro* continued:

> The test in determining the existence of agency so the doctrine of respondeat superior is applicable, is the right to control the servant.
>
> The bank had no control over Nicholas in procuring the signature of Betty, nor did the bank attempt to exercise any control. The bank merely required the signature of Betty and stated to Nicholas that if he wished to obtain the loan he would have to obtain her signature. The burden of proof was on Betty to establish by competent evidence the relationship of principal and agent. What constitutes agency and whether there is any competent evidence reasonably tending to prove its existence is a question of law. We conclude as a matter of law no agency existed between the bank and Nicholas Caro. [Citations omitted.]

In the case at bar Wallace Cunningham, the executive vice president for First Commercial Bank, testified that he handled the loan to the improvement district. He testified that the bank originally required that the commissioners themselves individually guarantee the debt. The commissioners declined to do so, and instead proposed that guaranties be obtained from landowners having property within the boundaries of the improvement district.

The guaranty agreement itself was apparently prepared in Mr. Pickens' office. Cunningham testified that the bank did not give any of the people representing the district any specific instructions about the execution of the loan documents. He said that, as far as he knew, the commissioners were the ones who decided who would sign the guaranty agreement and the amount of each individual's specific guaranty.

William Pratt testified that in meeting with Mr. McGaughey he was acting as a commissioner of the district. John Conner testified that First Commercial Bank gave him no instructions about any of the loan documents and that the bank did not have the power to control his actions with regard to the loan transaction. He testified that he was not acting on behalf of the bank, but rather in his capacity as a commissioner of the improvement district.

The relevant portion of Mr. McGaughey's testimony follows:

> A. They [Pratt and Conner] wanted to sign a signature on a guarantee is what it amounted to.
>
> Q. Who was the guarantee in favor of?
>
> A. A bank in Little Rock.
>
> Q. Was there anybody from the Little Rock bank present at the meeting?
>
> A. No. Not that I—they didn't identify themselves as such.
>
> Q. All right. Who at, who at the meeting had possession of this bank guaranty agreement?
>
> A. John and Bill. [Conner and Pratt]
>
> Q. Do you know how they had come to have or be carrying this guaranty agreement?
>
> A. No, they had it. I, I don't know how they got it.
>
> Q. Did you know who prepared it?
>
> A. No, I didn't.
>
> Q. What did they ask you to do with regard to the guaranty agreement?
>
> A. They told me that the Little Rock bank was requiring signatures from landowners and they were collecting the signatures for them.
>
> Q. For who?
>
> A. For, for the Little Rock bank, they were — they were

— it was a requirement from them that they have them before the loan would go through evidently.

Q. And they were carrying the guaranty agreement?

A. They, they had it on the—on the table, yes.

Q. What did they want you to sign for?

A. They wanted McGaughey Brothers to sign for $160,000.

* * *

Q. At the time it was first presented to you in '83, J.C., who did you believe Bill or John, Bill Pratt or John Conner, to be acting on behalf of?

A. Well, these signatures were required and they were getting them for the bank they said.

Q. And so?

A. I — I believed them to be acting for the bank.

Q. Which bank?

A. Little Rock bank.

* * *

Q. Mr. McGaughey, did Mr. Pratt tell you that he was acting for First Commercial Bank?

A. He didn't tell me who he was acting for.

Q. You heard his testimony in the deposition, did you not, that he was acting for the commissioners?

A. I heard that, yeah.

Q. Do you have any reason to dispute the accuracy of what he said under oath?

A. I believe he was acting for the bank but that wouldn't necessarily mean. . .

* * *

Q. Do you have any reason, Mr. McGaughey, to dispute what Bill Pratt said?

A. He didn't tell me directly that he was representing the bank.

* * *

Q. You made an assumption, didn't you, Mr. McGaughey?

A. It would, it would have been an assumption, I suppose. It's all I had to work with.

* * *

Q. They didn't tell you anything about who they represented.

A. That's right.

Q. So we can be fair with the jury, in your head you thought they were representing the landowners, which included you?

A. Yes.

When Mr. McGaughey's testimony is viewed in its entirety it is clear that he merely assumed that Pratt and Conner were acting as agents for First Commercial Bank from the fact that the bank had required that the note be guaranteed. We hold that the evidence was insufficient to create a question of fact on the issue of agency, and that that issue should have been determined by the court in appellant's favor, as a matter of law.

Of the other issues raised, we reach only those which are likely to recur upon retrial. Appellant contends that the court erred in refusing to give its requested instruction No. 7. This instruction, based on language appearing in *First American National Bank* v. *Coffey-Clifton, Inc.*, 276 Ark. 250, 633 S.W.2d 704 (1982), would have told the jury, in essence, that a guarantor has liability under a guaranty agreement if the principal debtor defaults. No doubt this is a correct general statement of law, but

the matter was adequately covered by other instructions. A trial court is not required to give a repetitious instruction. *Porter* v. *Lincoln*, 282 Ark. 258, 668 S.W.2d 11 (1984).

Appellant also contends that the court erred in refusing to give its requested instruction No. 18:

> You are instructed that one dealing with an admitted agent has the right to presume, in the absence of notice to the contrary, that he is a general agent, clothed with authority equal to the apparent scope of authority.

Although this is again a correct statement of law, we agree with the trial court that it is inapplicable to the particular facts of the case.

Finally, appellant argues that the court erred in giving the appellees' requested instruction No. 11:

> Any unauthorized signature is wholly inoperative as that of a person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value.
>
> Unauthorized signature indicates a signature made by an agent exceeding his actual or apparent authority. The unauthorized signature is effective to impose liability on the actual signor; *however, liability is limited to parties who pay the instrument in good faith, and one who knows the signature is unauthorized cannot recover from the signer on the instrument.* [Emphasis added.]

In the case at bar there was no evidence that the appellant had actual notice of Mr. McGaughey's disclaimer of authority. The only way such knowledge could have been imputed to the bank would be under the theory that the improvement district commissioners were agents for the bank. Because we have held that the commissioners were not the agents of the bank, the italicized portion of the instruction should not have been given.

We reverse and remand this case to the trial court for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

CORBIN, C.J., concurs.

MAYFIELD, J., would affirm.

COOPER, J., not participating.

DONALD L. CORBIN, Chief Judge, concurring. I concur with the result reached by the majority. However, I would not rely on *First National Bank of Denver* v. *Caro Construction Co.*, 211 Kan. 678, 508 P.2d 516 (1973), *Swan Savings Bank* v. *Snyder*, 124 Kan. 827, 830, 262 P. 547, 549 (1928), and other sister state case law for the basic premise of law that:

> One who desires to borrow money at a bank, or to renew an indebtedness he has there, and who goes to another to get him to sign the note with him in order that he can get the bank to accept it, acts for himself and does not act for the bank.

Instead, I would reverse and remand because of the court's refusal to instruct the jury that "the knowledge of an 'interested agent' is not imputed to his principal." Although I do not like the following authority, I am obliged to follow it as the long-standing precedent of Arkansas case law. *See Bank of Hoxie* v. *Meriwether*, 166 Ark. 39, 265 S.W. 642 (1924); *Little Red River Levee Dist. No. 2* v. *Garrett*, 154 Ark. 76, 242 S.W. 555 (1922); *Greer* v. *Levee Dist. No. 3*, 140 Ark. 60, 215 S.W. 171 (1919). *See also Central Mfg. Co.* v. *St. Louis-San Francisco Ry.*, 394 F.2d 704 (8th Cir. 1968).

The appellant bank, as a condition of refinancing the existing indebtedness of the Village Creek and White River Levee District and Mayberry Drainage District to the Merchants and Planters Bank of Newport, Arkansas, required that the districts deliver to it guarantees from individual landowners who were benefited by the improvements and had sufficient net worth to repay the debt. The commissioners of the district, according to their testimony, were acting within their capacities as commissioners of the district in obtaining guaranty signatures. I have to agree with appellant's argument that even if the commissioners were acting as the agents of the bank, they were so interested in the transaction on an individual basis and as commissioners of the district that any knowledge gained by them during McGaughey's signing of the guaranty agreement cannot be imputed to First

Commercial Bank. I do not believe we would have to engage in speculation to reach the conclusion that if McGaughey's disclaimer had been made known to appellant, it would not have funded the loan. As appellant points out, this would have been a result which would not have been in the best interests of the commissioners, either in their official capacities as commissioners or as individual landowners in the district. Generally, when an agent has no personal interest in the transaction, the law presumes that he will forward all relevant information obtained by him in his position as agent to the principal. However, the basis for the rule ceases to exist when, as here, the agent has a personal interest in the transaction which may conflict with the principal's interests.

Virginia HENDERSHOT *v.* Judy A. HENDERSHOT and Tom V. Hendershot

CA 89-425 785 S.W.2d 34

Court of Appeals of Arkansas
Division I
Opinion delivered February 28, 1990

Tucker & Thrailkill, by: *Patricia A. Tucker*, for appellant.

Gordon L. Humphrey, Jr., Legal Services of Arkansas, for appellees.

JOHN E. JENNINGS, Judge. The appellees, Tom and Judy Hendershot, were divorced in 1983, and Judy was awarded primary custody of their child, Chancy. In 1989 the appellant, Virginia Hendershot, Chancy's great-aunt, filed a "Petition to Intervene and Other Relief" seeking to intervene in the divorce case and asking for court-ordered visitation with her grandnephew. Both of the child's parents opposed the petition and filed a motion to dismiss. After a hearing, the chancellor granted the motion. The argument on appeal is that this was error. We disagree and affirm.

Although the appellant's claim was styled as a petition to intervene it was, in actuality, an independent action seeking court ordered visitation rights. The appellees' divorce action had been terminated by a final order some six years before this petition was filed. The petition did not seek custody, did not allege that appellant had previously had legal custody of Chancy, and did not allege that either parent was unfit. It did allege that appellant had, "for the most part, raised" the defendant, Tom Hendershot; that she had cared for her grandnephew, Chancy, for extended

periods of time; that she "figures significantly in the life" of the child; that she stands "in loco parentis" with the child; and that it would be in the child's best interest that she be allowed to visit him. Appellant also alleged that Judy Hendershot had not permitted her to visit with the child for the past four weeks.

At the hearing on the motion to dismiss, counsel for the appellant was permitted by the court to make a statement as to what additional matters she thought that she could prove. While appellant's counsel characterizes her statement as "testimony," it is apparent that the trial court treated it as additional allegations and, in effect, permitted amendment of the pleadings under Ark. R. Civ. P. Rule 15, even though appellant made no specific request that the complaint be amended.[1] The additional allegations made by appellant were: that she was an accountant, practicing in DeQueen, Arkansas; that Tom Hendershot had lived with the appellant from age eleven or twelve until he went to college; that she was at the hospital when Chancy was born; that the child had spent four Christmases with her; that she had voluntarily kept Chancy for a period of nine months in 1988 while Judy Hendershot went to Texarkana; and that she had spent thousands of dollars on the child.

The issue is whether a great-aunt may maintain an independent action for visitation with her grandnephew, when she has never had legal custody of the child, over the objections of both parents, neither of whom are alleged to be unfit to have custody of the child. To decide this issue it is necessary to examine our law relating to the visitation rights of grandparents. In *Veazey* v. *Stewart*, 251 Ark. 334, 472 S.W.2d 102 (1971)), the court stated that "under the general law there is no right of visitation enforceable by injunction in favor of a grandparent with respect to a grandchild when a natural parent having custody resists or objects." In *Quarles* v. *French*, 272 Ark. 51, 611 S.W.2d 757 (1981), the court said "at common law, a grandparent could not maintain an action for visitation rights to a grandchild except as a party to a custody proceeding." In *Cox* v.

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[1] To take a different view would mean that the trial court was obliged to decide the motion to dismiss based solely on the complaint as filed. *See Guthrie* v. *Tyson Foods*, 285 Ark. 95, 685 S.W.2d 164 (1985).

Stayton, 273 Ark. 298, 619 S.W.2d 617 (1981), an adoption case, the supreme court discussed the reason behind the rule:

> What the appellants ask us to do through this line of argument is to recognize some form of inherent 'grandparental rights' beyond those previously bestowed. This we decline to do, not out of disregard for the genuine relational ties which naturally exist between grandparents and grandchildren, but rather for the reason that the sanctity of the relationship between the parent and the child must be the overriding concern. To create new, enforceable rights in grandparents could lead to results that would burden rather than enhance the welfare of children.

In 1975 the New Jersey Supreme Court in *Mimkon* v. *Ford*, 66 N.J. 426, 332 A.2d 199 (1975), said that "[t]he courts have been substantially unanimous in denying a grandparent visitation privileges with grandchildren when the custodial parent objects." The court found five reasons cited in the cases for such a rule:

> (1) Ordinarily the parents' obligation to allow the grandparent to visit the child is moral, and not legal.
>
> (2) The judicial enforcement of grandparent visitation rights would divide proper parental authority, thereby hindering it.
>
> (3) The best interests of the child are not furthered by forcing the child into the midst of a conflict of authority and ill feelings between the parent and grandparent.
>
> (4) Where there is a conflict as between grandparent and parent, the parent alone should be the judge, without having to account to anyone for the motives in denying the grandparent visitation.
>
> (5) The ties of nature are the only efficacious means of restoring normal family relations and not the coercive measures which follow judicial intervention.

See also Brummer & Looney, *Grandparent Rights in Custody, Adoption and Visitation Cases*, 39 Ark. L. Rev. 259, 263 (1985).

Because of the position taken by most courts, the legislatures of all fifty states have now enacted statutes which

permit the granting of visitation rights to grandparents. *See* Fernandez, *Grandparent Access: A Model Statute*, 6 Yale L. & Pol'y Rev. 109 (1988). In Arkansas the first legislation regarding grandparent visitation was Act 320 of 1975 which authorized the chancellor to grant such visitation rights in connection with a divorce or custody proceeding. That act was repealed by more comprehensive legislation, Act 403 of 1985, which was subsequently amended by Act 17 of 1987, and is now codified at Ark. Code Ann. § 9-13-103. The code section provides that chancery courts are authorized to grant grandparents and great-grandparents reasonable visitation rights if such an order would be in the best interest of the child. The section applies only when the marital relationship between the child's parents has been severed by death, divorce, or legal separation. The section also contains a provision authorizing the court to award attorney's fees and costs against the petitioner if it finds the petition "not well-founded."

If, as the supreme court has held, there is no common law right to grandparent visitation, it must logically follow that a great-aunt would have no such right. The legislature has seen fit to change the rule by statute to allow such rights to grandparents and great-grandparents, under certain circumstances and with specific protective provisions for the parents. The statute is clear and cannot be read to include the appellant. Nor can we agree with appellant's argument that, because she helped raise Tom Hendershot, she should be treated as a grandparent under the statute. When the language of the statute is clear it is our duty to apply it as it is written. *Hinchey* v. *Thomasson*, 292 Ark. 1, 727 S.W.2d 836 (1987).

In reaching our conclusion we have also examined *In re Custody of D.M.M.*, 137 Wis.2d 375, 404 N.W.2d 530 (1987), a case which appears on its face to support the appellant's position, even though it is not binding precedent for us. There the Wisconsin Supreme Court held that a statute authorizing trial courts to order visitation for grandparents and great-grandparents did not preclude a petition for visitation rights filed by a great-aunt. The case is distinguishable on two grounds: first, the great-aunt in that case had had legal custody for six years; and second, under prior Wisconsin case law such an action was not prohibited. *See Weichman* v. *Weichman*, 50 Wis.2d 731, 184 N.W.2d 882 (1971).

We are persuaded that the trial court was correct in granting the motion to dismiss.

Affirmed.

COOPER and ROGERS, JJ., agree.

McILROY BANK & TRUST *v.* ACRO CORPORATION, et al.

CA 89-196 785 S.W.2d 47

Court of Appeals of Arkansas
Division II
Opinion delivered February 28, 1990

Roy & Lambert, by: *David E. Morris*, for appellant.

Steven D. Tennant; and *Pearson, Evans & Chadwick*, by: *C. Thomas Pearson*, for appellees.

JOHN E. JENNINGS, Judge. Appellee Acro Corporation was in the business of raising chickens and, in connection with its business, borrowed extensively from appellant, McIlroy Bank & Trust Company. Acro defaulted on its notes and on March 3, 1986, McIlroy filed suit for $500,000.00 and sought to foreclose its mortgages in Washington County Chancery Court. Ralston Purina Company, another creditor of Acro, was permitted to intervene.

On March 21, 1986, Acro filed a petition under Chapter 11 of the United States Bankruptcy Code and the foreclosure suit was stayed. The stay was subsequently lifted, and the chancery action was set for trial for November 1, 1988. On that date counsel for Acro, McIlroy Bank, and Ralston Purina appeared and announced that the case had been settled. The parties agreed that the court would enter a consent judgment in favor of McIlroy Bank against Acro for $541,772.24, representing the amount of principal and interest due. They also agreed that the settlement would have no effect on a related lawsuit then pending in Washington County Circuit Court. Finally, they agreed that Ralston Purina would be awarded a reasonable attorney's fee. Nothing was said about an attorney's fee for appellant. The court asked Mr. Morris, the attorney for McIlroy Bank, to prepare the decree.

Morris prepared a proposed decree but when he presented it

to Mr. Pearson, the attorney representing Acro, Pearson would not approve it because the decree would have awarded an attorney's fee of more than $54,000.00, and also because of a disagreement as to the language in the decree preserving the rights of the parties in the pending action in circuit court. Unable to resolve the disagreement, counsel for McIlroy Bank then took the unapproved consent judgment to the judge's office and left it for him to sign. Counsel for Acro responded by drafting its own proposed consent decree which awarded McIlroy Bank an attorney's fee of only $1,000.00 and contained substantially different language concerning the effect on the related litigation pending in circuit court. It was this decree that the chancellor signed, although none of the lawyers had approved it.

McIlroy Bank then filed a motion to amend the judgment. The court never ruled on the motion and it was "deemed denied" at the end of thirty days from its filing. Arkansas Rules of Appellate Procedure, Rule 4(c).

The primary argument on appeal is that the chancellor erred in signing a consent agreement to which appellant did not agree. We hold that it was error to sign the consent decree under these circumstances.

Rule 58 of the Arkansas Rules of Civil Procedure provides that the trial court "may enter its own form of judgment or decree or may enter the form prepared by the prevailing party without the consent of opposing counsel." A Reporter's Note to the Rule states:

> Implicit in this rule is the right of opposing counsel to be afforded an opportunity to approve the form of the judgment or decree. Where there is disagreement between the parties as to the form of the judgment or decree, the court should hold a hearing to consider whatever objections there might be.

Although Rule 58 does not, by its terms, apply to consent judgments, the admonition contained in the note applies with considerably more force in this context. A consent judgment is different in nature from a judgment rendered on the merits. In *Vaughan* v. *Brown*, 184 Ark. 185, 40 S.W.2d 996 (1931), the court said, "[c]onsent excuses error and ends all contention

between the parties. It leaves nothing for the court to do, but to enter what the parties have agreed upon, and when so entered, the parties themselves are concluded." (quoting *Schmidt* v. *Oregon Gold Mining Co.*, 28 Ore. 9, 40 P. 406 (1895)). In *Selig* v. *Barnett*, 233 Ark. 900, 350 S.W.2d 176 (1961), the court said:

> A judgment by consent is in effect an agreement or contract of the parties, acknowledged in court and ordered to be recorded, with the sanction of the court. A judgment by consent of the parties is a judgment, the provisions and terms of which are settled and agreed to by the parties to the action in which it is entered, and which is entered of record by the consent and sanction of the court. A consent judgment is not a judicial determination of any litigated right, and is not the judgment of the court except in the sense that the court allows it to go upon the record and have the force and effect of a judgment. [Punctuation altered and citations omitted.]

