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Luther E. BAILEY and Betty E. Bailey, Husband and Wife *v.* Larry MONTGOMERY d/b/a Larry Montgomery Real Estate

CA 89-374 786 S.W.2d 594

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

Paul Jackson, for appellants.

Coxsey & Coxsey, by: *Kent Coxsey*, for appellee.

JUDITH ROGERS, Judge. This appeal involves a judgment of the chancellor dismissing appellants' claim for the return of their

earnest money deposit plus damages and awarding appellee a broker's commission of $2,700.00 and attorney's fees of $2,500.00 on his counterclaim. We affirm the chancellor's dismissal of appellants' complaint and reverse the chancellor's award of damages and attorney's fees.

Appellee, Larry Montgomery, doing business as Montgomery Real Estate, advertised some property belonging to Wayne Dickens and Kathryn Dickens for auction. The advertisement read in part:

> Green Forest, Ark. 503 East Main (Hwy. 62 E)
> SATURDAY OCTOBER 5, 1985 10:00 A.M.
> REAL ESTATE, (Commercial or Residential)
>
> 2.57 acres with 168 ft. frontage on Hwy. 62, all fenced, has 1668 sq.ft. home with 28x30 basement, large family room with fireplace, 21x23 detached garage, 11x12 storage building, 26x28 barn, all city utilities. Real Estate to be offered at 12 noon if not sold before. For info. and available financing, contact auctioneer.

Appellants attended this auction and, on the same date, signed an offer and acceptance to purchase the property for $45,000.00 in cash. No special conditions were noted in appellants' offer other than "closing to be as soon as possible." Sometime during this period, appellants discovered that the property upon which they had made the offer had not been zoned for commercial use. Appellants demanded that appellee, the broker, have the property re-zoned, which appellee refused to do. Appellants then refused to close the transaction and, on March 1, 1988, filed this suit against appellee and the sellers. The substance of appellants' complaint was that appellee, by refusing to have the property re-zoned for commercial use, refused to convey the property as required by the contract and should be ordered to perform by the court. Appellants sought the return of their $1,000.00 earnest money deposit and damages for lost profits of $30,000.00.

Appellee answered, denying that specific performance was possible as the property had since been sold to another party and denied that appellants were entitled to the return of their earnest money or damages. Appellee also counterclaimed against appellants for his broker's commission of $2,700.00, which he con-

tended he lost as a result of appellants' failure to perform the contract. Appellee further alleged that this was the third lawsuit filed by appellants and that appellants' actions were frivolous and without merit and caused him to spend considerable sums for attorney's fees, for which he sought an award of $5,000.00. Because appellants never achieved service on the Dickenses, they were not parties to the suit at trial.

After trial on the merits, the chancellor dismissed appellants' complaint, finding that the proof was insufficient to state a cause of action against appellee. The chancellor found that appellee had suffered a loss of his broker's commission in the amount of $2,700.00 because of appellants' failure to perform the contract and awarded appellee damages of $2,700.00 against appellants but gave appellants credit for their $1,000.00 earnest money deposit, which appellee had retained. The court further awarded appellee attorney's fees of $2,500.00. From this judgment, appellants appeal.

For their first point, appellants contend the trial court erred in refusing to return their $1,000.00 earnest money deposit. Appellants assert that they made their offer on the property in reliance on the phrase in appellee's advertisement, "Commercial or Residential," which they inferred to mean that the property had been zoned for commercial use. Appellants state that, after they discovered the property had not been zoned for commercial use, they demanded that appellee obtain such zoning, which he refused to do. The thrust of their argument on appeal is that, by using the phrase "Commercial or Residential" in his advertisement, appellee warranted to appellants that the property had been zoned for commercial use and his refusal to obtain such zoning excused appellants from closing the transaction.

We agree with the chancellor that appellants are not entitled to damages for appellee's alleged misrepresentation of the zoning of the property. Appellant Luther Bailey testified that, when he purchased the property, there was a house, a two-car garage, and a barn upon the property and he was aware that the sellers lived there. Wayne Dickens, one of the sellers, testified that, while the parties were in the house waiting to sign the contract, he told appellants that the property was zoned for residential use but he saw no reason why it could not be zoned for commercial use. The

chancellor found appellants were aware, or should have been aware, that the property was residential and that the evidence was insufficient to find any fraud or misrepresentation on the part of appellee.