A valid consent judgment cannot be rendered by a court when the consent of one of the parties thereto is wanting. It is not sufficient to support the judgment that a party's consent thereto may at one time have been given; consent must exist at the very moment the court undertakes to make the agreement the judgment of the court. *Burnaman* v. *Heaton*, 150 Tex. 333, 240 S.W.2d 288 (1951). The term "consent judgment" necessarily implies a consent at the time the judgment is entered. The court may not enter judgment when it is advised that one of the parties either denies the existence of the contract or repudiates it, or for any other reason no longer consents to the judgment. *Van Donselaar* v. *Van Donselarr*, 249 Iowa 504, 87 N.W.2d 311 (1958); *see also Lalanne* v. *Lalanne*, 43 N.C. App. 528, 259 S.E.2d 402 (1979). A consent judgment rendered without the consent of a party will be inoperative in its entirety. *Overton* v. *Overton*, 259 N.C. 31, 129 S.E.2d 593 (1963).

Milstead v. *Milstead*, 633 S.W.2d 347 (Tex. App. 1982), was a divorce case. During the trial the parties entered into a settlement in open court. Afterwards each party submitted proposed judgments which were conflicting. The court cited *Burnaman, supra*, for the proposition that a valid agreed judgment cannot be entered when the consent of one of the parties is

lacking. The *Milstead* court said:

> The trial court has no power to supply terms, provisions or details not previously agreed to by the parties.
>
> When the parties submitted conflicting motions for judgment, the trial court was put on notice that mutual consent of the parties was lacking. At that point, rather than granting one party's motion and denying the other, the court should have denied *both* motions on the ground that mutual consent was lacking. [Citations omitted, emphasis in original.]

The circumstances in the case at bar are virtually identical to those presented to the court in *Milstead.* The chancellor should not have signed the decree proposed by the appellee after having become aware of a disagreement between the parties. Appellant is entitled to an order setting aside the consent judgment in its entirety. *See Overton* v. *Overton, supra.*

Reversed and Remanded.

MAYFIELD and ROGERS, JJ., agree.

John David GALLAGHER *v.* CITY OF VAN BUREN

CA CR 89-75 786 S.W.2d 837

Court of Appeals of Arkansas
Division II
Opinion delivered February 28, 1990

Robert S. Blatt, for appellant.

Steven G. Peer, for appellee.

MELVIN MAYFIELD, Judge. Appellant, John David Gallagher, was tried before a jury on May 19, 1988, for the offense of driving while intoxicated. The jury was unable to reach a verdict and the trial court declared a mistrial. On November 23, 1988, the matter was retried with the same result. On January 6, 1989, appellant filed a motion to dismiss on the ground that to try him a third time when two previous jury trials had resulted in "hung juries" would subject him to double jeopardy in violation of the Constitution of the United States and the Constitution of the State of Arkansas. The trial court denied the motion and this appeal followed.

Appellant's only argument on appeal is that his motion to dismiss on double jeopardy grounds should have been granted. Appellant contends that a retrial is prohibited because the appellee failed to present constitutionally sufficient evidence at the first or second trials to warrant a conviction, and that under the ruling in *Burks* v. *United States*, 437 U.S. 1 (1978), the court

should not be able to try him again by presenting substantially the same evidence.

The answer to appellant's argument is found in *Richardson* v. *United States*, 468 U.S. 317 (1984). In *Richardson* a jury acquitted the petitioner of one of several counts against him, but was unable to agree as to the remaining counts. The trial court declared a mistrial as to the remaining counts and set them for retrial. Richardson moved to bar his retrial, alleging a second trial would subject him to double jeopardy because evidence sufficient to convict on the remaining counts had not been presented at the first trial. The motion was denied and Richardson appealed.

The United States Supreme Court found the claim unavailing because the protection of the Double Jeopardy Clause applies only if there has been some event, such as an acquittal, which terminates the original jeopardy. The Court stated:

> [W]e hold . . . that the failure of the jury to reach a verdict is not an event which terminates jeopardy. Our holding in *Burks* established only that an appellate court's finding of insufficient evidence to convict on appeal from a judgment of conviction is for double jeopardy purposes, the equivalent of an acquittal; it obviously did not establish . . . that a hung jury is the equivalent of an acquittal. . . . [W]e reaffirm the proposition that a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected. The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree. Regardless of the sufficieny of the evidence at petitioner's first trial, he has no valid double jeopardy claim to prevent his retrial.

468 U.S. at 325-26.

Article 2, Section 8 of the Arkansas Constitution provides in pertinent part:

> [N]o person, for the same offense, shall be twice put in jeopardy of life or liberty; but if, in any criminal prosecution, the jury be divided in opinion, the court before which

> the trial shall be had may, in its discretion, discharge the jury, and commit or bail the accused for trial at the same or the next term of said court.

Although appellant cites no Arkansas cases on the issue presented in this case, the appellee cites the case of *Beard, Morrison & Cook* v. *State*, 277 Ark. 35, 639 S.W.2d 52 (1982), which held that the double jeopardy rights of the appellants in that case would not be violated if they were required to again stand trial after the court had declared a mistrial when the jury at the first trial had reported it was "hopelessly deadlocked."

The appellant in the instant case has presented nothing to suggest that the above quoted provision of the Arkansas Constitution is not in harmony and agreement with the rule set out in *Richardson* v. *United States, supra.*

Affirmed.

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

Paul T. RYAN, Jr. *v.* STATE of Arkansas

CA CR 89-172 786 S.W.2d 835

Court of Appeals of Arkansas
Division II
Opinion delivered February 28, 1990

Poynter & Gearhart, P.A., by: *Van A. Gearhart*, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant, Paul T. Ryan, Jr., was tried by the court without a jury and convicted of first offense driving while intoxicated. On appeal, he challenges the sufficiency of the evidence.

At trial, Baxter County Deputy Sheriff Michael Redmond testified that at approximately 1:30 a.m. on March 27, 1988, he was called to the scene of a one-vehicle accident on State Highway 101. When he arrived, he was informed that the driver had been taken to the hospital in a private vehicle. At the scene, he found a 1977 Chevrolet pickup truck in a ditch twenty-one feet from the pavement. The truck appeared to have rolled over, the front window was out and there was debris scattered around the

area which appeared to have come from the bed of the pickup. A check of the vehicle license determined that the vehicle belonged to appellant, Paul Ryan, Jr.

According to Deputy Redmond, after he finished investigating the scene of the accident, he went to the hospital where he found the appellant, who was being treated in one of the emergency rooms. The deputy testified that he arrived at the hospital at 2:32 a.m.; that appellant had no visible injuries, but his speech was slurred and there was a heavy odor of intoxicating beverages about him. Redmond said appellant admitted he had been driving the truck but said he could not remember how the accident happened. The deputy testified that he advised appellant of his rights under the implied consent law, and appellant consented to have blood drawn for a blood alcohol test.

On cross-examination Deputy Redmond admitted that, although in his opinion appellant was extremely intoxicated at that time, he did not charge appellant with DWI until approximately three weeks later when he received the result of the blood test. Because of evidentiary problems, the result of the test was not admitted into evidence at the trial.

Baxter County Deputy Sheriff John Booker testified that he was en route to the scene of the accident when he received word that the driver in the accident had been taken to the hospital. He said he then went to the Baxter County Hospital, arrived at 2:00 a.m. and located appellant in an emergency room. He said appellant was sound asleep on a gurney; that he did not attempt to talk to appellant; and that there was a strong odor of intoxicating beverages in the room, coming from the appellant.

On appeal, the appellant argues that without the result of the blood alcohol test, the evidence was insufficient to sustain the conviction. He contends that the only evidence of DWI was the testimony that he had an odor of alcohol about him and that his speech was slurred. He maintains the fact that he had an automobile accident cannot be used as evidence of intoxication because it could have just as easily been caused by a tire blowing out. Appellant emphasizes that he was not charged with DWI until three weeks after the accident and insists that this shows there was not even probable cause to arrest him until the result of the blood test was received.

Appellee submits that we should affirm on the basis that appellant failed to preserve his argument for appeal because he failed to move for a directed verdict or otherwise challenge the sufficiency of the evidence in the trial court. In *Doby* v. *State*, 28 Ark. App. 23, 770 S.W.2d 666 (1989), we cited Ark. R. Crim. P. 36.21(b) as authority for the statement that "a defendant is not required to request a directed verdict in a bench trial to preserve the sufficiency of the evidence," and we recently reaffirmed our position on this issue in *Smith* v. *State*, 30 Ark. App. 111, 783 S.W.2d 72 (1990).

Before determining the sufficiency of the evidence, we must also consider another argument which appellee submits. The state contends that we should consider the result of the blood test in reaching our decision on sufficiency because *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), requires us to consider all the evidence on appeal, even that which was inadmissible at trial. We believe appellee is misreading *Harris*. That case holds that when considering an appeal in which sufficiency of the evidence is an issue and there are also arguments that certain evidence introduced during trial was inadmissible, we deal with the sufficiency question first, considering all the evidence, even that which we may later hold was erroneously admitted at trial. This does not mean, however, that on appeal we can consider evidence which the trial court excluded.

We now come to the issue of whether the evidence is sufficient to sustain the conviction. On appeal in criminal cases, whether tried by a judge or jury, we review the evidence in the light most favorable to the state and affirm if there is any substantial evidence to support the trial court's judgment. *Lane* v. *State*, 288 Ark. 175, 702 S.W.2d 806 (1986); *Harris* v. *State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985). Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Jones* v. *State*, 269 Ark. 119, 598 S.W.2d 748 (1980). Because evidence is circumstantial does not render it insubstantial as the law makes no distinction between direct evidence of a fact and circumstances from which it may be inferred. *Johnson* v. *State*, 7 Ark. App. 172, 646 S.W.2d 22 (1983); *Small* v. *State*, 5 Ark. App. 87, 632 S.W.2d 448 (1982).

The evidence, when considered in the light most favorable to the state, showed that appellant was involved in a one-vehicle accident; he had a strong odor of alcohol about his person; and his speech was slurred. The deputy sheriff who questioned appellant testified that shortly after the accident appellant appeared to be "very drunk, very intoxicated." A careful review of the record convinces us, without considering the result of the blood test, that there is substantial evidence to sustain appellant's conviction.

Affirmed.

JENNINGS and ROGERS, JJ., agree.

J.A. RIGGS TRACTOR COMPANY *v.* William ETZKORN

CA 89-254 785 S.W.2d 51

Court of Appeals of Arkansas
Division I
Opinion delivered March 7, 1990
[Rehearing denied April 4, 1990.]

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

David L. Pake, for appellee Death and Permanent Total Disability Trust Fund.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Arkansas Workers' Compensation Commission. Appellant, J.A. Riggs Tractor Company, appeals from an opinion of the full Commission finding that appellee, William Etzkorn's, healing period had not ended and appellant was not entitled to credit for any weekly indemnity benefits paid to date against its maximum liability for permanent total disability benefits imposed by Arkansas Code Annotated Section 11-9-502(b)(1) (1987). We affirm.

Appellee was severely injured in a work-related injury on May 19, 1986, when a front-end loader bucket weighing approximately 2,500 pounds fell on him. There is no dispute that appellee's claim is compensable. The present action results from a disagreement between appellant and the Death and Permanent Total Disability Trust Fund over the extent to which each is liable for appellee's disability benefits. The full Commission affirmed and adopted the administrative law judge's findings of fact and conclusions of law. The Commission found that appellee was still within his healing period and any payments made by appellant

during this period were classified as temporary total disability benefits which could not be credited against the maximum permanent disability benefits for which appellant was liable. It is from this order that appellant appeals.

As its only point for reversal, appellant argues that the Commission erred in holding that it is not entitled to credit against its maximum liability all weekly indemnity benefits paid to or on behalf of appellee. The statute upon which appellant relies, Arkansas Code Annotated Section 11-9-502(b)(1) (1987), provides as follows:

> (b)(1) For injuries occurring on and after March 1, 1981, the first seventy-five thousand ($75,000) of weekly benefits for death or permanent total disability shall be paid by the employer or his insurance carrier in the manner provided in this chapter.

This court addressed this issue in *Sparks Regional Medical Center* v. *Death and Permanent Total Disability Bank Fund*, 22 Ark. App. 204, 737 S.W.2d 463 (1987) and held that all weekly disability benefits paid by appellant to the date of the hearing were "temporary total disability" and as such could not be credited against the $75,000 permanent disability benefits payable by the employer before subsequent benefits became the liability of the Death and Permanent Total Disability Trust Fund as provided above in Arkansas Code Annotated Section 11-9-502(b)(1) and (b)(2) (1987). Appellant herein contends that this court should reverse *Sparks* or confine it to its facts, or find that the case at bar does not support a finding that any benefits paid to appellee were anything other than permanent and total disability.

Appellant argues that appellee was permanently and totally disabled as of the date of his accident and that he will probably remain so for the remainder of his life. It, therefore, argues the word "temporary" is not literally descriptive of appellee's total disability. In support thereof, appellant alleges that the term "temporary total disability" is a creature of common law and is not included in the Workers' Compensation Act. Although the act does not specifically refer to temporary total disability, the term has become a definite part of our compensation law with a definite meaning attributable to it. The integration of this term to our act is not unique to our court. As stated in 2 A. Larson, *The*

Law of Workmen's Compensation § 57-12(a) (1989):

> Although the earliest compensation acts drew no distinction between "temporary" and "permanent" disability, since they simply paid benefits during any period of actual wage loss, there evolved in America a four-way classification of disabilities, (1) temporary total, (2) temporary partial, (3) permanent partial, and (4) permanent total.

Temporary disability is determined by the extent to which a compensable injury affects a claimant's ability to earn a livelihood. Temporary total disability is defined as that period within the healing period in which an employee suffers a total incapacity to earn wages. *Arkansas State Highway and Transp. Dep't* v. *Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is defined as that period for healing of the injury resulting from the accident which continues until the employee is as far restored as the permanent character of the injury will permit. If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Mad Butcher, Inc.* v. *Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. Based on the foregoing, we are unwilling to depart from the above and other decisions which have given these words their idiomatic meanings and decline to reverse or modify our decision in *Sparks* which applies those meanings to Arkansas Code Annotated Section 11-9-502.

Regarding the Commission's finding that appellee's healing period had not ended, the evidence in the case at bar reveals that appellee sustained severe fractures to his pelvic bones in the accident. He also suffered severe crushing of the tissues of the upper thighs, pelvic area, and lower abdomen as well as substantial damage to the bowel and bladder causing loss of control over his bodily functions. A colostomy was performed and a catheter inserted to alleviate these problems. Subsequently, appellee's physicians found it necessary to amputate his left leg at the thigh. Through numerous operations, the colostomy was closed, the catheter removed, and the urethra reconnected. Appellee has become ambulatory with the use of an artificial prosthesis. The

most recent entries in the record from appellee's two primary physicians reveal that appellee was still within his healing period. Dr. Munir Zufari, his surgeon, generally stated that progress was slow and appellee still had various problems. Dr. Zufari noted that after further work with Dr. Sinclair Armstrong, appellee's urologist, he would be in a better position to say if appellee had reached maximum rehabilitation ability. A June 29, 1988, report by Dr. Armstrong stated:

> This is to inform you that Mr. William Etzkorn is still in the healing period. He continues to have significant medical problems which require continued medical treatment.

The determination of when the healing period has ended is a factual determination that is to be made by the Commission, and if that determination is supported by substantial evidence it must be affirmed. *Mad Butcher, Inc.*, 4 Ark. App. at 132, 628 S.W.2d at 586. From the evidence, we are unable to conclude that the finding of the Commission that the healing period had not ended and that appellee was still suffering temporary total disability is not supported by substantial evidence.

Affirmed.

MAYFIELD and ROGERS, JJ., agree.

Gloria Dean FLOWERS *v.* STATE of Arkansas

CA CR 89-181 785 S.W.2d 242

Court of Appeals of Arkansas
Division II
Opinion delivered March 7, 1990

Bill R. Holloway, for appellant.

Steve Clark, Att'y Gen., by: *John D. Harris*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Gloria Dean Flowers appeals from her conviction of murder in the second degree, for which she was sentenced to a term of eleven years in the Arkansas Department of Correction. She contends only that the trial court erred in admitting into evidence an exculpatory pretrial statement that she made to the police. We find no error and affirm.

The evidence discloses that appellant shot and killed Johnny Brown on the night of August 26, 1988, in the City of McGehee in Desha County. Although she eventually pled self-defense, neither she nor any of several companions called an ambulance or hailed a police car which passed by shortly after the shooting. About thirty minutes after the shooting, appellant and her companions put the deceased's body into the trunk of a car, drove to Pine Bluff in Jefferson County, and dropped off the body on a dirt road near the Arkansas River.

Pine Bluff police officers testified that they found and identified the body early the next morning, and were informed

that appellant was his "nearest relative." An officer then went to appellant's house to inform her that Brown was dead. At the officer's request, appellant went to the police station to give a statement. The officer asked appellant when she last had seen Brown and if he had had an argument with anyone recently. Appellant told the officer that she had seen the deceased at her home the previous afternoon, but that he had left around 7:00 p.m. She also told the officer that the deceased had argued with a person named David Dillworth several days earlier. Appellant then signed a written statement containing that information. Later that day, the police were informed by witnesses that appellant and the deceased had been in McGehee the night before, and that appellant had shot the deceased and brought his body back to Pine Bluff. When this information was confirmed by an eyewitness to the killing, appellant was arrested.

In the trial court, appellant's objection to admission of the pretrial statement was made for the first time when the officer testified. There had been no motion to suppress. The objection was based initially on the failure of the police to advise appellant of her *Miranda* rights. The trial court properly denied that objection on a finding that it was untimely and that no good cause for its untimeliness had been shown. *See* Ark. R. Crim. P. 16.2; *Oglesby* v. *State*, 299 Ark. 403, 773 S.W.2d 443 (1989); *Dodson* v. *State*, 4 Ark. App. 1, 626 S.W.2d 624 (1982). Appellant then made a very general relevancy objection.

On appeal, appellant has abandoned her *Miranda* arguments and contends simply that the evidence was immaterial to any issue in the case, was highly prejudicial, and was introduced only to inflame the jury. We cannot agree.

"Relevant evidence" is defined as any evidence having the tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Ark. R. Evid. 401. Determinations of the relevancy of evidence and whether its probative value is substantially outweighed by the danger of unfair prejudice are matters within the trial court's discretion. This court will affirm such determinations absent a showing of an abuse of discretion. *Irvin* v. *State*, 28 Ark. App. 6, 771 S.W.2d 26 (1989); *Clark* v. *State*, 26 Ark. App. 276, 764 S.W.2d 458

(1989).

As a rule of general application, proof of an attempt to fabricate evidence of innocence, or other conduct amounting to an obstruction of justice, is admissible. *See Kellensworth* v. *State*, 276 Ark. 127, 633 S.W.2d 21 (1982); *Kidd* v. *State*, 24 Ark. App. 55, 748 S.W.2d 38 (1988); 2 J. Wigmore, *Evidence* § 278 (Chadbourn rev. 1979); E. Cleary, *McCormick's Handbook of the Law of Evidence* §§ 190, 273 (3rd ed. 1984). When a defendant voluntarily offers an untrue exculpatory statement or explanation, it may be considered as circumstantial evidence of not only one's belief that his case is weak, but also of guilt itself. *Kellensworth* v. *State, supra. See also United States* v. *Eley*, 723 F.2d 1522 (11th Cir. 1984); *United States* v. *Rajewski*, 526 F.2d 149 (7th Cir. 1975). Here, proof that appellant continued to cover up the circumstances of Brown's death, by lying to the police about her last encounter with him, served directly to rebut appellant's plea of self-defense and was evidence from which the jury might infer a consciousness of guilt on her part. From our review of the record, we cannot conclude that the trial court abused its discretion in admitting this evidence.

Affirmed.

COOPER and JENNINGS, JJ., agree.

Odis ROSS, Administrator of the Estate of Robert Ross, Jr.
v. Dorothy MOORE

CA 89-270 785 S.W.2d 243

Court of Appeals of Arkansas
En Banc
Opinion delivered March 7, 1990

Felver A. Rowell, Jr., for appellant.

Dale Lipsmeyer, for appellee.