The chancellor also noted that, if appellants, as buyers, had intended their offer on the property to be contingent on the fact that the property had been or was to be zoned for commercial use, they could have included this requirement in their offer. Appellant Luther Bailey admitted that, prior to purchasing the property, he never questioned appellee regarding the zoning of the property. Furthermore, there was no contention made by appellants that they would be unable to obtain commercial zoning for the property. In fact, at trial, appellee introduced into evidence City Ordinance No. 347 which provided in part that "all lots, tracts or other parcels of real property with frontage on U.S. Highway No. 62 shall be zoned either Commercial or Residential, at the election of the Buyer thereof upon proper application therefor."

In sum, we agree with the chancellor's conclusion that there was not any misrepresentation by appellee as to the zoning of the property and that appellants were not justified in refusing to perform the contract. Accordingly, we find appellants' complaint was properly dismissed. On appeal, we review chancery decisions *de novo* and reverse the chancellor's findings only if clearly erroneous or clearly against the preponderance of the evidence, giving due deference to his superior position to observe the witnesses and weigh their credibility. *Miniat* v. *McGinnis*, 26 Ark. App. 157, 159, 762 S.W.2d 390, 391 (1988).

■ We also agree that the chancellor did not err in refusing to return appellants' earnest money deposit to them. With reference to the earnest money deposit, the offer and acceptance provided:

> 6. Buyer herewith tenders *$1,000.00* as earnest money, to become part of purchase price upon acceptance. This sum shall be held by Agent and if offer is not accepted or if title requirements are not fulfilled, it shall be promptly returned to Buyer. If, after acceptance, Buyer fails to fulfill his obligations, the earnest money may become liquidated damages, which fact shall not preclude Seller or Agent

> from asserting other legal rights which they may have because of such breach.

The court found that there was no basis for appellants' failure to perform the contract and, therefore, under the terms of the contract, the earnest money became liquidated damages. It is undisputed that appellee was damaged when he lost his broker's commission of $2,700.00 because of appellants' failure to perform the contract.

We agree, however, with appellants' second point, that the chancellor's finding that appellants were liable for an additional $1,700.00 in damages to appellee is clearly erroneous, however, not for the reason argued by appellants. The $1,700.00 amount appellee was awarded represented the balance of the broker's commission to which appellee was entitled under the contract with the sellers after deducting appellants' earnest money deposit which appellee retained. Appellants erroneously contend that appellee is not entitled to his broker's commission because the sale of the property to appellants was never completed. A completed sale, however, is not always required in Arkansas in order for a broker to be entitled to a commission. This court has held:

> In the absence of an express contract by which a broker warrants the financial ability of the purchaser procured by him, or in the absence of fraud on the part of the broker, the realtor does not lose the commission where a binding contract of sale is effected through the agency simply because the purchaser, procured by the broker, is financially unable, or for any other reason fails to carry out the contract of purchase. *Harnwell* v. *Arnold*, 128 Ark. 10, 193 S.W. 506 (1917). *Moore* v. *Irwin*, 89 Ark. 289, 116 S.W. 662 (1909).

Gautrau v. *Long*, 271 Ark. 394, 396, 609 S.W.2d 107, 109 (Ark. App. 1980). *See also Oliver* v. *Dent*, 207 Ark. 843, 846-47, 183 S.W.2d 302, 304 (1944); *Graham* v. *Crandall*, 11 Ark. App. 109, 112, 668 S.W.2d 548, 549-50 (1984). Nevertheless, the award of a broker's commission here is in error because no contractual relationship existed between appellee and appellants.

The right of a real estate broker to recover a commission

for his services must be predicated on a contractual relation; he must have been employed to negotiate the contract in connection with which his services were rendered, and the employment must have been by the person from whom the commission is claimed. *Peebles* v. *Sneed*, 207 Ark. 1, 5, 179 S.W.2d 156, 158 (1944). In the case at bar, the written offer and acceptance only provides that the sellers agree to pay appellee a fee of six percent for his professional services rendered in securing the offer. Appellee was employed by the sellers, who are not parties to this action, and there is no evidence of an agreement by appellants to pay appellee for his services.