JAMES R. COOPER, Judge. This is the second appeal in this paternity case. In the first appeal, *Ross* v. *Moore*, 25 Ark. App. 325, 758 S.W.2d 423 (1988), we reversed the trial court's finding that the decedent, Robert Ross, was the putative father of the appellee's two children because the appellee had not proven her case by clear and convincing evidence. Although a blood test had been performed in connection with those proceedings, the results were not made part of the record.

In the second trial, the blood test report from National

Paternity Laboratories, Inc., was introduced into evidence over the objection of the appellant. At the conclusion of the hearing, the circuit court again found that the decedent was the putative father. From that decision, comes this appeal.

The appellant argues that the evidence was insufficient to establish paternity, that the trial court erred in allowing the blood test report to be admitted into evidence, and that the trial court erred in allowing the decedent's former attorney to testify. We agree that the trial court erred in permitting the blood test report to be introduced, and we reverse and remand.

At the second hearing, a report from National Paternity Laboratories, Inc., was admitted into evidence. This report was addressed to Joe Cambiano, the decedent's former attorney. It stated:

> On August 25, 1983 blood specimens were received from the Child Support Enforcement Unit on Robert Ross (alleged father), Dorothy M. Moore (presumed mother), Tracy J. Moore (child #1) and Dexter Moore (child #2) for the purpose of paternity exclusion studies. Completed identification forms of all parties are in our files.

The report stated further that the plausability of paternity for Tracy was % 98.39 and for Dexter % 96.7. The report concluded that it was very likely that both children were fathered by the decedent. The report was signed by Laboratory Director Randall A. Smith, Ph.D., and his signature was notarized.

The appellant objected to the introduction of this report because it did not reflect that it was performed by a duly licensed physician appointed by the court in accordance with Ark. Code Ann. § 9-10-108 (1987). The appellant also objected because

> [H]e does not show that the blood in these samples were drawn by the physicians or person qualified to do so to administer the test. Without that foundation, your honor, and without that testimony the report itself is not subject to being introduced.

Later in the hearing, the appellant again objected on the grounds that the report did not show that the people who conducted the test were qualified, and that a proper foundation had not been

laid. The appellant then referred to subsection § 9-10-108(b), which was in effect at the time of the hearing, and which provided that:

> (b) The tests shall be made by a duly qualified physician or physicians, or by another duly qualified person or persons, not to exceed three (3), to be appointed by the court.

Subsection (c) further provided that:

> (c)(1) The results of the tests shall be receivable in evidence.
>
> (2) A written report of the test results by the duly qualified expert performing the test, certified by an affidavit duly subscribed and sworn to by him before a notary public, may be introduced in evidence in illegitimacy actions without calling the expert as a witness. If either party shall desire to question the expert in those cases where he has performed the blood tests, the party shall have him subpoenaed within a reasonable time prior to trial.
>
> (3) The experts shall be subject to cross-examination by both parties after the court has caused them to disclose their findings.

(*Cf.* Ark. Code Ann. § 9-10-108 (Supp. 1989)) (changing prior law). The appellant contends that it was error for the trial court to admit the report into evidence because no foundation was laid pursuant to subsection (b). Although the circuit court has broad discretion in determining whether such reports should be admitted into evidence, *Chandler* v. *Baker*, 16 Ark. App. 253, 700 S.W.2d 378 (1985), we hold that the trial court abused its discretion in this case.

Prior to the adoption of Ark. Code Ann. § 9-10-108, this report would have been considered inadmissible hearsay, and in order to be admissible and fall into one of the exceptions to the hearsay rule, certain foundational requirements must have been met. *Shipley* v. *State*, 25 Ark. App. 262, 757 S.W.2d 178 (1988). For example, in order for this evidence to fall into the medical diagnosis exception, the proponent would have to show that the statements were made for the purpose of medical diagnoses or treatment. Ark. R. Evid. 803(4). Other medical records may be

admitted where there is a showing of trustworthiness or authenticity, see *Lee* v. *State*, 266 Ark. 870, 587 S.W.2d 78 (1979), or where the author of the medical report is in court to testify and is subject to cross-examination. *See Southern Farm Bureau Casualty Ins. Co.* v. *Pumphrey*, 256 Ark. 818, 510 S.W.2d 570 (1974).

The purpose of § 9-10-108 is to relax these foundational requirements and make it less difficult to introduce paternity testing results into evidence. However, to insure the reliability of this type of testing, the foundational prerequisites in the statute must be met. *See Newton* v. *Clark*, 266 Ark. 237, 582 S.W.2d 955 (1979). In light of the fact that recently developed genetic testing can, with a high degree of certainty, identify the father of a child and, thus, be viewed as conclusive by the fact-finder in paternity suits, we do not think that strict adherence to the statutory prerequisites is unreasonable.

In *Tolhurst* v. *Reynolds*, 21 Ark. App. 94, 729 S.W.2d 25 (1987), we upheld the trial court's refusal to admit a similar blood test report because the persons testifying about the report were not the persons who actually conducted the test. In that case the person supervising the tests and the person who verified the results testified, but both admitted that they did not actually perform the tests. We held that the person making the test must make the verification on the test. Since that was not done in this case we must reverse and remand.

In this case, the appellee has totally failed to establish the statutory foundation which is a prerequisite to admission into evidence. There is nothing in the report to indicate the identity of the person who performed the test or whether the person who performed the test was a duly qualified expert. Although the report is signed by Dr. Smith and states that Dr. Smith is the laboratory director, there is nothing in the report to indicate that Dr. Smith was the person who performed the test, or that he was a qualified expert. On this record we cannot say that a proper foundation was laid. *See Newton* v. *Clark*, 266 Ark. 237, 582 S.W.2d 955 (1979); *Simolin* v. *Wilson*, 253 Ark. 545, 487 S.W.2d 603 (1972).

The appellant also argues that the trial court erred in allowing the decedent's former attorney to testify because it violated the lawyer-client privilege set out at Ark. R. Evid.

502(b). Mr. Cambiano testified that the paternity report came from his files. He also testified that the decedent admitted to him that he had fathered the children, that he had visited the children and had taken them gifts, and that he was willing to support them but did not want to be forced to by the courts.

The appellant first asserts that it was error for the trial court to introduce the report into evidence because it came from Mr. Cambiano's files and was privileged. We address this issue and the appellant's issue concerning Mr. Cambiano's testimony because they are likely to recur in another trial.

The general rule of attorney-client privilege is set forth in Ark. R. Evid. 502(b):

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

In Ark. R. Evid. 502(a) (4), a "representative of the lawyer" is defined as "one employed by the lawyer to assist the lawyer in the rendition of professional services." Furthermore, the privilege may be claimed by the personal representative of a deceased client. Ark. R. Evid. 502(c).

The communication from National Paternity Laboratories to Mr. Cambiano was not a communication protected by the attorney-client privilege. Mr. Cambiano testified that the blood tests were ordered by the county court and clearly National Paternity Laboratories did not qualify as a "representative of the lawyer." We cannot say that the circuit court erred in admitting Mr. Cambiano's testimony about the report or in admitting the report into evidence.

The appellant also contends that it was error to allow Mr. Cambiano to testify about what the decedent told him. The appellee argues that there is an exception to the attorney-client privilege in accordance with Ark. R. Evid. 501(d)(2) which provides in pertinent part:

> (d) Exceptions. There is no privilege under this rule:
>
> . . .
>
> (2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transactions.

The appellee contends that, because the appellant is an heir of the decedent and she is making a claim against the estate on behalf of her children, both parties are claiming "through the same deceased client."

On this record, we cannot determine whether the exception applies. It is clear that the appellant is the administrator of the estate, but that does not necessarily mean that he is claiming through the decedent. There are some comments by the appellant's attorney which indicate that the appellant is the decedent's brother and is a legatee, but these comments were made in arguments directed to the trial court. Argument and comments by attorneys are not evidence. *See* AMI Civil 3d, 101(e) (1989).

We hold that the trial court erred in admitting the blood test report into evidence because an adequate foundation was not laid. Furthermore, there has been a failure of proof as to whether or not the testimony of Mr. Cambiano was privileged. Because the report was erroneously admitted, and because we are unable to determine whether Mr. Cambiano's testimony was privileged, we reverse and remand for further proceedings consistent with this opinion.

JENNINGS and ROGERS, JJ., dissenting.

JUDITH ROGERS, Judge, dissenting. Because I cannot agree with the majority that the trial court abused its discretion in admitting the blood test report into evidence, I dissent.

In 1985, the General Assembly amended Ark. Stat. Ann. Section 34-705.2 to provide that a written report of the blood test results by a duly qualified expert performing the tests, certified by an affidavit duly subscribed and sworn to by him before a notary public, may be produced in paternity actions without calling the expert as a witness; and, if either party desires to question the expert, the party shall have him subpoenaed within a reasonable time before trial. *See* Ark. Stat. Ann. Section 34-705.2 (Supp. 1985). Arkansas Statutes Annotated Section 34-705.2 (Supp. 1985) is now codified at Ark. Code Ann. Section 9-10-108(c)(2) (1987).[1] In amending Ark. Stat. Ann. Section 34-705.2 in 1985, the General Assembly made it much easier to admit these reports into evidence and placed the burden of producing the expert upon the party wishing to question him. Here, appellant made no attempt to produce the expert certifying the report for examination.

In the majority opinion, it is stated that strict adherence to the statutory foundational prerequisites is required in these cases. I do not agree that such strict adherence was the intent of the legislature. In construing a statute, it is this Court's duty to ascertain and give effect to the intent of the legislature. *Williams* v. *City of Pine Bluff*, 284 Ark. 551, 554, 683 S.W.2d 923 (1985); *Thompson* v. *Younts*, 282 Ark. 524, 527, 669 S.W.2d 471 (1984). Every effort must be made to give effect to the legislative purpose in enacting the statute, and strict and literal meaning of any section of the statute ought not to prevail where it is opposed to the intention of the General Assembly. *Garrett* v. *Cline,* 257 Ark. 829, 831, 520 S.W.2d 281 (1975). *Accord Henderson* v. *Russell*, 267 Ark. 140, 143, 589 S.W.2d 565 (1979). Further, statutes are to be construed with reference to the public policy which they are designed to accomplish. *Sanyo Mfg. Corp.* v. *Stiles*, 17 Ark. App. 20, 23, 702 S.W.2d 421 (1986); *Feagin* v. *Everett*, 9 Ark. App. 59,

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[1] This code section was extensively amended by the General Assembly in March of 1989. The 1989 amendment permits a written report of the test results by a duly qualified expert under whose supervision and direction the tests and analysis have been performed, certified by an affidavit before a notary public, to be introduced into evidence without calling the expert as a witness. The amendment also provides that, if either party desires to question the expert certifying the results, the party shall have the expert subpoenaed within a reasonable time prior to trial.

66, 652 S.W.2d 839 (1983).

It is true that there is very little information about the qualifications of Randall Smith. From the report, we only know that Smith purports to have a Ph.D. and that he was serving as "Laboratory Director" on the 8th day of September, 1983, when he signed the report. From Joe Cambiano's testimony, we also know that this report resulted from the court's order that blood tests be performed. The circuit judge was satisfied that Smith met the qualifications of an "expert" within the meaning of Ark. Code Ann. Section 9-10-108(c)(2) (1987). Whether a witness may give expert testimony rests largely within the sound discretion of the trial court and will not be reversed unless an abuse of discretion is found. *Carter* v. *St. Vincent Infirmary*, 15 Ark. App. 169, 171, 690 S.W.2d 741 (1985); *Whaley* v. *State*, 11 Ark. App. 248, 253, 669 S.W.2d 502 (1984). The determination of the qualifications of a witness with respect to knowledge or special experience concerning the matters about which he testifies rests largely in the discretion of the trial court, and such determination will not be disturbed by an appellate court, except in extreme cases where it is manifest that the trial court has fallen into error or abused its discretion. *Arkansas-Louisiana Gas Co.* v. *Maxey*, 245 Ark. 15, 19, 430 S.W.2d 866 (1968). This is true even though the appellate court might have decided the question differently if it had been presented to it in the first instance. *Firemen's Ins. Co.* v. *Little*, 189 Ark. 640, 648, 74 S.W.2d 777 (1934).

In *Dildine* v. *Clark Equip. Co.*, 282 Ark. 130, 135-36, 666 S.W.2d 692 (1984), the Arkansas Supreme Court said:

> Obviously no firm rule can be derived which would serve uniformly as a means of measuring the qualifications of an expert, but the tone of our cases suggests that too rigid a standard should be avoided and if some reasonable basis exists from which it can be said the witness has knowledge of the subject beyond that of persons of ordinary knowledge, his evidence is admissible. *Roark Transportation* v. *Sneed, supra*; *Blanton* v. *Mo. Pac. Rd. Co.*, 182 Ark. 543, 31 S.W.2d 947 (1930). In *Firemen's Insurance Co.* v. *Little*, 189 Ark. 640, 74 S.W.2d 777 (1934) we approved the following language:

> A skilled witness is one possessing, in regard to a particular subject or department of human activity knowledge and experience which are not acquired by ordinary persons. Where he testifies as to facts, he must be shown to have adequate knowledge of the matters of which he speaks, and where he states an inference he must have the ability, skill, and experience, not only to observe accurately, but to draw the correct conclusion from what he observes. Such a witness may be qualified by professional, scientific, or technical training, or by practical experience in some field of activity conferring on him special knowledge not shared by mankind in general, the rule in this respect being that one who had been engaged for a reasonable time in a particular profession, trade, or calling, will be assumed to have the ordinary knowledge common to persons so engaged.

In *Scott* v. *Jansson*, 257 Ark. 410, 413, 516 S.W.2d 589 (1974), the Arkansas Supreme Court held that the trial court did not abuse its discretion in admitting the testimony of a police officer to express an opinion as to whether an automobile's brakes had worked properly. The court stated:

> [T]he trial court did not abuse its discretion in ruling that Officer Robertson, an experienced highway patrolman, was qualified to express an opinion even though he was not, in the language of counsel, "a brake expert." If counsel doubted the officer's familiarity with the effect of defective brakes upon skid marks, a request should have been made that he be put on voir dire to show his incompetency to testify. *Brown* v. *State*, 24 Ark. 620 (1897); McKelvey on Evidence, Section 187 (5th ed., 1944). Absent such a request reversible error is not shown, for upon a retrial it might turn out that the officer was fully qualified to testify as he did.

I am also not convinced that appellant properly preserved an objection to the introduction of the report on the specific ground that it does not show whether Smith actually performed the tests. A timely objection must be made at trial to preserve an alleged error for review, and the only specific objection available on

appeal is the specific objection made in the trial court. *Whaley*, 11 Ark. App. at 253. I do not believe that the objections by counsel for appellant, set forth in the majority opinion, are sufficiently specific to preserve for appellate review the issue of whether Smith actually performed the tests.

In sum, the majority's decision to reverse this case and remand it for yet another trial is totally at odds with the applicable standard of review and with the General Assembly's apparent intent in relaxing the foundational requirements for the introduction of these blood test reports. I also see no reason to reach the issue of whether the exception to the attorney-client privilege found in Ark. R. Evid. 502(d)(2) applies here, because I believe the blood test report was admissible. With the report admitted into evidence, there was overwhelming evidence of the decedent's paternity; therefore, even the erroneous admission of Mr. Cambiano's testimony would have been harmless error. Error is no longer presumed to be prejudicial; unless the appellant demonstrates prejudice accompanying error, this court will not reverse. *Hibbs* v. *City of Jacksonville*, 24 Ark. App. 111, 112, 749 S.W.2d 350, 351 (1988).

JENNINGS, J., joins this opinion.

Garland Charles SHERMAN *v.* STATE of Arkansas

CA CR 89-201 785 S.W.2d 49

Court of Appeals of Arkansas
Division I
Opinion delivered March 7, 1990
[Rehearing denied April 11, 1990.]

Stripling & Morgan, by: *M. Edward Morgan*, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged on January 11, 1989 with theft by receiving, a class C felony, and on April 27, 1989, he entered a guilty plea to that charge. At a sentencing hearing held on May 11, 1989, the trial court sentenced the appellant as a habitual offender to thirty years in the Arkansas Department of Correction. From that decision, comes this appeal.

For reversal, the appellant contends that the trial court erred in sentencing him as a habitual offender. We agree, and we modify the sentence imposed by the trial court.

We first address the threshold question of our jurisdiction. The State asserts that this Court lacks jurisdiction to entertain a direct appeal from a guilty plea. We note that direct appeals from guilty pleas are, with few exceptions, prohibited

under Arkansas law. *See Redding* v. *State*, 293 Ark. 411, 738 S.W.2d 410 (1987); Ark. Code Ann. § 16-91-101(c) (1987); Ark. R. Crim. P. 36.1; *but cf.* Ark. R. Crim. P. 24.3(b). However, we think this general prohibition is addressed to challenges to the adjudication of guilt, and that questions addressed solely to the legality of the sentence imposed may properly be entertained on direct appeal, as the Arkansas Supreme Court did in *Brimer* v. *State*, 295 Ark. 20, 746 S.W.2d 370 (1988). We conclude that we have jurisdiction to review the legality of the appellant's sentence.

The record shows that the State filed a felony information on January 11, 1989, alleging that the appellant committed class C felony theft by receiving on January 5, 1989. No prior convictions were alleged, and the Habitual Offender Act was not mentioned. On January 23, 1989, the State amended the felony information to allege that the appellant committed Class C felony theft by receiving on January 7, 1989, rather than January 5, as stated in the original information. Again, no mention was made of prior convictions or the Habitual Offender Act.

At a proceeding held on April 27, 1989, the appellant withdrew his initial plea of not guilty to the charge alleged in the information and entered a guilty plea, and the following exchange took place:

> THE COURT: Would you tell him the range of punishment that, uh, he could receive upon a plea of guilty?
>
> BY MR. MORGAN:
>
> Q. Are you aware that you can receive—that the charge you are charged with is a class C felony?
>
> A. Yes, I am aware of it.
>
> Q. And, that you can receive from three to ten years for a class C felony?
>
> A. Yes.
>
> Q. All right. And/or up to a ten thousand dollar fine?
>
> A. Yes, sir.

The trial court proceeded to establish the factual basis for the plea, and then accepted the appellant's guilty plea and set a

sentencing hearing for May 11, 1989.

Although the record is devoid of any allegation of prior convictions or reference to the Habitual Offender Act, the trial court imposed a thirty-year sentence at the sentencing hearing, stating that:

> Mr. Sherman, I had a presentence investigation made on you, and I find that, uh, you're a four-time loser. Burglary and grand larceny in Texas. Theft, you went to the Department of Correction at Huntsville; that was in 1973. The first charge was 1972. 1974 you were charged with murder, and you got life in the Department of Correction at Huntsville. And, November the 6th, '85, armed violence, you got six years for that. That's four-time loser, and you plead guilty here to theft by receiving, which is a C felony. And, for four or more priors on a C felony, you can get from ten to thirty years. I'm sentencing you to thirty years in the Arkansas Department of Correction.

(The presentence report to which the court referred is not a part of the record of this case.) The appellant made a timely objection to any sentence exceeding ten years on the grounds that the State has the burden of proving prior convictions, and that the State had not charged him as a habitual offender.

In *Finch* v. *State*, 262 Ark. 313, 556 S.W.2d 434 (1977), the Arkansas Supreme Court stated that:

> Whenever the state seeks to charge one as a previous offender or habitual criminal in order to warrant the imposition of additional punishment for the offense charged, the previous offense is an essential element in the punishment, which must be alleged in the indictment or information.

Finch v. *State*, 262 Ark. at 316; *accord, Clinkscale* v. *State*, 269 Ark. 324, 602 S.W.2d 618 (1980). In the case at bar there is no indication that the State ever alleged previous offenses or charged the appellant as a habitual offender, or that the State took any action to amend the information to include such allegations: instead, the record shows only that the appellant was charged with class C felony theft by receiving. Because the maximum permissible sentence for this offense is ten years where the

Habitual Offender Act has not been invoked, *see* Ark. Code Ann. § 5-4-401(a)(4) (1987), the thirty-year sentence imposed by the trial court was not an authorized disposition. We therefore reduce the appellant's sentence to ten years, the maximum allowable under the State's charges and allegations for the offense to which the appellant entered his guilty plea. *See Ellis* v. *State*, 270 Ark. App. 243, 603 S.W.2d 891 (1980); *Scott* v. *State*, 1 Ark. App. 207, 614 S.W.2d 239 (1981).

Affirmed as modified.

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

James WOODARD *v.* WHITE SPOT CAFE and American States Ins. Co.

CA 89-290 785 S.W.2d 54

Court of Appeals of Arkansas
Division I
Opinion delivered March 7, 1990

Nolan and Caddell, P.A., by: *Bennett S. Nolan*, for appellant.

Warner and Smith, by: *James M. Dunn*, for appellee.

JAMES R. COOPER, Judge. The appellant in this workers' compensation case injured his back while getting out of his auto in the employer's parking lot five minutes before he was scheduled to begin work. The Workers' Compensation Commission found that the appellant failed to prove that the injury arose out of his employment, and denied benefits. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in finding that his injury did not arise out of and in the course of his employment. We affirm.

The parties stipulated that the appellant was injured in the employer's parking lot, and that the employee/employer relationship existed at the time of the injury. The appellant testified that employees were required to park behind the restaurant near the alleyway. He stated that he parked his car in this lot five minutes before work was to begin, turned off the ignition, opened the car door, placed his left foot on the ground, turned to get out of the car, and "felt something pop" in his back. Finally, he stated that there was nothing different about the way he got out of the car when he was injured, but that he got out of the car the same way he always had.

The claimant in a workers' compensation case must prove that the injury he sustained arose during the course of his employment, and that the injury arose out of his employment.

Ark. Code Ann. § 11-9-401 (1987). The appellant in the case at bar argues that he met his burden of proving that his injury arose out of and in the course of his employment under the "premises exception" to the going and coming rule. We do not agree.

The going and coming rule ordinarily precludes recovery for an injury sustained while the employee is going to or returning from his place of employment. *Bales* v. *Service Club No. 1*, 208 Ark. 692, 187 S.W.2d 321 (1945). The rationale behind the rule is that an employee is not within the course of his employment while traveling to or from his job. *Brooks* v. *Wage*, 242 Ark. 486, 414 S.W.2d 100 (1967). Although an exception to the going and coming rule may operate to place an employee traveling to or from work within the course of his employment, *id.*; *see generally City of Sherwood* v. *Lowe*, 4 Ark. App. 161, 628 S.W.2d 610 (1982), it does not follow that the employee's injury is therefore compensable, because the employee must still show that the injury *arose out of* his employment. *See* Ark. Code Ann. § 22-9-401, *supra*.

A similar issue arose in *Neale* v. *Weaver*, 60 Idaho 41, 88 P. 2d 522 (1939), where the appellant argued that the accident *ipso facto* arose out of and in the course of his employment because it occurred on his employer's premises. The *Neale* Court responded to that argument as follows:

> It is true numerous cases have made the general statement to that effect, but on a careful examination and analysis of these cases we find there were in all an additional feature showing a causal connection between the employment or the condition of the place or means or appliance furnished, or under the control of the employer, directly or indirectly and at least to some extent, however slight, contributing to the accident, or tying it into or with the employment, which, in addition to the employee being on the premises of the employer at the time of the accident, constituted a sufficient make-weight to tip the scales and justifiably support the conclusion that the accident arose in the course of and out of the employment.

Neale, 88 P.2d at 524; *see* Annot., 159 A.L.R. 1395 (1945). An examination of Arkansas cases involving the going and coming rule likewise reveals a causal connection between the employ-

ment, or the condition of the place, means, or appliance furnished or controlled by the employer, to the claimant's accident. In *Davis* v. *Chemical Construction Co.*, 232 Ark. 50, 334 S.W.2d 697 (1960), the claimant's employment required him to travel one mile in eighteen minutes in order to clear a "critical area," and it was not unusual for employees to catch rides on trucks belonging to subcontractors. These employment conditions contributed to the claimant's injury when he caught his foot and fell while getting off a truck on which he had ridden to the parking area. Likewise, in *Bales* v. *Service Club No. 1*, 208 Ark. 692, 187 S.W.2d 321 (1945), there was a causal connection between the accident, in which the employee was killed after slipping on an icy sidewalk in front of her workplace, and a condition of a place under the employer's control, because, as the *Bales* Court noted, it was the employer's duty to keep the sidewalk clear of ice.

While we agree with the appellant that this case falls within the premises exception to the going and coming rule, *see Davis* v. *Chemical Construction Co.*, 232 Ark. 50, 334 S.W.2d 697 (1960), we think that the appellant was nevertheless required to prove that his injury arose out of his employment.

The phrase "arising out of the employment" refers to the origin or cause of the accident, and, in order to arise out of the employment, an injury must be "a natural and probable consequence or incident of the employment and a natural result of one of its risks." *J. & G. Cabinets* v. *Hennington*, 269 Ark. 789, 793, 600 S.W.2d 916, 918 (Ark. App. 1980). The appellant in the case at bar was employed as a dishwasher, and there is no evidence that either the circumstances of his employment or the condition of the employer's premises contributed to his back injury. Nor can it be said that the appellant's employment required him to be in a particular place and thus brought him within range of an external force or event which caused his injury: there is no suggestion in the record that the appellant's surroundings had any influence on his injury, and it appears that he could have injured his back in this manner any time and any place that he got out of his automobile.

See Martin v. *Unified School District No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980). Under the circumstances of this case, we are unable to find any causal connection between the

injury and the employment other than the bare fact that it occurred in the employer's parking lot, and we hold that the Commission did not err in finding that he failed to prove that his injury arose out of his employment.

Affirmed.

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

Rose CROSBY *v.* MICRO PLASTICS, INC. and Travelers Insurance Co., Inc.

CA 89-294 785 S.W.2d 56

Court of Appeals of Arkansas
Division I
Opinion delivered March 7, 1990

Frederick S. "Rick" Spencer, for appellant.

Michael E. Ryburn, for appellee.

JUDITH ROGERS, Judge. The appellant, Rose Crosby, who was formerly employed by appellee, Micro Plastics, Inc., appeals from a decision of the Workers' Compensation Commission which denied her claims for wage loss disability, additional temporary total disability benefits, and the payment of certain medical expenses for treatment. We affirm in part, and reverse and remand in part.

On February 28, 1985, appellant sustained a compensable back injury when she was carrying a fifty pound tray of plastic nuts while employed by appellee. As a result of this injury, appellant was unable to work for three weeks, and temporary total benefits were paid from March 1 through March 25, 1985, when she was released by her physician, Dr. Larry Kelley, to return to work with a fifteen pound lifting restriction. Appellee also accepted payment of all medical bills for treatment provided by Drs. Kelley and John Tsang, to whom appellant had been referred by Dr. Kelley. Appellant continued in her employment with appellee until her termination in May of 1986. Appellant is currently unemployed.

In October of 1986, appellant filed a claim with the Commission alleging her entitlement to awards of temporary total benefits which were said to have occurred sporadically since March 1, 1985; permanent disability and wage loss benefits; and the payment of medical expenses associated with treatment

provided by Dr. Thomas E. Knox and Dr. Wilbur Giles. In an opinion dated May 16, 1988, an administrative law judge awarded appellant permanent partial disability benefits in relation to five percent of the body as a whole, but concluded that appellant was not entitled to wage loss benefits under Ark. Code Ann. § 11-9-522(b) (1987), or further temporary total benefits beyond March 25, 1985. Additionally, appellant's claim for the payment of medical expenses for treatment by Drs. Knox and Giles was denied based on a finding that she had failed to comply with the requisite procedure for a change of physicians. Upon review by the full Commission, the decision of the law judge was affirmed and adopted on April 13, 1989, with one Commissioner dissenting.

As her first issue on appeal, appellant claims as error the Commission's denial of wage loss benefits based upon the retroactive application of Act 10 of 1986, now codified as Ark. Code Ann. § 11-9-522(b) (1987). Pursuant to this provision, the Commission concluded that appellant was not entitled to wage loss benefits because she had resumed her job with appellee.

In the recent case of *Arkansas State Police* v. *Welch*, 28 Ark. App. 234, 772 S.W.2d 620 (1989), we held that the provision of Act 10, found in the above-mentioned code section, which precludes the recovery of wage loss benefits when the employee "has returned to work, has obtained employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident," is substantive in nature, and thus is to be applied prospectively, and not to injuries occurring before the effective date of the act, July 1, 1986. In *Welch*,[1] we noted that under previous law, a claimant might suffer a wage loss capacity yet return to work earning higher wages than before the injury due to cost-of-living increases. *See City of Fayetteville* v. *Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Here, the appellant's injury of February 28, 1985, occurred before the effective date of

[1] We note that the decision in *Welch* was an affirmance of the Commission's interpretation that this provision of Act 10 of 1986 was not to be retroactively applied. We now reverse the instant case because the Commission did not follow its own interpretation of the law which we previously affirmed in *Welch*.

the act; therefore, we agree with the appellant that the Commission erred by concluding that her claim for wage loss benefits was barred by Ark. Code Ann. § 11-9-522(b) (1987). Accordingly, we remand to the Commission for a determination as to whether appellant is entitled to wage loss benefits under the law as it existed as of the time of her injury. Inasmuch as we are remanding on this issue, we decline to address appellant's second argument on appeal in which she further claims entitlement to wage loss benefits.

As her third point on appeal, appellant contends, as stated in her brief, that "[t]he pre-existing degenerative disc disease, if any, did not disqualify a WCC claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought." However, there has been no finding that appellant's claim was disqualified on this basis, and moreover, appellee has raised no cross-appeal on the question as to permanent impairment.

Appellant next argues that the Commission erred by not allowing the change of physician to Dr. Knox, who referred her to Dr. Giles, thereby relieving appellee of the obligation to pay for medical treatment provided by them, or those under their direction. Based upon the appellant's testimony that she was initially followed by Dr. Kelley, as he was her private physician, the Commission determined that Dr. Kelley was a physician of her own choosing, and concluded that she was not entitled to the payment of expenses associated with the change of physician for her failure to comply with Ark. Code Ann. § 11-9-514(a)(1) (1987). Specifically, the Commission found that she changed physicians from Dr. Kelley to Dr. Knox without informing either the Commission or appellee, although she had been provided notice of her rights and responsibilities concerning a change of physician as required by Ark. Code Ann. § 11-9-514(c)(1) (1987).

■ Arkansas Code Annotated § 11-9-514(b) (1987) clearly provides that treatment or services furnished or prescribed by any physician other than the one selected according to the outlined procedures, except emergency treatment, shall be at the claimant's expense. *American Transportation Co.* v. *Payne*, 10 Ark. App. 56, 661 S.W.2d 418 (1983). In *Wright Contracting*

Co. v. *Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984), we noted that under the present law, the Commission no longer has the broad discretion it once had to *retroactively* approve a change of physician, and that, absent compliance with § 81-1311 (now codified as Ark. Code Ann. § 11-9-514 (1987)), the employer is not liable for a new physician's services (emphasis in original). In this case, it is undisputed that the appellant did not request prior approval of the change of physicians and thus failed to comply with the procedures outlined by the statute. Therefore, the Commission did not err by denying her claim for expenses related to the change of physicians.

The appellant last argues that her healing period did not end until Dr. Giles gave her his impairment rating of five percent in 1988, and that she was entitled to further temporary total benefits. We disagree.

A claimant's healing period ends when the underlying condition causing the disability has become stable, and if nothing further in the way of treatment will improve that condition. *Elk Roofing Co.* v. *Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987). In a workers' compensation proceeding, the determination of when the healing period has ended is a factual determination that is to be made by the Commission; if that determination is supported by substantial evidence, it must be affirmed on appeal. *Mad Butcher, Inc.* v. *Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

In the instant case, the record reveals that immediately following her injury in February of 1985, X-rays disclosed no evidence of significant injury. On March 25, 1985, appellant was released to return to work by Dr. Kelley with a fifteen pound lifting restriction, and appellant did in fact return and continue to work until her termination in May of 1986. After her termination in 1986, she was followed by Dr. Tsang, who reported that the results of a lumbar myelogram and CT Scan were normal. Also, the results of the CT Scan and myelogram ordered in 1988 by Dr. Giles were normal, which Dr. Giles said was inconsistent with appellant's symptoms of leg pains. Dr. Giles did opine that appellant had a pre-existing degenerative disc disease at L-5, S-1, which could have been aggravated by the 1985 injury, and he assessed a five percent anatomical impairment rating. Dr. Giles

said that he felt surgery was unnecessary, and that the only treatment he would recommend would be occasional physical therapy and mild anti-inflammatory drugs or muscle relaxants. There was evidence that appellant missed a number of days from work after her injury, but the Commission concluded that it was difficult to determine whether her absences were attributable to her compensable injury, as appellant had other medical problems for which she had been treated. For instance, appellant admittedly was absent from work for ten weeks in July of 1985 when she had surgery. Based on a review of this record, we cannot say that the Commission's decision that appellant was not entitled to temporary total benefits beyond March 25, 1985, is not supported by substantial evidence.

AFFIRMED in part.

REVERSED and REMANDED in part.

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

Amy SPENCER *v.* Randall FLOYD, Sr.

CA 89-299 785 S.W.2d 60

Court of Appeals of Arkansas
Division II
Opinion delivered March 7, 1990

Sexton Law Firm, P.A., by: *Joseph C. Self*, for appellant.

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

JUDITH ROGERS, Judge. This interpleader action involves a

dispute over the proceeds of a life insurance policy. Upon finding that the primary beneficiary was disqualified for having wrongfully caused the death of the insured, the chancery court held that the proceeds were distributable to the contingent beneficiary named in the policy, as opposed to the insured's estate. On appeal, the appellant contends that this decision is contrary to Arkansas law and the terms of the policy. We uphold the decision of the chancellor, and affirm.

The record reveals that on March 2, 1983, the insured, Randall Floyd, Jr., entered into a contract of life insurance with Federal Kemper Life Assurance Company. The policy was issued in the face amount of $100,000, and designated the insured's wife, Jackie Lee Floyd, as primary beneficiary, and his father, Randall Floyd, Sr., appellee herein, as the contingent beneficiary. The insured died intestate on March 15, 1988, and was survived by appellee, his wife, a son, and a daughter, Amy Spencer, the appellant. Upon entering a plea of guilty, the insured's wife, the primary beneficiary, was convicted of first degree murder in connection with the death of the insured, and she is presently serving a term of life imprisonment in the Arkansas Department of Correction.

After receiving a claim by appellee for the proceeds of the policy, Federal Kemper instituted this litigation as an interpleader action, joining as defendants both appellee and the insured's estate.[1] Appellant, claiming a beneficial interest through the estate, was allowed to intervene, and thereafter she filed a motion for judgment on the pleadings. By order of April 27, 1989, the chancellor determined that the proceeds were payable to appellee, as the contingent beneficiary named in the policy. It is from this order that this appeal arises.

As below, the sole question on appeal is who, as between the insured's estate and the named contingent beneficiary, is entitled to the proceeds of a life insurance policy when the primary beneficiary intentionally murders the insured? By stating the

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[1] Originally, the complaint named appellee as defendant both individually and as the personal representative of the insured's estate. Appellee was duly replaced by order of the probate court by a special administrator, Dale Arnold, who was substituted in this action to represent the claim of the estate.

issue in this manner we are recognizing that it is settled law in Arkansas that when the beneficiary in a policy of life insurance wrongfully kills the insured, public policy prohibits a recovery by the beneficiary. *Calaway* v. *Southern Farm Bureau Life Ins. Co*, 2 Ark. App. 69, 619 S.W.2d 301 (1981). *See also York, Administratrix* v. *Hampton*, 229 Ark. 301, 314 S.W.2d 480 (1958); *Horn* v. *Cole, Administrator*, 203 Ark. 361, 156 S.W.2d 787 (1941); *Inter-Southern Life Ins. Co.* v. *Butts*, 179 Ark. 349, 16 S.W.2d 184 (1929); *Cooper* v. *Krisch*, 179 Ark. 952, 18 S.W.2d 909 (1929); *Metropolitan Life Ins. Co.* v. *Shane*, 98 Ark. 132, 135 S.W. 836 (1911). In *Shane*, our supreme court stated:

> The willful, unlawful and felonious killing of the assured by the person named as beneficiary in a life policy forfeits all rights of such person therein. It is unnecessary that there should be an express exception in the contract of insurance forbidding a recovery in favor of such person in such event. On considerations of public policy the death of the insured, willfully and intentionally caused by the beneficiary of the policy, is an excepted risk as far as the person thus causing the death is concerned.

98 Ark. at 138, 135 S.W. at 839. The finding of the chancellor that the primary beneficiary is disqualified for having wrongfully murdered the insured is not contested on appeal.

The appellant's argument that the proceeds should become an asset of the estate is two-fold. She first argues that this result is supported by Arkansas law, and she refers us to the decisions in *Horn* v. *Cole, Administrator, supra*, and *Cooper* v. *Krisch, supra*. Secondly, appellant contends that this result is consistent with the terms of the subject policy. The policy provides:

> Death—Unless otherwise provided:
>
> 1. If no beneficiary survives the insured, the proceeds of the policy will be paid to the insured's estate or assigns.
>
> 2. The interest of any beneficiary who dies before the insured will pass to any beneficiary who survives, share and share alike.

In this regard, appellant argues that the policy specifies that the contingent beneficiary takes only when the primary beneficiary

dies before the insured, and since the primary beneficiary is still living, the contingency upon which the alternative beneficiary would prevail has not arisen, and thus the proceeds are then distributable to the insured's estate. Conversely, the appellee argues that the intent of the insured is controlling, which is indicated by his naming a contingent beneficiary. The chancellor here found that this expression of the insured's intent was determinative, as he found "that it was the insured's intent as clearly expressed in the policy that in the event his wife, Jackie Lee Floyd, was unable to take the proceeds of the insurance policy, the proceeds would be paid to the named contingent beneficiary, Randall Floyd, Sr."

We have reviewed the Arkansas decisions in this area of law, but do not find them to be controlling on the issue now before us. In *Cooper* v. *Kirsch, supra*, the insured's estate was preferred over an heir when the *sole beneficiary* to the life insurance policy murdered the insured. There, citing *Inter-Southern Life Ins. Co.* v. *Butts, supra*, and *Metropolitan Life Ins. Co.* v. *Shane, supra*, the supreme court stated that "when the beneficiary in a policy of insurance unlawfully kills the insured, public policy prohibits recovery by him, and that the amount of the insurance automatically becomes an asset of the deceased's estate, to be recovered by the administrator for the payment of debts and distribution to heirs." Likewise, in the case of *Horn* v. *Cole, Administrator, supra*, it was held that the estate was entitled to the proceeds as it was found that the *sole beneficiary* unlawfully killed the insured. In these decisions, however, our appellate courts have not addressed this question in the context of a dispute between the estate and a contingent beneficiary. Only in *Calaway* v. *Southern Farm Bureau Life Ins. Co., supra*, was there involved a contingent beneficiary, who unsuccessfully appealed the lower court's decision that the killing of the insured by the primary beneficiary was justified, which thereby permitted the primary beneficiary to receive the proceeds. The precise issue in the instant case has not been addressed by our appellate courts; therefore, it is one of first impression in this state.

Since this is a novel question, we have looked to other jurisdictions for guidance. However, we note that of those jurisdictions which have squarely addressed this question, the courts have reached divergent conclusions. In favoring the estate

over the contingent beneficiary, some courts strictly construe the terms of the policy in question,[2] as advanced by appellant, while others have denied recovery by the contingent beneficiary based upon statutory authority.[3] Courts which have held for the contingent beneficiary primarily do so based on the intent of the insured,[4] as argued by appellee. Some jurisdictions have preferred the contingent beneficiary despite statutory language seemingly to the contrary,[5] while yet another considers the primary beneficiary to have predeceased the insured for the purpose of interpreting the policy.[6] While this survey is by no means exhaustive, it is indicative of the range of the opinions on this issue.