Nor can we consider appellee a third party beneficiary of the contract between appellants and the sellers. "[T]he presumption is that parties contract only for themselves and a contract will not be construed as having been made for the benefit of a third party unless it clearly appears that such was the intention of the parties." *Howell* v. *Worth James Const. Co.*, 259 Ark. 627, 629, 535 S.W.2d 826, 828 (1976). Moreover, it is not enough that appellee would have benefited from the contract between appellants and the sellers, *Thompson-Holloway Agency, Inc.* v. *Gribben*, 3 Ark. 119, 123, 623 S.W.2d 528, 530 (1981), appellee also had to prove that privity of contract existed between himself and appellants and that appellants, by entering into the contract with the sellers, intended to secure a benefit for him. *See Hopkins* v. *Ives*, 263 Ark. 565, 566, 566 S.W.2d 147, 148 (1978), where the supreme court held that the appellant broker was not entitled to recover his broker's commission from the buyer when the buyer defaulted on an agreement to purchase property.

> "An agent does not have such an interest in a contract as to entitle him to maintain an action at law upon it in his own name merely because he is entitled to a portion of the proceeds as compensation for making it or because he is liable for its breach."

263 Ark. at 566, 566 S.W.2d at 148, quoting Restatement (Second) of Agency Section 372(2) (1957). There is no evidence in the case at bar that appellants intended appellee to be a beneficiary of their contract with the sellers. We therefore reverse the portion of the chancellor's judgment awarding appellee

$1,700.00.

We also reverse the chancellor's award of attorney's fees to appellee. As a general rule, attorney's fees are not allowed in Arkansas unless expressly authorized by statute. *Damron* v. *Univ. Estates, Phase II, Inc.*, 295 Ark. 533, 536, 750 S.W.2d 402, 404 (1988); *Pack* v. *Hill*, 18 Ark. App. 104, 105, 710 S.W.2d 847, 849 (1986). Appellee claims that the chancellor, in awarding him attorney's fees, could have relied on Ark. Code Ann. Section 16-22-309 (Supp. 1989), which gives the court authority to award attorney's fees for complete lack of a justiciable issue. While appellee may be correct in his claim, section 16-22-309 goes on to provide that: "[o]n appeal, the question as to whether there was a complete absence of a justiciable issue shall be determined de novo on the record of the trial court alone." Based on our review of the record, we cannot say there was a complete absence of a justiciable issue and accordingly reverse the chancellor's award of attorney's fees.

Affirmed in part; reversed in part.

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

SUNBELT COURIERS *v.* Joan McCARTNEY

CA 90-63 786 S.W.2d 121

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

James C. Baker, Jr., for appellant.

Pope, Shamburger, Buffalo & Ross, by: *John K. Shamburger* and *Brad A. Cazort*, for appellee.

PER CURIAM. Joan McCartney, the appellee in this appeal from a decision of the Arkansas Workers' Compensation Commission, has filed a motion to dismiss the appeal. The issue to be decided is whether Ark. Code Ann. § 11-9-711(b) has been superseded by Rule 4 of the Rules of Appellate Procedure. We hold that the statute has not been superseded.

Because this case involves an interpretation of a rule adopted by the supreme court it would clearly be best if the decision could be made by that court. We are, however, prohibited from certifying the case to the supreme court under the decisions in *Houston Contracting Co.* v. *Young*, 271 Ark. 455, 609 S.W.2d 895 (1980), and *Ward School Bus Manufacturing* v. *Fowler*, 261 Ark. 100, 547 S.W.2d 394 (1977).

Arkansas Code Annotated Section 11-9-711(b) provides, in part:

> (b) AWARD OR ORDER OF COMMISSION—APPEAL. (1) A compensation order or award of the Workers' Compensation Commission shall become final unless a party to the dispute shall, within thirty (30) days from receipt by him of the order or award, file notice of appeal to the Court of Appeals, which is designated as the forum for judicial review of those orders and awards.
>
> (A) The appeal to the Court of Appeals may be taken by filing in the office of the commission, within thirty (30) days from the date of the receipt of the order or award of the commission, a notice of appeal, whereupon the commission under its certificate shall send to the court all pertinent documents and papers, together with a transcript of evidence and the findings and orders, which shall become the record of the cause.