The leading decisions, however, supporting the parties' respective positions, appear to be *Beck* v. *West Coast Life Ins. Co.*, 38 Cal. 2d 643, 241 P.2d 544 (1952), and *Bullock* v. *Expressmen's Mutual Life Ins. Co.*, 234 N.C. 254, 67 N.E.2d 71 (1951). In *Bullock*, the North Carolina Court strictly construed the terms of the policy which provided that upon the death of the insured, the insurance money should be paid to the primary beneficiary, if living, or if not living to the contingent beneficiary. The court determined that the alternative beneficiary's interest was contingent upon not only the death of the insured, but also the death of the primary beneficiary. Since the primary beneficiary

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[2] *Webb* v. *Voirol*, 773 F.2d 208 (8th Cir. 1985); *Life & Casualty Ins. Co.* v. *Martin*, 603 F. Supp. 281 (E.D. Mo. 1985); *Reliable Life Ins. Co.* v. *Spurgeon*, 763 S.W.2d 674 (Mo. App. 1988); *Bullock* v. *Expressmen's Mutual Life Ins. Co.*, 234 N.C. 254, 67 S.E.2d 71 (1951).

[3] *Crawford* v. *Coleman*, 726 S.W.2d 9 (Tex. 1987) (overruling *Deverox* v. *Nelson*, 529 S.W.2d 510 (Tex. 1975); *Dowdell* v. *Bell*, 477 P.2d 170 (Wyo. 1970). *Cf., Seidlitz* v. *Eames*, 753 P.2d 775 (Colo. App. 1987); *Wilkins* v. *Fireman's Fund American Life Ins. Co.*, 107 Idaho 1006, 695 P.2d 391 (1985).

[4] *Life Ins. Co. of Virginia* v. *Cashatt*, 206 F. Supp. 410 (E.D. Va. 1962); *Maneval* v. *Lutheran Brotherhood Corp.*, 281 A.2d 502 (Del. Super. Ct. 1971); *Metropolitan Life Ins. Co.* v. *Wenckus*, 244 A.2d 424 (Me. 1968); *Turner* v. *Prudential Ins. Co. of America*, 60 N.J. Super. 175, 158 A.2d 441 (1960); *Carter* v. *Carter*, 88 So.2d 153 (Fla. 1956); *Beck* v. *West Coast Life Ins. Co.*, 38 Cal.2d 643, 241 P.2d 544 (1952); *Neff* v. *Massachusetts Mutual Life Ins. Co.*, 158 Ohio St. 45, 107 N.E.2d 100 (1952); *Prudential Ins. Co. of America* v. *Baitinger*, 452 So.2d 140 (Fla. Dist. Ct. App. 1984).

[5] *Lewis* v. *Lewis*, 315 N.E.2d 816 (S.C. App. 1984); *Brooks* v. *Thompson*, 521 S.W.2d 563 (Tenn. 1975).

[6] *In re Kaplan's Estate*, 49 Misc.2d 335, 267 N.Y.S.2d 345 (1966).

was still living, although prohibited from taking, the court concluded that the contingency had failed upon which the alternative beneficiary's interest devolved, and thus the estate was held to be entitled to the proceeds of the policy.

On the other hand, in *Beck, supra*, although there was analogous language in the policy under consideration, Judge Traynor, speaking for the California court, concluded that the contingent beneficiary should prevail against the estate based on the intent of the insured as determined by the naming of an alternative beneficiary. The court said:

> Because the beneficiary clause of a life insurance policy in which the insured has reserved the right to change beneficiaries is donative and testamentary in character, the intent of the insured as expressed by the language that she used should be given effect so far as possible. Although her expressed intent that her husband receive the proceeds cannot be given effect, the policy names the one she wished to take if her husband could not. It stated that the proceeds should be paid to the alternative beneficiary, if the primary beneficiary predeceased the insured. Thus, in the type of disability that would naturally be anticipated by the insured, the alternative beneficiary was preferred over the estate of the insured. In this case there occurred the only other possible contingency in which the primary beneficiary would be under a disability equivalent to actual death. The insured has clearly indicated her intent that any interest her estate might have in the proceeds of the policy should be subordinate to the interest of the alternative beneficiary. This intent is recognized by a holding that the alternative beneficiary may recover the proceeds. A holding that the estate of the insured is entitled to the proceeds would not only defeat this intent, but would also enable the murderer to deprive the alternative beneficiary of her opportunity to take in preference to the estate by foreclosing the possibility that the murderer might predecease the insured. The rule that prevents his profiting by his own wrong should not be invoked in such a way as to prejudice the rights of the alternative beneficiary. 'In a word, it appears to me that the crime of one person may prevent that person from the assertion of what would otherwise be a

> right, and may accelerate or beneficially affect the rights of third persons, but can never prejudice or injuriously affect those rights.'

Beck, 241 P.2d at 546-47 (citations omitted). Similarly, in *Carter* v. *Carter*, 88 So. 2d 153 (Fla. 1956), it was stated:

> Although obviously not a will, the beneficiary clause of a life insurance policy is in some measure analogous in principle to the disposition of one's estate by will. It is usually ambulatory. It is almost always donative, and in a sense it is testamentary in character in that payment is customarily contingent upon the death of the insured. In view of the nature of the beneficiary clause, it would appear to be appropriate in construing it to endeavor to give effect to the intent of the insured if it is possible to do so without doing violence to the expressed language of the policy.

Carter, 88 So. 2d at 159-60. The court further found that the word "beneficiary" comprehends the term in its broadest legal sense and must be considered as having reference to the survival of a beneficiary eligible to take. The court declined to follow the decision in *Bullock*, and in agreement with *Beck*, it held that "[w]e prefer to adhere to what we consider the better rule which is one that appears to give effect to the intent of the insured by paying the proceeds to the beneficiary first in priority who is eligible under the law to receive the money."

Other courts have determined that the proceeds in this situation should be distributed to the contingent beneficiary based upon similar reasoning. In *Brooks* v. *Thompson*, 521 S.W.2d 563 (Tenn. 1975), the Tennessee court surmised:

> Admittedly the insured in cases such as this never anticipates being feloniously killed by the primary beneficiary. It is difficult to know what the actual intention of the insured would have been had the problem in question been brought to his attention. It is clear, however, that he did name an alternate beneficiary in the insurance policy, and in our opinion the *better view* is to allow the proceeds to pass according to the alternative provisions of the policy rather than go as intestate personal property.

Brooks, 521 S.W.2d at 567 (emphasis ours). Moreover, in

Maneval v. *Lutheran Brotherhood Corp.*, 281 A.2d 502 (Del. Super. Ct. 1971), it was said:

> Although there are cases to the contrary, the *better rule* in similar cases in other courts gives effect to the *underlying intent* of the insured and permits the contingent beneficiaries to recover despite the fact that the primary beneficiary, barred from recovery by operation of law, has in fact survived the insured.

Maneval, 281 A.2d at 504 (emphasis ours).

We agree that the "better view" is to permit recovery by the contingent beneficiary as opposed to the insured's estate, when the primary beneficiary wrongfully causes the death of the insured. Under Arkansas law, provisions in insurance policies as to beneficiaries are in the nature of a last will and testament, and as such, these provisions are to be construed in accordance with the rules applicable to the construction of wills. *American Foundation Life Ins. Co.* v. *Wampler*, 254 Ark. 983, 497 S.W.2d 656 (1973). The cardinal rule for the interpretation of wills or other testamentary documents is that the intent of the testator should be ascertained from the instrument itself and effect given to that intent. *Ware* v. *Green*, 286 Ark. 268, 691 S.W.2d 167 (1985). The purpose of construing a will or testamentary document is to arrive at the testator's intention, but that intention is not that which existed in his mind, but that which is expressed by the language of the instrument. *Mills Heirs* v. *Wylie*, 250 Ark. 703, 466 S.W.2d 937 (1971).

We believe that the intent for the contingent beneficiary to recover the proceeds in the instant case can be gleaned from the terms of the policy itself in that the insured designated an alternative beneficiary, and the policy provided that the insured's estate should take only if *no* beneficiary survived the insured. We also note that one reason why many people take out life insurance policies payable to named beneficiaries is to provide those beneficiaries with funds which are not subject to probate and thus claims against the estate. *See Life Ins. Co. of Virginia* v. *Cashatt*, 206 F. Supp. 410 (E.D. Va. 1962). We find unpersuasive the narrower construction advanced by the appellant that the contingent beneficiary should not recover because the primary beneficiary is actually living. Just as the primary beneficiary cannot

profit from his own wrong, his actions should not be allowed to frustrate the expressed intent of the insured, and deprive the contingent beneficiary of his interest in the proceeds of the insurance policy.

Therefore, we affirm the decision of the chancellor.

AFFIRMED.

JENNINGS and MAYFIELD, JJ., agree.

The ESTATE OF J.D. PUDDY, Jr., Deceased
v. James GILLAM

CA 89-98 785 S.W.2d 254

Court of Appeals of Arkansas
En Banc
Opinion delivered March 14, 1990
[Rehearing denied August 22, 1990.]

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

Robert R. Cortinez, for appellee.

MELVIN MAYFIELD, Judge. The administrator of the estate of J.D. Puddy, Jr., filed a petition in the Probate Court of Van Buren County seeking a judgment for the amount alleged to be due the estate by appellee, James Gillam. The appellee filed an answer denying that he was indebted to the estate and denying that a judgment for any amount should be entered against him.

At a hearing on the petition, the administrator presented evidence that at the time of Puddy's death on November 19, 1987, Puddy had in his possession a check for $10,000.00, drawn on the farm account of James Gillam, and signed by James Gillam. Although the check had the notation "Loan" on it, the estate contended that Gillam was actually indebted to Puddy for that amount. Gillam contended that the check was a loan to Puddy.

After the estate introduced its evidence and rested, Gillam moved that the claim be dismissed. The motion was granted on the finding that the estate had not made a prima facie case. The estate has appealed from that ruling, but we are unable to decide the matter on its merits because the probate court had no jurisdiction over the matter presented.

Article 7, § 34, of the Arkansas Constitution, as amended by Amendment 24, provides that courts of probate shall have "such exclusive original jurisdiction in matters relative to the probate of wills, the estates of deceased persons, executors, administrators, guardians, and persons of unsound minds and their estates, as is now rested in courts of probate, or may be hereafter prescribed by law." Statutory jurisdiction, pertinent to this case, is stated in Ark. Code Ann. § 28-1-104 (1987) (formerly Ark. Stat. Ann. § 62-2004(b) (Repl. 1971)) as follows:

(a) The probate court shall have jurisdiction over:

(1) The administration, settlement, and distribution of

estates of decedents.

In *Hilburn* v. *First State Bank of Springdale*, 259 Ark. 569, 535 S.W.2d 810 (1976), the decedent's mother, Jewel Hilburn, filed exceptions to the administrator's inventory on the ground that the real estate listed in the inventory did not belong to the decedent. The administrator then filed a petition asking that it be authorized to sell all the estate's property, and Mrs. Hilburn filed a response again alleging that the real estate sought to be sold belonged to her because the deed to the realty had been obtained from her by fraud and undue influence. The probate court held against Ms. Hilburn, but the Arkansas Supreme Court reversed on the holding that the probate court order was void for lack of jurisdiction. The court first noted that Ms. Hilburn was not an heir, distributee or devisee of her son, or a beneficiary of or claimant against her son's estate, but a "third person" or "stranger to the estate." The court then discussed the jurisdiction of the probate court, saying:

> The probate court is a court of special and limited jurisdiction, even though it is a court of superior and general jurisdiction within those limits. . . . It has only such jurisdiction and powers as are expressly conferred by statute or the constitution, or necessarily incident thereto.

259 Ark. at 572 (citations omitted). The court then stated that "the probate court's lack of jurisdiction to determine contests over property rights and titles between the personal representative and third parties or strangers to the estate has long been recognized." The court also discussed other cases, some of which held or indicated that lack of jurisdiction could be waived. The court in *Hilburn* concluded, however, that those cases were "aberrations," and said "it is not only the right but the duty of this court to determine whether it has jurisdiction of the subject matter."

The case of *Shane* v. *Dickson*, 111 Ark. 353, 163 S.W. 1140 (1914), addressed the issue now before us. In that case, the appellee, as executor of the decedent's last will and testament, instituted an action in circuit court against the husband of the decedent to recover $1,200.00 alleged to be due for money borrowed from the decedent. After a trial, the court determined there was a balance due of $853.69 and rendered judgment in that

amount for the appellee. On appeal, the appellant contended that the circuit court was without jurisdiction to determine the case because the probate court had exclusive jurisdiction in matters relative to the probate of wills and the estates of deceased persons, executors and administrators. The Arkansas Supreme Court said:

> This contention involves a misconception as to the nature of this action. It is not a matter "relative to the probate of wills, the estate of deceased persons, executors, administrators," etc., but is a suit by the executor to recover a debt due the estate. The probate court has no jurisdiction of contests between an executor or administrator and third parties over property rights *or the collection of debts due the estate.* Its jurisdiction is confined to the administration of assets which come under its control, and, incidentally, to compel discovery of assets. . . .
>
> The suit was therefore properly brought in the circuit court.

111Ark. at 357 (citations omitted) (emphasis added).

Likewise in the instant case, Gillam is not an heir, distributee, or beneficiary, and was therefore a "third" person or "stranger to the estate." *Shane* v. *Dickson* was cited in *Ellsworth* v. *Cornes*, 204 Ark. 756, 165 S.W.2d 57 (1942), where the court said:

> Aside from this phase of the case, we are convinced that the order of the probate court was void for want of jurisdiction to make it. Throughout its history, this court has held that probate courts are without jurisdiction to hear contests of and determine the title to property between personal representatives of deceased persons and third persons claiming title adversely to the estates of deceased persons.

204 Ark. at 765.

While *Shane* v. *Dickson*, *supra*, was decided prior to the adoption of Amendment 24 to our constitution in 1938, the jurisdiction of the probate court, so far as the issue here is concerned, was the same—"exclusive original jurisdiction in

matters relative to the probate of wills, the estates of deceased persons, executors, administrators . . . ." *See* Complier's Note, Ark. Const. art. 7 § 34, Ark. Stat. Ann. (1947).

In *Risor* v. *Brown*, 244 Ark. 663, 426 S.W.2d 810 (1968), involving probate jurisdiction long after the adoption of Amendment 24, the court cited *Shane* v. *Dickson* in the following holding:

> In the present case, the suit is not a matter "relative to the probate of wills, the estate of deceased persons, executors, administrators, etc.," but is actually a suit by the administratrix seeking contribution from one she alleges to be a distributee and beneficiary (under the provisions of Section 63-150). As pointed out in *Shane*, the Probate Court's jurisdiction was "confined to the administration of assets which come under its control," *i.e.*, assets which were a part of the estate devised or bequeathed by Mrs. Anderson in her will.

244 Ark. at 666.

In *Merrell* v. *Smith*, 226 Ark. 1016, 295 S.W.2d 624 (1956), it was held that the probate court did not have jurisdiction to require specific performance of an agreement the testatrix allegedly made to leave her property to the appellants. The court said while the probate court properly admitted the will to probate, it lacked jurisdiction to decide the issue of specific performance. And in a recent case, *Eddleman* v. *Estate of Farmer*, 294 Ark. 8, 740 S.W.2d 141 (1987), a tort claim was filed in probate court against an estate. The probate court ruled that the statute of limitation had run and dismissed the tort action. The Arkansas Supreme Court reversed this ruling because the probate court did not have jurisdiction of the tort case.

It is our conclusion that in the case at bar, the probate court did not have jurisdiction of the suit by the administrator of the estate to collect a debt alleged to be due to the estate by the appellee. Therefore, we reverse the probate court's granting of appellee's motion for directed verdict, or dismissal of claim, on the administrator's suit to recover the alleged debt. The court's ruling was void.

The dissenting opinion agrees that *Hilburn*, *supra*, as well as

other cases, supports our holding that the probate court lacked subject matter jurisdiction of the petition filed by the administrator in this case. The dissent states, however, that the issue is not "clear" and cites cases which the dissent contends "arguably would support a holding to the contrary."

One case cited is *Deal* v. *Huddleston*, 288 Ark. 96, 702 S.W.2d 404 (1986), which held that the probate court had subject matter jurisdiction of a petition filed by the executrix, who was a daughter of the deceased, against her two brothers, who were sons of the deceased. The executrix alleged her brothers had wrongfully taken various articles belonging to the estate, and she asked that they be directed to return this property. The Arkansas Supreme Court cited *Snow* v. *Martensen*, 255 Ark. 1049, 505 S.W.2d 20 (1974), and *Keenan* v. *Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979), as authority for its holding that the probate court had jurisdiction of the petition in *Deal*. The court said it had concluded in *Snow* v. *Martensen* "that 'the better rule would be that the probate courts do have jurisdiction to determine the ownership of property . . . as between personal representatives claiming for the estates and heirs or beneficiaries claiming adversely to the estates.' " And the court in *Deal* added that it had in the *Keenan* v. *Peevy* case "echoed the statement in *Snow*."

The *Snow* v. *Martensen* case is cited in the dissent to the opinion in the instant case and was cited in the *Hilburn* case which we have above discussed. However, there is no conflict between the two cases. Our supreme court said in *Hilburn* that the probate court had no jurisdiction over the petition filed by the decedent's mother who was not an heir, distributee or devisee of her deceased son, or a beneficiary of or claimant against his estate, but a "third person" or "stranger" to that estate; and the court cited *Snow* v. *Martensen* and said that case reversed the probate court's dismissal "of a challenge by beneficiaries under the will of the decedent to the inventory filed by the personal representative who was the other beneficiary." Thus, *Hilburn*, *Snow*, *Keenan* and *Deal* are all consistent.

The dissenting opinion also cites *Hartman* v. *Hartman*, 228 Ark. 692, 309 S.W.2d 737 (1958); *Hobbs* v. *Collins*, 234 Ark. 779, 354 S.W.2d 551 (1962); and *Park* v. *McClemens*, 231 Ark. 983, 334 S.W.2d 709 (1960), as cases which "arguably" would

support a holding contrary to our conclusion in the instant case. However, those cases were also cited in *Hilburn* which said that *Hartman* v. *Hartman* and *Park* v. *McClemens* (upon which *Hobbs* v. *Collins* had relied) were both "aberrations." *See* 259 Ark. at 575.

The dissent also cites *Hooper* v. *Ragar*, 289 Ark. 152, 711 S.W.2d 148 (1986), and *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986), as "applicable by analogy" and suggests that they show "an inclination" by our supreme court "to follow the trend of foreclosing the issue of subject matter jurisdiction when the issue has not been raised." The dissent then makes the statement that "because I do not think the probate court had no tenable nexus whatever to the claim below, I would treat the matter as 'one of propriety,' " and concludes that by raising the issue of lack of jurisdiction *sua sponte* we lose the benefit of briefs on the issue by the parties in the case.

However, we do not agree that *Hooper* and *Liles* are "applicable by analogy" to the jurisdictional issue here. Both of those cases involved situations where the jurisdictional issue was clearly different from the one in the instant case and both of these cases recognized and commented on this point. In *Liles* the court said:

> Of course, where the exclusive jurisdiction to adjudicate a matter has been placed by the constitution or by statute in some other court, *such as probate matters in the probate court* or bastardy proceedings in the county court, the question of subject matter jurisdiction may not be waived and the chancery court is totally without power.

289 Ark. at 176 (emphasis added). And in *Hooper* the court referred to the *Liles* decision and said:

> As we explained, subject matter jurisdiction in one sense means power and may be exclusively vested in a particular court. For example, the circuit court has exclusive jurisdiction of election contests, the chancery court of divorce cases, and the probate court of the probating of wills. No other court has the power to entertain and decide such cases.

289 Ark. at 154.

In the final analysis, *Hilburn* v. *First State Bank of Springdale*, *supra*, was decided by the Arkansas Supreme Court, we think it is on point and controlling in the instant case, and it is our duty to follow it. The instant case is very simply an attempt by the administrator of an estate to obtain a money judgment in probate court for the estate against one who is a "third person" or "stranger" to the estate. The suit does not come within the constitutional and statutory jurisdiction of the probate court. That was the holding in *Hilburn*, and if that were not still the law, our supreme court would not have held in *Eddleman* v. *Estate of Farmer*, *supra*, that the probate court did not have jurisdiction of a tort claim filed against an estate.

As for raising the jurisdictional question *sua sponte*, *Hilburn* said "it is not only the right but the duty of this court to determine whether it has jurisdiction of the subject matter." 259 Ark. at 576. In *Liles* v. *Liles*, *supra*, cited in the dissenting opinion, the court recognized that *Hilburn* stands for this proposition. 289 Ark. at 174. And in regard to input from counsel for the parties, the rules allow the filing of a petition for rehearing and briefs on the jurisdictional issue may be filed by both parties in support of and response to the petition for rehearing.

We think, however, that it is not necessary to dismiss the suit against the appellee but that it can be transferred to circuit court. In *Hilburn*, *supra*, upon finding the probate court to be without jurisdiction, the Arkansas Supreme Court reversed the probate court and remanded with directions to transfer the contest to chancery court. Also, in *Cummings* v. *Fingers*, 296 Ark. 276, 753 S.W.2d 865 (1988), because of the circuit court's lack of jurisdiction to grant the relief sought, the Arkansas Supreme Court, citing *Hilburn*, reversed and remanded with directions to transfer the cause to chancery court. 296 Ark. at 281.

Furthermore, Ark. Code Ann. § 28-1-114(b) (1987) provides that the procedure in probate courts, except as otherwise provided, shall be the same as in courts of equity, and chancery courts are specifically authorized to transfer matters to circuit court. *See* Ark. Code Ann. § 16-13-401 (1987).

We therefore reverse and remand with directions to transfer this suit against the appellee to circuit court.

JENNINGS, J., dissents.

JOHN E. JENNINGS, Judge, dissenting. I cannot agree that the answer to the question whether the trial court had "subject matter jurisdiction" is clear. I do agree that these cases, cited by the majority, support the argument that the probate court lacked subject matter jurisdiction: *Hilburn* v. *First State Bank of Springdale*, 259 Ark. 569, 535 S.W.2d 810 (1976); *Risor* v. *Brown*, 244 Ark. 663, 426 S.W.2d 810 (1968); *Ellsworth* v. *Cornes*, 204 Ark. 756, 165 S.W.2d 57 (1942); *Shane* v. *Dickson*, 111 Ark. 353, 163 S.W. 1140 (1914). The majority's position on this issue is also supported by *Huff* v. *Hot Springs Savings, Trust & Guaranty Co.*, 185 Ark. 20, 45 S.W.2d 508 (1932). The following cases, however, at least arguably would support a holding to the contrary: *Deal* v. *Huddleston*, 288 Ark. 96, 702 S.W.2d 404 (1986); *Keenan* v. *Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979); *Snow* v. *Martensen*, 255 Ark. 1049, 505 S.W.2d 20 (1974); *Hobbs* v. *Collins*, 234 Ark. 779, 354 S.W.2d 551 (1962); *Park* v. *McClemens*, 231 Ark. 983, 334 S.W.2d 709 (1960); *Carlson* v. *Carlson*, 224 Ark. 284, 273 S.W.2d 542 (1954); *Thomas* v. *Thomas*, 150 Ark. 43, 233 S.W. 808 (1921). Confusion in this area has periodically been acknowledged. *See, e.g.*, *Hartman* v. *Hartman*, 228 Ark. 692, 309 S.W.2d 737 (1958); *Hilburn, supra*; *Deal, supra.*

Historically, the supreme court has taken a restrictive approach in determining the jurisdiction of probate court. This has not been entirely a function of constitutional limitations. *See, e.g.*, *Moss* v. *Moose*, 184 Ark. 798, 44 S.W.2d 825 (1931). Some of the reasons for taking a restrictive approach no longer exist. As late as 1931, the supreme court said of probate judges: "Some possibly are dishonest, many are not wise or discriminating." *Moss* v. *Moose*, 184 Ark. at 802. Today all probate judges are chancellors; an increasing number are also circuit judges.

Traditionally, if a court acts outside of the constitutional or statutory provisions defining its subject matter jurisdiction, any resulting judgment would be *coram non judice* and void. *See* R. Casad, *Jurisdiction in Civil Actions* § 1.01[1] (1983); *Huff* v. *Hot Springs Savings, Trust & Guaranty Co.*, 185 Ark. 20, 45 S.W.2d 508 (1932). *See also Eddleman* v. *Estate of Farmer*, 294 Ark. 8, 740 S.W.2d 141 (1987); *Filk* v. *Beatty*, 298 Ark. 40, 764

S.W.2d 454 (1989). Professor Casad, however, notes:

> Actually, the effect of a court exceeding the limits of its subject matter jurisdiction is not as cut-and-dried a matter as traditional doctrine would suggest. The issue of subject matter jurisdiction can, in fact, be foreclosed in some situations.

Casad, *supra*; *see also* Dobbs, *The Validation of Void Judgments: The Bootstrap Principle*, 53 Va. L. Rev. 1003 (1967). There is certainly authority in Arkansas for foreclosing the issue of subject matter jurisdiction under certain circumstances. *Fancher* v. *Kenner*, 110 Ark. 117, 161 S.W. 166 (1913), suggests that jurisdiction of the probate court may be "acquiesced in." In *Mason* v. *Urban Renewal*, 245 Ark. 837, 434 S.W.2d 614 (1968), the supreme court held that one could be estopped to assert a lack of subject matter jurisdiction. *Taylor* v. *Terry*, 279 Ark. 97, 649 S.W.2d 392 (1983), suggests that the issue must be raised on appeal.

In an article entitled *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse*, 1988 B.Y.U.L. Rev. 1, Professor Robert Martineau notes that the American Law Institute, both in its *Restatement Second of Judgments* and in its proposal on diversity jurisdiction, suggests that there is no reason why the issue of subject matter jurisdiction cannot be foreclosed in the trial court under the same rules that apply to preserving other types of error. "Namely, counsel must raise it in the trial court, have the objection noted in the record, and then present the issue in the principal brief on appeal." Martineau at p. 33. He says:

> Foreclosing the issue of subject matter jurisdiction is justified because both the other party and the judicial system have been put to substantial expense in time and money to decide the case on the merits. This expense may all have been avoided if the party objecting to subject matter jurisdiction had done so as a preliminary matter prior to trial.

Id. at p. 34.

Martineau also notes that "making a requirement that a particular person or type of person be made a party an element of

subject matter jurisdiction cannot be justified by even an expansive interpretation of the concept. Even when the confusion over necessary and indispensable parties was at its height, there was no suggestion that a court's subject matter jurisdiction was involved." *Id.* at p. 26. This observation is particularly applicable to the issue of subject matter jurisdiction in the case at bar because the applicable case law seems to turn, at least in part, on the "type of person" who is a party to the action.

In my view the Arkansas Supreme Court has shown an inclination to follow the trend of foreclosing the issue of subject matter jurisdiction when the issue has not been raised. In *Hooper* v. *Ragar*, 289 Ark. 152, 711 S.W.2d 148 (1986), the primary argument on appeal was that the circuit court lacked jurisdiction to entertain a suit for an accounting and settlement of partnership affairs. The court said:

> Hence, it is said, the circuit court had no jurisdiction of the subject matter, so that the entire proceeding in that court was a nullity. There was no objection in the lower court to its jurisdiction, but the argument is that a lack of subject matter jurisdiction may be raised at any time.
>
> * * *
>
> As we explained [in *Liles* v. *Liles*], subject matter jurisdiction in one sense means power and may be exclusively vested in a particular court. For example, the circuit court has exclusive jurisdiction of election contests, the chancery court of divorce cases, and the probate court of the probating of wills. No other court has the power to entertain and decide such cases.
>
> The present litigation, however, does not come within that category. . . . Here the lawyers and the trial judge tacitly recognized the jurisdiction of the circuit court and went ahead with the trial. The appellants have had their day in court and are not entitled to a second chance.

In *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986), decided the same day as *Hooper*, the contention was that the chancery court lacked subject matter jurisdiction to decide a tort claim (fraud). There the court said:

> We are not considering whether the plaintiff had a right to have the claim in chancery rather than the circuit court; rather the issue is whether the chancellor had the *power* to determine the matter.
>
> * * *
>
> We noted [in *Crittenden County* v. *Williford*] it is only when the court of equity is "wholly incompetent" to consider the matter before it will we permit the issue of competency to be raised for the first time on appeal.
>
> Viewed together, these cases demonstrate that we have come to the position that unless the chancery court has no tenable nexus whatever to the claim in question we will consider the matter of whether the claim should have been heard there to be one of propriety rather than one of subject matter jurisdiction. We will not raise the issue ourselves, and we will not permit a party to raise it here unless it was raised in the trial court. [Emphasis in original. Citations omitted.]

See also Horne Brothers, Inc. v. *Ray Lewis Corp.*, 292 Ark. 477, 731 S.W.2d 190 (1987) (the test is whether the court has no tenable nexus whatever to the claim in question) and *McCoy* v. *Munson*, 294 Ark. 488, 744 S.W.2d 708 (1988). Although neither *Hooper* nor *Liles* involved the issue of the jurisdiction of probate court they seem applicable by analogy.

Because I do not think that the probate court had no tenable nexus whatever to the claim below, I would treat the matter as "one of propriety." Particularly in view of the uncertainty as to whether the probate court did in fact have subject matter jurisdiction, I would not raise the issue *sua sponte*. While I agree with the majority that we have the power to raise the issue of the trial court's subject matter jurisdiction *sua sponte*,[1] I do not agree that we have a duty to do so. The cases which refer to the *duty* of the court to raise the issue of subject matter jurisdiction are cases dealing with the court's *own* jurisdiction. For instance, the lack of an appealable order goes to the appellate court's own jurisdiction

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[1] *See Coran* v. *Keller*, 295 Ark. 308, 748 S.W.2d 349 (1988).

and is a matter which the appellate court raises *sua sponte*. *See, e.g.*, *Cigna Ins. Co.* v. *Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988); *State* v. *Hurst*, 296 Ark. 132, 752 S.W.2d 749 (1988). Likewise, the trial court has a duty to determine whether a case presented to it is within its subject matter jurisdiction. *See generally* 20 Am. Jur. 2d *Courts* § 92 (1965); 21 C.J.S. *Courts* § 114 (1940). There is, however, no *duty* on the part of the appellate court to raise, on its own motion, the issue of the subject matter jurisdiction of the trial court.

There are practical reasons for not raising issues on our own motion. We do not have the benefit of briefs on the issue. We are left to our own research. We lose the benefits of the adversary system. For precisely these reasons we are less likely to arrive at the correct answer when we raise an issue *sua sponte*.[2]

Here, it is not at all clear that the probate court was wholly without subject matter jurisdiction, and it is neither necessary nor the best course of action to raise that issue on our own. Appellant has had its day in court in the forum it selected and is not entitled to a second chance. I would decide the case on the merits.

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[2] Two recent examples are *Gorchik* v. *Gorchik*, 10 Ark. App. 331, 663 S.W.2d 941 (1984), overruled in *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986) and *Travelers Indemnity Co.* v. *Olive's Sporting Goods, Inc.*, 25 Ark. App. 81, 753 S.W.2d 284 (1988), reversed on petition for review *Travelers Indemnity Co.* v. *Olive's Sporting Goods, Inc.*, 297 Ark. 516, 764 S.W.2d 596 (1989).

Robert THRELKELD and Sammy Grisham
d/b/a T & G Cattle Company *v.* Don WORSHAM
and Mike Statler

CA 89-185 785 S.W.2d 249

Court of Appeals of Arkansas
Division I
Opinion delivered March 14, 1990

W. Swain Perkins; and *Sullivan, Emmons & Kissee*, by: *Larry Dean Kissee*, for appellants.

J. Scott Davidson & H. David Blair; and *Jim Short*, for appellees.

MELVIN MAYFIELD, Judge. The appellees in this case, Don Worsham and Mike Statler, are residents of Arkansas. They filed separate lawsuits against appellants for breach of express and implied warranties, the selling of unreasonably dangerous cattle in a defective condition, and for knowingly bring in (or causing to be brought) diseased cattle into the state of Arkansas. The cases were consolidated for trial. Appellants, who are residents of Missouri, argued that Missouri law controlled the implied warranty issue. Before trial, appellants filed a motion to strike appellees' claims for damages for breach of implied warranty,

because under Missouri law, a written warranty was necessary to maintain such a claim involving livestock. The trial judge denied this motion. At trial, appellants again argued that Missouri law controlled on the implied warranty issue. This objection was overruled, and the jury was instructed on the law of Arkansas. The case was submitted on interrogatories covering the separate theories of implied warranty, strict products liability, and statutory liability. The answer to each interrogatory was favorable to the appellees, and judgments were entered for them in the amounts found by the jury.

On appeal, appellants argue that: (1) the trial court erred in not applying Missouri law to each of the theories relied upon by the appellees, and (2) that the trial court erred in denying appellants' challenge to a juror for cause. With regard to the theory of strict liability for supplying cattle in a defective condition which rendered them unreasonably dangerous, and the statutory liability under Ark. Code Ann. Section 2-40-101(c) for bringing, or causing to be brought, cattle into Arkansas knowing them to be suffering from a contagious or infectious disease, the appellees correctly point out that the appellants have failed to preserve objections for appeal on these theories. Appellants did object to the giving of instructions using Arkansas law on the implied warranty theory but made no such objection to the application of Arkansas law to the other claims, and we do not consider arguments on appeal if they were not raised in the trial court. *Ark. Burial Ass'n* v. *Dixon Funeral Home, Inc.*, 25 Ark. App. 18, 24, 751 S.W.2d 356, 359 (1988).

In *W. M. Bashlin Co.* v. *Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982), the jury verdict was submitted on interrogatories concerning two grounds for recovery: (1) defective product liability, and (2) negligence. The court said:

> We have recognized that more than one theory of liability may properly be used in matters involving products liability. AMI 1012 provides first for a finding of a defect in the product and second that there was negligence on the part of the supplier. The plaintiff need not bear the burden of proving both theories of liability, it is enough that he prove either.

277 Ark. at 414. And in *E. I. DuPont de Nemours & Co.* v.

Dillaha, 280 Ark. 477, 659 S.W.2d 756 (1983), the jury returned a general verdict which could be sustained under both strict product liability and warranty theories. In affirming the trial court's judgment, the Arkansas Supreme Court said there was substantial evidence to sustain the jury's verdict under either theory. Therefore, we think the instant case must be affirmed under either the products liability or statutory liability theories, regardless of the warranty theory. The abstract simply does not show that any alleged error on the first two theories was preserved for appeal, and the only theory for recovery that is contested on appeal is the one based on breach of warranty. However, if we do need to examine the implied warranty issue, we find that the case should also be affirmed on that theory.

We find no Arkansas case clearly in point on the issue of the application of Arkansas law to the claims based upon breach of implied warranty. Arkansas Code Annotated Section 4-1-105(1) (1987) provides as follows:

> Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement, this subtitle applies to transactions bearing an appropriate relation to this state.

Comments 2 and 3 to Ark. Stat. Ann. Section 85-1-105 (Add. 1961) (now Ark. Code Ann. Section 4-1-105 (1987)) state:

> 2. Where there is no agreement as to the governing law, the Act is applicable to any transaction having an "appropriate" relation to any state which enacts it. Of course the Act applies to any transaction which takes place in its entirety in a state which has enacted the Act. But the mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state. Cases where a relation to the enacting state is not "appropriate" include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code.

> 3. Where a transaction has significant contacts with a state which has enacted the Act and also with other jurisdictions, the question what relation is "appropriate" is left to judicial decision. In deciding that question, the court is not strictly bound by precedents established in other contexts. Thus a conflict-of-laws decision refusing to apply a purely local statute or rule of law to a particular multistate transaction may not be valid precedent for refusal to apply the Code in an analogous situation. Application of the Code in such circumstances may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries. Compare Global Commerce Corp. v. Clark-Babbitt Industries, Inc., 239 F.2d 716, 719 (2d Cir. 1956). In particular, where a transaction is governed in large part by the Code, application of another law to some detail of performance because of an accident of geography may violate the commercial understanding of the parties.

The trial court apparently believed that the transactions in the case at bar were "transactions bearing an appropriate relation to this state." Clearly, there was no agreement by the parties as to which state's law would govern.

In *Wallis* v. *Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453 (1977), the Arkansas Supreme Court was presented with an issue involving the proper choice of law in a tort case resulting from a motor vehicle accident, and the court expressed approval of Dr. Robert Leflar's "choice-influencing considerations," which are: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. *See also* R. Leflar, L. McDougal, & R. Felix, *American Conflicts Law* Section 95, at 279 (4th ed. 1986). In *Wallis*, the supreme court reversed the trial court's application of Missouri's contributory negligence statute, because it found that Arkansas' comparative fault statute is a better rule of law. The supreme court stated:

> This State's governmental interest in its citizens is best served by application of our comparative fault statute rather than Missouri's contributory negligence law. As expressed in *Clark* v. *Clark*, 107 N.H. 351, 222 A.2d 205 (1968), probably the truest governmental interest the forum has is "in the fair and efficient administration of justice," and in our opinion application of our statute better achieves that result.

261 Ark. at 632, 550 S.W.2d at 458.

Arkansas Code Annotated Section 2-40-101(c) (1987) provides:

> Any person who shall bring in, or cause to be brought in, to the state any animal suffering from a contagious or infectious disease or that has been exposed to the contagion or infection of any disease, knowing it to have been so diseased or to have been so exposed, shall be guilty of a misdemeanor. Upon conviction, an offender shall be fined in any sum not to exceed five hundred dollars ($500). He shall, moreover, be liable for damages to others due to infection from the animal.

Thus, it is clear that Arkansas has a state interest in preventing the bringing of diseased livestock into this state.

In the treatise *American Conflicts Law*, the authors state:

> [S]ome choice-of-law statutes have been intelligently framed, with deliberate and foresighted planning of anticipated consequences. Section 1-105(1) of the Uniform Commercial Code is an example. It reads:
>
> > Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.
>
> Then certain areas of the new law are excepted, and more specific choices of law are laid down for them. The two

> ideas that are basic to the main part of this enactment are (1) parties should be free to plan their transactions with reference to what relevant law is to govern them, and (2) if they have not so planned a given transaction, the "better law" (which has an appropriate relation to the transaction) should govern it. The Uniform Commercial Code constitutes the best and most carefully formulated body of commercial law available anywhere, and this is good reason for making it the governing law.

R. Leflar, L. McDougal & R. Felix, *American Conflicts Law* Section 101, at 286-87 (4th ed. 1986).

Appellants rely on *McMillen* v. *Winona Nat'l & Savings Bank*, 279 Ark. 16, 648 S.W.2d 460 (1983). That case is distinguishable from the case at bar, because in *McMillen*, the documents recited that Minnesota law would govern. The court stated:

> The trial court held that Minnesota law should apply and we agree. The principal significant contracts [sic] were in Minnesota. *Standard Leasing Corp.* v. *Schmidt Aviation, Inc.*, 264 Ark. 851, 576 S.W.2d 181 (1979). More important, Brooks, the central figure and moving force in this whole transaction, initiated the entire arrangement. He contacted the Minnesota seller, told them financing would have to be arranged through them, and it was entirely at his behest that the matter had any contact at all with Arkansas. This makes the situation different from one where an out-of-state seller initiates contacts in Arkansas. *See Tri-State Equipment Co.* v. *Tedder*, 272 Ark. 408, 614 S.W.2d 938 (1981); *Standard Leasing Corp.* v. *Schmidt Aviation, Inc.*, *supra*; *Lyles* v. *Union Planters National Bank*, 239 Ark. 738, 393 S.W.2d 867 (1965). The documents, reciting that Minnesota law would govern, were mailed to Brooks' lawyer in Arkansas, signed in Arkansas by the buyers, and then signed in Minnesota by the seller.
>
> What contact did the Winona bank have with Arkansas? None at all. Did a Minnesota company initiate a sale to an Arkansan? No. Did the parties intend for Arkansas law to apply? Certainly there is no evidence of it, except those facts recited and Brooks' testimony that that was his

> intent. Brooks, of course, was the key to the matter and he sought to buy equipment financed by an out-of-state bank. The fact the contract was actually signed in Arkansas, and the investors never went to Minnesota cannot overcome the opposite facts: That Winona did not seek out the investors, and neither did it ever come to Arkansas; and that the contract expressly provided Minnesota law would govern. [citations omitted]
>
> Although the trial court's finding in such cases is not always critical, it has to be given some weight because a fact question did exist and the trial court found the facts to be in favor of Winona. We will not reverse that finding unless it is clearly contrary to the preponderance of the evidence. *Tri-State Equipment Co.* v. *Tedder*, *supra.*

279 Ark. at 18-19, 648 S.W.2d at 462.

Appellants also rely on *Tri-State Equip. Co.* v. *Tedder*, 272 Ark. 408, 614 S.W.2d 938 (1981). In *Tri-State*, the Arkansas Supreme Court agreed with the trial court that the contract in question was an Arkansas contract and void under Arkansas' usury law in spite of the fact that the agreement stated that it would be governed by Tennessee law. In that case, the supreme court noted that all negotiations surrounding the transaction were conducted in Arkansas: the equipment was ordered and delivered, the contract was signed, the trial of the machinery and approval occurred, and the sales tax was paid in Arkansas. The court stated:

> From the evidence presented, the chancellor could certainly conclude that in spite of a provision to the contrary, the contract was an Arkansas contract and should be governed by Arkansas law. We will not reverse the findings of the chancellor unless they are clearly contrary to the preponderance of the evidence.