Rule 4 of the Rules of Appellate Procedure provides, in part:

> (a) Time for Filing Notice. 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.

In the case at bar the appeal is timely if Ark. Code Ann. § 11-9-711(b) governs but untimely if Rule 4 applies. Appellee relies on the Supersession Rule adopted by the supreme court:

> All laws in conflict with the Arkansas Rules of Civil Procedure, Rules of Appellate Procedure and Rules for Inferior Courts shall be deemed superseded as of the effective dates of these rules.

She also notes that Act 38 of 1973 was one of the bases for the supreme court's authority to enact rules governing appellate procedure. The act provides, in part:

> Section 3. The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals.
>
> . . . .
>
> Section 5. All laws in effect on the effective date of this Act regarding pleading, practice and procedure in civil proceedings in the courts of the state and those relating to the time and manner of taking appeals in civil proceedings shall remain in effect only until such time as the Supreme Court prescribes rules regarding the same or until the same are repealed or revised by legislative action.

Appellee argues that § 11-9-711(b) has been "preempted" by Rule 4, citing *Curtis* v. *State*, 301 Ark. 208, 783 S.W.2d 47 (1990). She also relies on Rule 1 of the Rules of Appellate Procedure which states, "[t]hese rules shall govern procedure in appeals to the Arkansas Supreme Court or Court of Appeals." She correctly argues that timely notice of appeal is jurisdictional. *LaRue* v. *LaRue*, 268 Ark. 86, 593 S.W.2d 185 (1980). She also directs us to our decisions which hold that Ark. R. App. P. 2, which provides that only final orders are appealable, is applicable to appeals from the Workers' Compensation Commission. *See, e.g. Mid-State Construction* v. *Sealy*, 26 Ark. App. 186, 761

S.W.2d 951 (1988).

Nevertheless, we are not persuaded that the supreme court intended that § 11-9-711(b) be superseded by Ark. R. App. P. 4. In *St. Clair* v. *State*, 301 Ark. 223, 783 S.W.2d 835 (1990), the supreme court said that the rule making power is shared between the supreme court and the general assembly. In *Ashcraft* v. *Quimby*, 2 Ark. App. 174, 617 S.W.2d 390 (1981), we held, in effect, that the time for filing notice of appeal in a workers' compensation case was governed by Acts 252 and 253 of 1979 (predecessors of Ark. Code Ann. § 11-9-711(b)) rather than Rule 4 of the Rules of Appellate Procedure. The problem is similar to that addressed by the supreme court in *Whitlock* v. *G.P.W. Nursing Home, Inc.*, 283 Ark. 158, 672 S.W.2d 48 (1984). In that case there was conflict between the Administrative Procedure Act and the Arkansas Rules of Civil Procedure. The supreme court held that the APA procedure for judicial review is an exception to the Rules of Civil Procedure, stating "[i]t is obvious that the legislature and this court intended for the APA to be one of those exceptions to the Rules of Civil Procedure." We also note that the Rules of Appellate Procedure are broad and general in their scope while Ark. Code Ann. § 11-9-711 may be characterized as a "special" statute governing appeals only in workers' compensation cases. In such a case there seems to be a presumption that the "special" statute was intended to remain in force as an exception to the latter and more general enactment. *See* 73 Am. Jur. 2d *Statutes* § 417 (1974).

We conclude that the Arkansas Supreme Court did not intend that Ark. Code Ann. § 11-9-711(b) be superseded by Rule 4 of the Rules of Appellate Procedure.