272 Ark. at 410, 614 S.W.2d at 940.

Appellants also rely on *Myers* v. *Council Mfg. Corp.*, 276 F. Supp. 541 (W.D. Ark. 1967), where the district court held that Arkansas law applied to the issue of whether there must be privity for the purchaser to maintain an action for breach of implied warranty. In *Myers*, the purchaser was a resident of Washington

but negotiated with a local salesman and distributor for the purchase of equipment manufactured in Arkansas; the contract of sale was consummated in Arkansas upon acceptance of the purchase order and delivery of the equipment to a carrier, f.o.b. Arkansas. In its decision, the district court relied upon the 1959 edition of Dr. Leflar's treatise. Appellees contend that appellants' reliance on *Myers* is misplaced because *Myers* does not hold what constitutes an "appropriate relation" under Section 4-1-105(1) in the warranty context. Additionally, *Myers* was decided in 1967, before the Arkansas Supreme Court enunciated in *Wallis* its adoption of Dr. Leflar's "choice-influencing considerations."

Appellants point to the fact that appellees went to the state of Missouri to purchase the dairy cattle; they negotiated the purchase with appellants in Missouri; and the sales were consummated in Missouri. They also rely on the fact that, after the disease problem was identified, appellees went to Missouri to discuss the problems with appellants. It is appellants' contention that all of the principal significant contacts between the parties occurred in Missouri.

Appellees argue, however, that Arkansas' own governmental interest in protecting its citizens and livestock from the spread of infectious disease warrants a finding that the transactions in question bear an appropriate relation to this state. They point out that both plaintiffs were residents of the state of Arkansas; the injuries and damages sustained occurred in Arkansas; the suit was filed in Arkansas; and at least some of the cattle were delivered by appellants or their agents to the appellees in Arkansas. We agree with the appellees' argument and, under the factual circumstances and the considerations expressed in the *Wallis* case, *supra*, we cannot say that the trial court erred in applying the law of Arkansas to the transactions in this case.

For their second point on appeal, appellants argue that the trial court erred in denying appellants' challenge to a juror for cause. Appellants contend the juror should have been excused for cause because she had a business relationship with appellee Worsham for about five years prior to trial. On voir dire, she informed the court that she had prepared Worsham's income tax returns but stated that she did not believe their prior business relationship would influence her decision in any way. Appellants

moved to strike this juror for implied bias due to the employer-employee or master-servant relationship. They also argued that she was privy to Worsham's income tax and financial records, which might be relied upon to establish damages. Appellees countered that the juror did not fall in the employer-employee or master-servant categories and that the income tax returns would not be introduced into evidence. The trial court denied the challenge for cause. We first point out that appellants' abstract does not show that appellants exhausted their peremptory challenges, and under the decision of *Mason* v. *Loving*, 251 Ark. 356, 359, 473 S.W.2d 169 (1971), we are not required to examine this contention on its merits. We also point out that there is no argument made by appellants in regard to the amount of the jury verdicts; therefore, we do not find any merit in the suggestion that this juror was privy to Worsham's income tax information.

Arkansas Code Annotated Section 16-33-304(b)(2) (1987) provides in pertinent part:

> (2) Particular causes of challenge are actual and implied bias.
>
> > (A) Actual bias is the existence of such a state of mind on the part of the juror, in regard to the case or to either party, as satisfies the court, in the exercise of a sound discretion, that he cannot try the case impartially and without prejudice to the substantial rights of the party challenging.
> >
> > (B) A challenge for implied bias may be taken in the case of the juror;
> >
> > (i) Being related by consanguinity, or affinity, or stands in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, employer and employed on wages, or is a member of the family of the defendant or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted. . . .

The qualification of a juror is within the sound judicial discretion of the trial court, who has an opportunity to

observe the veniremen that this court does not have, and the trial court will not be reversed unless the appellant demonstrates an abuse of discretion. *Hobbs* v. *State*, 277 Ark. 271, 274, 641 S.W.2d 9, 11 (1982); *Henslee* v. *State*, 251 Ark. 125, 127, 471 S.W.2d 352, 354 (1971); *Rumping* v. *Ark. Nat'l Bank*, 121 Ark. 202, 211, 180 S.W. 749, 752 (1915). The fact that a juror has done business with one of the litigating parties does not *ipso facto* disqualify him as a prospective juror. *Walker* v. *State*, 237 Ark. 34, 37, 371 S.W.2d 135, 137 (1963). In *Rumping*, *supra*, the supreme court stated:

> The mere fact that the juror was indebted to one of the parties did not necessarily disqualify him. Jurors who are accepted by the court as men of sufficient intelligence to decide upon questions of fact, are expected to forget their friendships for one of the parties even though that friendly feeling should be based on past favors. [citation omitted]

121 Ark. at 211, 180 S.W. at 752.

Appellants rely on *Caldarera* v. *Giles*, 235 Ark. 418, 360 S.W.2d 767 (1962), in arguing that the trial court erred in not excusing the juror challenged for cause in the present case. *Caldarera* is distinguishable. In that case, the juror withheld information that he had a pecuniary interest in the proceeds from the verdict in the case.

In the case at bar, the juror clearly did not fall into the employer-employee or master-servant relationship, from which bias will be implied. Additionally, appellants failed to demonstrate actual bias on her part. We find no error in the trial court's refusal to strike this juror.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

David HART *v.* Larry BRIDGES

CA 89-477 786 S.W.2d 589

Court of Appeals of Arkansas
Division I
Opinion delivered March 21, 1990

Mitchell and Roachell, by: *Paul J. Ward*, for appellant.

Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A., by: *Dan F. Bufford* and *Brian Allen Brown*, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Sebastian County Circuit Court, Greenwood Division. Appellant, David Hart, sued appellee, Larry Bridges, alleging that appellee, a principal for the Greenwood School District, had offered him a teaching job, which he accepted, and that, in reliance upon appellee's promise of a job, he had incurred financial obligations and suffered mental anguish and distress. Appellee moved for and was granted summary judgment. From the order granting summary judgment comes this appeal. We reverse and remand.

Appellant was employed by the Ozark School District in the 1986-87 school year, and appellee was a junior high school principal for the Greenwood School District. At the end of that school year, the Ozark School District terminated appellant's employment because of his failure to obtain proper certification. Shortly thereafter, he applied for employment with the Greenwood School District and was interviewed by appellee for a position teaching eighth grade science and math. The Greenwood School Board instructed appellee to select an applicant and have the applicant sign an employment contract to be presented for review and approval at the July 1987 school board meeting. Appellee obtained appellant's signature on a contract and, at the July 1987 meeting, presented it to the school board with his recommendation that appellant be hired. Because of his failure to pass the National Teachers' Exam and his difficulties with obtaining certification, the school board refused to approve appellant and did not sign the contract.

On February 7, 1989, appellant sued appellee and stated that appellee had offered appellant a job with the school district, which he had accepted, and that, in reliance upon appellee's promise of a job, appellant purchased an automobile, incurred other financial obligations, and suffered mental anguish and distress. The school district was not included as a defendant in the lawsuit. In his answer, appellee stated that he had not offered

appellant a job; that he had no authority to do so; and that teacher contracts can be approved only by the school board.

In his answers to appellee's requests for admission, appellant admitted that he never received a written contract signed by appellee or any member of the Greenwood School Board.

On May 26, 1989, appellee moved for summary judgment on the grounds that he was merely the agent of a disclosed principal (the Greenwood School District) and lacked the power to employ teachers and only written contracts for the employment of teachers are enforceable. The affidavits of appellee, Kenny Bell, a member of the Greenwood School Board, and Gail Martin, president of the Greenwood School Board, were attached to the motion.

In his affidavit, appellee stated:

> 2. In May of 1987, Mr. Steve Perdue resigned as teacher of Eighth Grade Science and Math at the Raymond E. Wells School.
>
> 3. Thereafter, I began reviewing applications and conducted several interviews for the purpose of hiring a replacement for Mr. Perdue.
>
> 4. That I interviewed five applicants, including Mr. Dan Lokey and Mr. David Hart.
>
> 5. That, however, Mr. Dan Lokey was my first choice and Mr. Hart was my second.
>
> 6. That on June 4, 1987, I recommended Mr. Lokey to the Board, and he was approved and hired. Shortly, thereafter, Mr. Lokey informed me that this family had a change in their plans and that he would have to turn down the job.
>
> 7. That during the June, 1987, Board meeting, and because of the urgency to get a teacher hired, the Board instructed me to select another applicant, have this applicant sign a proposed employment contract with the District, and present this applicant and his proposed contract at the July, 1987, meeting for the review and approval by the Board.

8. I was not instructed or authorized to hire an applicant, but merely told to obtain his signature on a proposed contract, which would then be reviewed and approved by the Board before it became effective.

9. In early July, 1987, I met, again, with David Hart. At this meeting, I explained these circumstances to Mr. Hart and I explained to him that I would recommend his hiring to the Board. I did tell Mr. Hart that I was confident that the Board would hire him, and asked him to sign the proposed employment contract so that the contract would be prepared and signed, awaiting Board approval and their signatures.

10. At no time did I ever tell Mr. Hart that he was hired by either me or the School District, or that I had any authority to hire him. Furthermore, I never signed the proposed contract or any other document purporting to be an employment contract with the School District.

11. At the July, 1987 meeting of the Greenwood School Board, I recommended that they hire David Hart and presented his proposed contract. However, the members of the board were unwilling to approve Mr. Hart or sign the proposed contract because of difficulties with Mr. Hart's certification and his failure to pass the National Teachers' Exam.

In his response to appellee's motion for summary judgment, appellant argued that he had not sued appellee for breach of an employment contract but that appellee had misled him into believing that he had a job with the school district. Appellant also argued that a school board is not prohibited from delegating the power to hire teachers to an agent and that appellant reasonably believed that appellee had this power. Appellant attached his affidavit wherein he stated that, during his interview, appellee told him that he had authority to hire a teacher; that appellee had offered him a job; that appellee told him to report for work on August 25, 1987; and that, because appellee had believed he would be employed by the district, he had bought a new car and entered summer school classes to complete his certification requirements.

On June 20, 1989, the Sebastian County Circuit Court entered summary judgment for appellee. In his findings, the circuit judge stated:

> 2. The Plaintiff alleges that he was misled by the defendant, an agent of the School District, that he had authority to hire the plaintiff as a teacher, the plaintiff relied upon the representations of the defendant, and this reliance caused him resulting damage for mental auguish, lost earnings from the promised contract, and financial loss he incurred in purchasing an automobile and expenses for further education.
>
> 3. The Plaintiff did not have a written contract (Ark. Code Ann. Section 6-17-919 (2)) and the offer of a teaching position by the defendant and accepted by the plaintiff was never approved by the Board of Directors of the Greenwood School District. Ark. Code Ann. Section 6-13-620(3)
>
> 4. As a matter of law, the plaintiff, an experienced teacher, could not have reasonably been misled by the statements of the defendant (agent) in excess of the authority given to him by the School District (Principal) that he could hire the defendant to teach at Greenwood in view of the fact that he should reasonably have known under the facts and circumstances that he had to have a written Contract approved by the Greenwood School District Board for it to be an enforceable Contract.
>
> 5. Therefore, the Plaintiff, in view of *Ark. Code Ann.* Sections 6-17-919(2) and 6-13-620(3), could not have justifiably relied upon defendants' representations and as a result sustain damages. (AMI 405)

On appeal, appellant emphasizes that he has not based this lawsuit upon the contract with the school district into which he thought he had entered, but upon appellee's breach of promise. Appellant contends that appellee's false representations that he had authority to hire appellant and that appellant would have a job with the school district are the bases for this suit. Appellant argues that, even though he had no enforceable contract with the school district, appellee is liable for his damages because an agent

who contracts in the name of his principal without authority may be personally liable to the other party.

Summary judgment is an extreme remedy and should be granted only when it is clear that there is no issue of fact to be decided. *Johnson* v. *Stuckey & Speer, Inc.*, 11 Ark. App. 33, 35, 665 S.W.2d 904, 906 (1984). The object of summary judgment is not to determine any issue of fact, but to determine whether there is an issue of fact to be tried; if there is any doubt, the motion should be denied. *Rowland* v. *Gastroenterology Assoc., P.A.*, 280 Ark. 278, 280, 657 S.W.2d 536, 537 (1983). Summary judgment should be granted only when a review of the pleadings, depositions, and other filings reveals that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Township Builders, Inc.* v. *Kraus Constr. Co.*, 286 Ark. 487, 490, 696 S.W.2d 308, 309 (1985). Once the moving party makes a prima facie showing of entitlement to summary judgment, the party opposing summary judgment must meet proof with proof by showing a genuine issue as to a material fact. *Hughes Western World, Inc.* v. *Westmoor Mfg. Co.*, 269 Ark. 300, 301, 601 S.W.2d 826, 827 (1980).

We agree with appellee that appellant had no enforceable contract with the school district. We agree with appellant, however, that the statutes relied upon by appellee simply do not address the issue here, and do not bar appellant from bringing an action against appellee. Arkansas Code Annotated Sections 6-13-620(3) (Supp. 1989) and 6-17-919 (1987) provide that teachers' contracts are to be in writing and that these contracts shall be made with the school board. Arkansas Code Annotated Section 6-17-302(c) (1987) provides that public school principals shall "submit recommendations to the superintendent regarding the appointment, assignment, promotion, transfer, and dismissal of all personnel assigned to the attendance area." This code section also makes it clear that the principal is under the supervision of the school board.

In *Morton* v. *Hampton School Dist. No. 1*, 16 Ark. App. 264, 266, 700 S.W.2d 373, 375 (1985), we affirmed the trial court's finding that, in order to be enforceable, a teacher's contract must be in writing and signed by the secretary and president of the school board or a majority of the members of the

board. In that case, a principal had sued the school district for its failure to renew his contract. In our decision in *Morton*, we relied upon *Johnson* v. *Wert*, 225 Ark. 91, 279 S.W.2d 274 (1955). In *Johnson*, the school board had voted to give Johnson, its superintendent, a two-year contract, but before it was prepared, a school board member asked Johnson to resign. In Johnson's breach of contract suit, the supreme court affirmed the trial court's directed verdict for the school board and stated:

> In *Bald Knob Special School Dist.* v. *McDonald*, 171 Ark. 72, 283 S.W. 22, we held the requirement of a similar statute that employment be by written contract to be mandatory and not merely directory as appellant contends. This holding conforms to the general rule that compliance with the formal requisites prescribed by statute is essential to the validity of a teacher's or superintendent's contract except insofar as the statutory requirements are directory only. 78 C.J.S., Schools and School Districts, Section 189.
>
> It is also well settled that in order to be entitled to recover compensation, a teacher must have been appointed or elected to the position for which it is sought, and have a valid contract for his services. 78 C.J.S., Schools and School Districts, Section 218c.

225 Ark. at 95, 279 S.W.2d at 276. *Accord Corbin* v. *Special School Dist. of Ft. Smith*, 250 Ark. 357, 365, 465 S.W.2d 342, 346 (1971); *Marr* v. *School Dist. No. 27*, 107 Ark. 305, 308, 154 S.W. 944 (1913).

Our inquiry cannot end with a review of the statutes and cases dealing with teachers' contracts, however. Appellant is correct in his assertion that, generally, an agent who contracts in the name of his principal without authority, so that the principal is not bound, may be personally liable to the other contracting party. *See Lasater* v. *Crutchfield*, 92 Ark. 535, 538, 123 S.W. 394, 395 (1909). In such cases, the law may imply a contract between the injured party and the agent upon the agent's implied warranty of his authority. *Dale* v. *Donaldson Lumber Co.*, 48 Ark. 188, 192, 2 S.W. 703, 704 (1886). In *Clements* v. *Citizens' Bank of Booneville*, 177 Ark. 1085, 9 S.W.2d 569 (1928), the Arkansas Supreme Court discussed this issue:

"Whether the agent can be held liable upon the contract itself which he has, without authority, assumed to make, is a question which has been much discussed and upon which the cases cannot be entirely reconciled. It would seem, however, that this question is one which must be determined largely by the circumstances of each case. Where the promise is made in the name of a principal who might have authorized it and as his contract, the better opinion is that the agent cannot be held liable upon it, but only in an action based upon the deceit; or upon the contract of warranty or indemnity, even in the case of a written contract, where the assumed relation of agency appears upon the face of it. Some courts have indeed manifested a disposition in this latter case to reject the words referring to the alleged principal as mere surplusage, and to hold the agent liable upon the remainder as upon his own contract. This, however, as has been well said, is rather to make a new contract for the parties than to construe the one which they have made for themselves." Mechem on Agency, 2d edition, vol. 1, 1023-4.

"The proper remedy against an agent by a third party, with whom the agent has dealt, where the agent acts without, or in excess of, his authority, is an action of assumpsit upon his expressed or implied warranty of authority, or, in a proper case, an action of trespass on the case for fraud and deceit, and in some jurisdictions the latter is held to be the only remedy in such cases." 2 C.J. 892.

"Some of the authorities hold that, in all written contracts, except specialties, if the pretended agent has so worded the instrument as to make it appear that he is acting for or on behalf of another, and not himself having no authority to do so — he binds himself personally, and will be liable in an action on the contract itself, for the reason that he must have intended to bind some one; and, if he was unauthorized to bind the principal, he is estopped to deny that he intended to bind himself, as in that case no one whatever would be bound. But the objection to this doctrine is that it would require the court to make a new contract for the parties, or one into which they have not

themselves entered; and the courts now generally repudiate it. While the decisions are not uniform, the great weight of modern authority is that the agent is not personally bound on the contract itself, and cannot be held liable in an action thereon." *LeRoy* v. *Jacobosky*, 136 N.C. 443, 48 S.E. 796, 67 L.R.A. 977.

In discussing the liability of agents under circumstances like this, the Wisconsin court said:

"This whole doctrine proceeds upon a plain principle of justice; for every person so acting for another, by a natural, if not a necessary, implication, holds himself out as having competent authority to do the act, and he thereby draws the other party into a reciprocal engagement. If he has no such authority, and acts *bona fide*, still he does a wrong to the other party; and, if that wrong produces injury to the latter, owing to his confidence in the truth of an express or implied assertion of authority by the agent, it is perfectly just that he who makes such assertion should be personally responsible for the consequences, rather than that the injury should be borne by the other party who has been misled by it. * * * Later and better considered opinion seems to be that the liability, when the contract is made in the name of his principal, rests upon implied warranty of authority to make it, and the remedy is by an action for its breach." *Oliver* v. *Morawetz*, 97 Wis. 332, 72 N.W. Rep. 877. And the Supreme Court of Oregon has said:

"Though the agent who has exceeded his authority cannot be sued on the contract itself, as a party thereto, unless it contains apt words to charge him, an action may be maintained against him on his implied promise that he had authority to bind the principal. * * * This promise is not a part of the agreement supposed to have been entered into with the principal, but independent thereof, and tantamount to an implied warranty that, if a third party will enter into a contract with the agent on behalf of his principal, he will indemnify such party against any loss that he may sustain, if it shall be ascertained that he does not possess the measure of authority which he assumes. Such warranty being impliedly given, it cannot be said that

> in enforcing it the court makes a new contract for the agent and a third party." *Anderson* v. *Adams*, 43 Ore. 621, 74 Pacific Rep. 215.
>
> "As we have seen, the authorities have been conflicting as to whether the agent could be held liable on the instrument, the weight of authority being in the negative." *Haupt* v. *Vint*, 68 W. Va. 657, 70 S.E. 702, 34 L.R.A. (N.S.) 518.
>
> The authorities seem to be unanimous in holding that the agent, under such circumstances, is liable, and almost unanimous in holding that an action cannot be maintained on the contract itself, but on an implied promise on the part of the agent that he has the authority to make the contract.

177 Ark. at 1088-90, 9 S.W.2d at 570-71. *Accord Hill* v. *First Nat'l Bank of Malvern*, 129 Ark. 265, 268-69, 195 S.W. 678, 680 (1917).

Here, the circuit judge granted summary judgment to appellee on the ground that appellant could not reasonably have been misled by appellee, since appellant should have known that he could not have an enforceable contract unless it was in writing and approved by the school board. It is true "that all persons who deal with school officers are presumed to have knowledge of the extent of their powers." *Ark. Nat'l Bank* v. *School Dist. No. 99*, 152 Ark. 507, 511, 238 S.W. 630, 631 (1922). Nevertheless, Arkansas recognizes the liability of an agent for contracts created outside his authority for a disclosed principal. Appellant argues that the statutes dealing with teachers' contracts simply do not apply to this situation, and we agree. It cannot be held as a matter of law that these statutes absolutely bar an action against a school principal for damages allegedly caused by his actions in excess of his authority.

We therefore cannot agree with the circuit judge that no material issue of fact remains for trial. In *Dickson* v. *Delhi Seed Co.*, 26 Ark. App. 83, 93, 760 S.W.2d 382, 388 (1988), we stated that "[i]t is well settled that whether estoppel is applicable is an issue of fact to be decided by the trier of fact," and held that summary dismissal of the complaint was not appropriate because a question of fact existed. There is no question that the parties in

the case at bar disagree as to whether appellee misrepresented his authority and that appellant was to be hired. Additionally, whether appellant relied on appellee's representations, whether appellant's acts in reliance were foreseeable by appellee, and whether appellant acted reasonably in justifiable reliance on appellee's representations are all issues of fact to be decided by the trier of fact. We therefore hold that the trial court erred in granting summary judgment for appellee.

Reversed and remanded.

CRACRAFT and COOPER, JJ., agree.

FIRST NATIONAL BANK of Roland *v.* Desno RUSH and Mary Anne Rush

CA 88-421 785 S.W.2d 474

Court of Appeals of Arkansas
Division I
Opinion delivered March 21, 1990

Daily, West, Core, Coffman & Canfield, by: *Douglas M. Carson*, for appellant.

Kirkpatrick and Horan, by: *Neal Kirkpatrick*, for appellee Mary Anne Rush.

GEORGE K. CRACRAFT, Judge. First National Bank of Roland, Oklahoma, appeals from a decision of the chancery court of Sebastian County refusing to set aside as fraudulent conveyances quitclaim deeds executed by Desno Rush. This appeal was originally filed in the Arkansas Supreme Court, which transferred the case to this court for decision.[1] We affirm.

In 1983, Bokoshe T.V. Cable, Inc., borrowed $60,000.00 from the appellant bank. Desno Rush and Ralph Lewis were the owners of all of the stock of that corporation. The loan was

[1] On recusal of Judge Mayfield, this case was resubmitted to the present members of this Division and assigned to this writer on February 21, 1990. The tape recording of the oral argument was available to all members of the Division.

secured by a security interest in the corporation's equipment and inventory. Prior to consummation of the loan, Desno Rush submitted to the bank a financial statement, which included as assets thirteen parcels of real estate owned by Rush and his wife, Mary Anne. Although the bank prepared papers for Lewis, Rush, and their wives, to personally guarantee the corporate note, for reasons that the bank could not explain, only Desno Rush signed the guaranty agreement.

When the note became in default in August, 1984, appellant filed suit against Desno Rush, Ralph Lewis, and Bokoshe T.V. Cable, Inc., and obtained judgment in January, 1985. In December, 1984, however, Rush had executed deeds conveying his interest in the thirteen lots to his wife, Mary Anne.

Shortly after the judgment was entered in Oklahoma, it was registered in Sebastian County, Arkansas. After attempts to collect on the judgment against Desno Rush in Sebastian County were unsuccessful, this action was brought to set aside the deeds to Mary Anne, as having been made with intent to defraud Desno's creditors.

After a trial, the chancellor found that all of the property in question had been purchased with Mary Anne's separate funds. He found that she owned and managed the property, and that Desno had no interest therein, other than "in name only." He further found that Mary Anne had no knowledge either of appellant's loan to Desno, that Desno had ever represented to a potential creditor that he held an interest in her property, or that any creditor of Desno's had ever relied upon her property when granting a loan to Desno. The chancellor then concluded:

> It is the Court's opinion from the facts, evidence and law that the [appellant] has failed to show fraud or intent to defraud, delay or hinder [appellant], a secured creditor of Desno Rush, and others, and that [appellant], even with entitlement to a presumption herein, the same has been rebutted and overcome by the testimony and evidence of the [appellees]. There was no intent on the part of either [appellee] to fraudulently convey property which rightfully and from its acquisition date belonged to Mary Anne Rush. It is understandable that Desno Rush's name was on the property, papers and accounts, but his interest was in

> name only until the happening of some event to give him title by possession. Mary Anne Rush did not have and has no connection with Desno Rush's businesses and no connection with an obligation to [appellant]. It would be highly inequitable to take her property to satisfy someone else's claim under the facts and circumstances in this case, more so in view of the fact that there are other avenues of satisfaction unapproached by the creditor concerned.

Appellant argues that, as Desno was not only in debt but was insolvent at the time of the transfers, a conclusive presumption of fraud of creditors arose, and the chancellor erred in holding that Desno was not insolvent and that the presumption had been rebutted. The view we take of the matter makes it unnecessary for us to determine whether or not Desno was insolvent, because the presumption of fraud never arose under the facts as found by the chancellor.

This court reviews chancery cases *de novo* on the record. However, we do not disturb the chancellor's findings of fact unless we find them to be clearly erroneous, giving due deference to the chancellor's superior position to judge the credibility of the witnesses and the weight to be given their testimony. *Hackworth* v. *First National Bank*, 265 Ark. 668, 580 S.W.2d 465 (1979); Ark. R. Civ. P. 52(a). We also will affirm a decree if it appears to be correct upon the record as a whole, even though the chancellor may have given, in whole or in part, the wrong reason for the result he reached. *Horton* v. *Koner*, 12 Ark. App. 38, 671 S.W.2d 235 (1984); *Frawley* v. *Smith*, 3 Ark. App. 74, 622 S.W.2d 194 (1981). Here, although we may not fully agree with all of the reasons stated by the chancellor, we conclude that he reached the correct result in holding that the conveyances were not fraudulent as to existing creditors of Desno Rush.

Desno and Mary Anne Rush were married in 1959. Mary Anne was a Korean national and Desno Rush was a career officer serving in the United States Army in the Republic of Korea. Mary Anne was from a wealthy family and had substantial sums of money on deposit in Korean banks prior to the marriage. Desno returned to the United States in 1971. At the time Mary Anne and their children joined him in Fort Smith, she transferred between $70,000.00 and $90,000.00 from her Korean bank to a

bank in Fort Smith. She controlled this money and used part of it to begin purchasing various rental properties. She continued to use these separate funds, along with subsequent rental income, to purchase the remainder of the thirteen lots in question. None of Desno's separate money went toward these acquisitions. The family's living expenses were paid with Desno's retirement income and Mary Anne's earnings from other employment.

Mary Anne testified that she was afraid that being an Asian female would cause people to take advantage of her, and that she had been advised by an attorney to take title to the property with her husband jointly, which she did. She also testified that, in order to assume loans on the properties, lending institutions required her to have Desno sign the notes and mortgages. There was no evidence of any intention by either spouse that Desno acquire any present interest in Mary Anne's property. Mary Anne testified that she maintained complete control over the property, collected the rents, and made all arrangements with regard to it. Desno went his separate way and engaged in entirely different business pursuits. Mary Anne had specifically instructed Desno not to use her property to borrow money, and he had promised her that he never had and never would. She knew nothing about his cable television business, was not aware of the loan made in Oklahoma, and had no knowledge that the suit had been filed against Desno or that judgment had been entered.

Mary Anne testified that as early as 1981 she had demanded that Desno convey his interest in the lots to her and that she had threatened to divorce him if he did not do so. She testified that they were having marital difficulties and that he had promised to execute the conveyances several times before the Oklahoma problems arose. Desno testified that Mary Anne had insisted on the conveyances and that he had conveyed the property to her solely in exchange for her agreement not to divorce him or expel him from the house.

[redacted] Our law of fraudulent conveyances is well settled. When a financially embarrassed debtor conveys his property to a near relative or member of his household, the conveyance must be looked upon with suspicion and scrutinized with care. If the evidence shows the conveyance to be voluntary, it is prima facie fraudulent as to existing creditors. If the debtor is insolvent and

unable to pay his debts, the presumption that the conveyance is fraudulent as to antecedent creditors is conclusive. *Brady* v. *Irby*, 101 Ark. 573, 142 S.W. 1224 (1912); *Rudy* v. *Austin*, 56 Ark. 69, 19 S.W. 111 (1892).

Not every conveyance from an insolvent husband to his wife or other member of his family is deemed fraudulent, however. There also must be a showing of some injury to the person complaining; the creditor must show that his debtor has disposed of property that might otherwise have been subjected to the satisfaction of his debt. *McCown* v. *Taylor*, 186 Ark. 273, 53 S.W.2d 434 (1932); *Mente & Co., Inc.* v. *Westbrook*, 181 Ark. 96, 24 S.W.2d 976 (1930); *Quachita Electric Cooperative Corp.* v. *Evans-St. Clair*, 12 Ark. App. 171, 672 S.W.2d 660 (1984). Therefore, if Desno's interest in the thirteen lots was not one that could have been subjected to the payments of his debts, the conveyances would not be fraudulent.

Ordinarily, when property is purchased in the name of one person with money furnished by another, a resulting trust arises in favor of the person furnishing the purchase money. *Waller* v. *Waller*, 15 Ark. App. 336, 693 S.W.2d 61 (1985); *Andres* v. *Andres*, 1 Ark. App. 75, 613 S.W.2d 404 (1981); Restatement (Second) of Trusts § 440 (1959). Under such circumstances, the person furnishing the consideration for the purchase is said to have all of the beneficial or equitable interest in the property, with the person into whose name the property was transferred having only bare, legal title. Subject to certain exceptions not applicable here, the trustee's interest is not sufficient to allow a personal creditor of the trustee to obtain satisfaction of his claim out of the trust property. *See* G. Bogert, *The Law of Trusts and Trustees*, § 466 (rev. 2d ed. 1977); 76 Am. Jur. 2d *Trusts* § 192 (1975).

In *Seib's Hatcheries* v. *Lindley*, 111 F. Supp. 705 (W.D. Ark. 1953), relied upon by appellee, a number of transfers from a judgment debtor to his wife were sought to be set aside as fraudulent as to creditors. One such transfer involved assets that the court found to have been purchased by the husband with funds provided entirely by his wife. The court, citing *Jenkins* v. *Smith*, 170 Ark. 806, 281 S.W. 377 (1926), and other Arkansas decisions, applied the principle that, when a husband takes title to

property purchased with his wife's money, the wife ordinarily becomes the equitable owner of such property. The court concluded:

> The transfers by the defendant, F.M. Lindley, to his wife, Mrs. Willie Lindley, of the Illinois Central Railroad Company and the Southwest Line Company note and mortgage, were not voluntary transfers. Mrs. Willie Lindley used her own money to purchase these items, and F.M. Lindley acted merely as her agent in purchasing them. Ms. Lindley paid a good and valuable consideration and was at all times the equitable owner; *F.M. Lindley at no time had more than a bare, legal title to these two items. Therefore, these two transfers were not fraudulent.*

Sieb's Hatcheries, 111 F. Supp. at 717 (emphasis added). *See Hall* v. *Weeks*, 214 Ark. 703, 217 S.W.2d 828 (1949); *Jenkins* v. *Smith, supra. See also* 37 C.J.S. *Fraudulent Conveyances* § 170 (1943).

The fact that title to property is taken in spouses' joint names does not necessarily alter the result. When property is taken in the joint names of husband and wife, and the consideration has been furnished by one of them, there is a presumption of a gift to the other from the one furnishing the consideration. *Jones* v. *Wright*, 230 Ark. 567, 323 S.W.2d 932 (1959). This presumption, although a strong one, may be overcome by clear and convincing proof that no such gift was intended. *Lofton* v. *Lofton*, 23 Ark. App. 203, 745 S.W.2d 635 (1988); *Lyle* v. *Lyle*, 15 Ark. App. 202, 691 S.W.2d 188 (1985). Clear and convincing evidence is evidence by a credible witness whose memory of the facts about which he testifies is distinct, whose narration of the details is exact and in due order, and whose testimony is so direct, weighty, and convincing as to enable the factfinder to come to a clear conviction, without hesitance, of the truth of the facts related. It is simply that degree of proof that will produce in the trier of fact a firm conviction of the allegations sought to be established. Our test on review is not whether we are convinced that there was clear and convincing evidence to support the trial judge's finding, but whether we can say that the finding is clearly erroneous. *Akin* v. *First National Bank*, 25 Ark. App. 341, 758 S.W.2d 14 (1988).

Here, the only testimony with regard to these factual

matters was given by Mary Anne and Desno Rush. Although the testimony of an interested party is never considered uncontradicted or uncontroverted, this does not mean that the trial court must reject the uncorroborated testimony of an interested witness when it finds the testimony to be worthy of belief. *Norman* v. *Norman*, 268 Ark. 842, 596 S.W.2d 361 (Ark. App. 1980).

Mary Anne testified clearly and unequivocally that the money used to purchase the lots was her separate property, and that none of the property was purchased with monies belonging to Desno. She stated that she had been advised by an attorney to take the title in both names to enable her to escape problems that she envisioned would result due to her Asian background. She testified that Desno had promised her that he would never use that property to obtain a loan. She also testified that she knew nothing about the business of the cable company, the loan from appellant, or the lawsuit in Oklahoma. Desno confirmed that she was without that knowledge, and he made no claim to having any interest in Mary Anne's property.

The chancellor found this testimony to be credible and true, and that Mary Anne owned the property, that Desno's interest therein was "in name only," and that Desno was motivated to convey his bare legal title by fear of divorce, rather than with intent to defraud his creditors. From our *de novo* review, we cannot conclude that the findings of the trial court are clearly erroneous. In light of those findings, we conclude that the correct result was reached.

Affirmed.

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

Lenora DUCKWORTH *v.* K.E. "Gene" POLAND

CA 89-164 785 S.W.2d 472

Court of Appeals of Arkansas
Division II
Opinion delivered March 21, 1990

R.C. Lewellen, Jr., for appellant.

Fletcher Long, Jr., for appellee.

GEORGE K. CRACRAFT, Judge. Lenora Duckworth appeals from a judgment entered against her in the amount of $16,065.00. She contends that the chancellor erred in finding that she had been unjustly enriched to that extent as a result of services rendered by appellee, K.E. Poland. We agree and reverse.

It is undisputed that during 1978 appellant, one of the heirs to a piece of ancestral property, acquired all but three-eighteenths of the undivided fractional interests of her co-tenants. Although Michael Hamelin, appellant's nephew and one of the other heirs, conveyed his interest to appellant, he was permitted to reside on the premises with his wife, Janice. At the time appellant acquired the interests of the other heirs, her stated purpose was to acquire title so that she could leave it to the Hamelin children at her death. There was evidence that she had written a will so providing. In 1983, Michael and Janice were divorced and Janice was awarded custody of the children and placed in possession of the dwelling.

In 1985, Michael and Janice Hamelin entered into a contract with appellee to remodel the dwelling at a cost of $18,000.00, and made an application for a loan at a Forrest City bank to obtain financing for the improvements. Appellee apparently completed the improvements before the bank acted on the loan. When it was determined that Michael and Janice did not have merchantable title to the property, the bank refused the loan. Appellee subsequently brought this action against Michael Hamelin on the contract, and against appellant on allegations that, as appellant was the recipient of a major portion of the benefits of his labor and material, appellee should recover from her on the theory of unjust enrichment.

The trial court found that, although appellant did not contract with appellee for the work, she was "well aware" of the improvements; that to allow her to retain the improvements by which she was unjustly enriched would be inequitable; and that she was responsible for payment of the improvements to the extent of her interest. Judgment was entered against her accordingly. On appeal, appellant argues several points for reversal. As we agree that the trial court erred in holding her liable to appellee on the theory of unjust enrichment, we do not address the other arguments.

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. A finding is clearly erroneous when the reviewing court 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); *Johnson* v. *Southern Electric, Inc.,* 29 Ark. App. 160, 779 S.W.2d 190 (1989).

Contracts implied in law are legal fictions, created by the law to do justice, and do not rest in implied or express assent of the parties. Rather, the underlying principle is that one should not unjustly enrich himself at the expense of another. To find unjust enrichment, a party must have received something of value to which he was not entitled and which he should restore. *Dews* v. *Halliburton Industries, Inc.,* 288 Ark. 532, 708 S.W.2d 67 (1986). However, there must be some operative act, intent, or situation to make the enrichment unjust and compensable. *Id.; Frigillana* v. *Frigillana,* 266 Ark. 296, 584 S.W.2d 30 (1979). The courts will imply a promise to pay for services only where they were rendered in such circumstances as authorized the party performing them to entertain a reasonable expectation of their payment by the party beneficiary. *Dews* v. *Halliburton Industries, Inc., supra; Dunn* v. *Phoenix Village, Inc.,* 213 F. Supp. 936 (W.D. 1963).

Here, the trial court's finding that appellant knew that the improvements were being made is not supported by any evidence of record. Appellant testified that she was aware that Michael Hamelin had made some minor improvements to the house in 1979, 1980, and 1981, but she knew that the improvements were being paid for by Michael. Those improvements are not at issue here. Appellant testified that she did not know appellee, and that she had never seen him before the day of trial. She testified that she had only one conversation with appellee, by telephone in September of 1985, which was after the work had been completed and after appellee had learned that the bank would not make the loan to Michael. She stated: "I was not in Arkansas last year. I saw all of the improvements after they were done."

Appellee testified that his dealings were had entirely with the Hamelins and that he had no contact whatsoever with

appellant until the work had been completed. He stated that he assumed that Michael Hamelin owned the property, and that he had begun work before the bank acted on the Hamelins' application for a loan on the belief that it would be accepted. "I had one telephone conversation with [appellant]. She did not ask me to do any work. *I did not intend to look to [appellant] to pay me.* I had no reason whatever to think she would be involved, but I feel she should pay me because she owns the house and took the house away from them."

Under the circumstances of this case, we cannot agree that any detriment sustained by appellee was sufficient, in and of itself, to justify a determination of unjust enrichment. That detriment was not brought on under any circumstances that would authorize him to entertain a reasonable expectation that the work for which he contracted with Hamelin would be paid for by appellant. To the contrary, there was direct testimony from appellee himself that he at no time entertained such an expectation but looked only to Hamelin.

Reversed and dismissed.

COOPER and JENNINGS, JJ., agree.

[redacted]