Motion denied.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. I concur in the denial of the appellee's motion to dismiss the appeal in this matter. However, in addition to the reasons set out in the per curiam opinion by the majority of the court, I want to point out that in *Davis* v. *C & M Tractor Company*, 2 Ark. App. 150, 617 S.W.2d 382 (1981), the Arkansas Court of Appeals, in an opinion issued at the time the court was sitting en banc, considered the

relationship of Acts 252 and 253 passed by the Arkansas General Assembly in 1979, both of which provided for appeals from the Workers' Compensation Commission directly to the Court of Appeals. In that case, we pointed out that the provisions of the two acts were not exactly the same with regard to the time requirement for filing the record on appeal. Recognizing that this was a decision that the Arkansas Supreme Court "can and may ultimately make," we held that the record had to be filed within 90 days from the filing of the notice of appeal. That decision has never been changed by the Arkansas Supreme Court.

In *Ashcraft* v. *Quimby*, 2 Ark. App. 174, 617 S.W.2d 390 (1981), this court applied the provision found in Acts 252 and 253 of 1979 providing that an appeal from the Workers' Compensation Commission could be taken by filing a notice of appeal within 30 days of the date of the receipt of the order or award of the Commission. That provision may now be found in Ark. Code Ann. § 11-9-711 (1987). Our decision in *Ashcraft* has never been changed by the Arkansas Supreme Court.

Therefore, since 1981 when this court decided the *Davis* and *Ashcraft* cases, the time periods have been fixed in which notice of appeals had to be filed in workers' compensation cases and the time in which the record on appeal had to be filed in those cases. I certainly do not think this court should do anything that would contribute to making those time elements indefinite, uncertain or unsettled.

Stowe HOFFIUS *v.* Paul A. MAESTRI

CA 89-418 786 S.W.2d 846

Court of Appeals of Arkansas
Division II
Opinion delivered April 4, 1990

 [redacted]

[redacted]

Truman H. Smith, for appellant.

Jeff H. Watson, for appellee.

JAMES R. COOPER, Judge. Stowe Hoffius appeals from a summary judgment for the appellees, Paul Maestri and P.A.M. Transportation Services, Inc. The appellant brought this action for breach of an alleged three-year employment contract. Maestri is the president, chairman of the board, and chief executive officer of P.A.M. In his complaint, the appellant alleged that, in March 1987, he met with Maestri to discuss his employment with P.A.M. and that Maestri agreed to certain terms and conditions and instructed the appellant to meet with George Smith, the executive vice president and chief operating officer for P.A.M. A written contract was not prepared, but, according to the appellant, Maestri assured him that "his word was his bond." On April 4, 1987, the appellant entered into an employment contract with P.A.M. as vice president of maintenance, and a handwritten memorandum was prepared, which provided:

4/4/87

1st year		Bonus
Salary	$75,000	*$75,000
2nd year	$90,000	$90,000
3rd year	$105,000	$105,000

$75,000 Life Insurance
Car 15K to 18K

No waiting period on insurance

7500 shares stock 1st year
17500 shares stock 2nd year
The above options on 5 yr plan

3 wks vacation

Moving expenses from Ft. Smith to Springdale area one time

*Bonus is guaranteed.

/s/ George Smith /s/ Stowe Hoffius

In February 1988, the appellant was terminated as an employee of P.A.M.

In his complaint, the appellant alleged that he had an enforceable written employment contract with P.A.M.; that the appellees had breached this contract, and terminated him without cause; and that they had made "certain [untrue] statements concerning [the appellant's] job performance" that had caused damage to his reputation in the transportation industry. The appellant also stated that he had detrimentally relied upon the appellees' representations, had sacrificed a secure and well-paying job, and had moved his family to Washington County in reliance upon the agreement.

Maestri first moved to dismiss under Ark. R. Civ. P. 12(b)(6). In its answer, P.A.M. asserted the statute of frauds as a complete bar to the appellant's cause of action. Maestri and P.A.M. later moved for summary judgment on the basis of the statute of frauds. In his response to the motion for summary judgment, the appellant asserted that the memorandum satisfies the statute of frauds. The appellant also filed an affidavit with the circuit court, in which he stated:

> (1) That I was employed by P.A.M. Transportation Services, Inc., and entered into a memorandum agreement of employment on April 4, 1987.
>
> (2) That the agreement between myself and P.A.M. Transportations Services, Inc., was personally negotiated with the defendant, Paul A. Maestri, and that he guaranteed same.
>
> (3) That the employment contract discussed between

myself and the defendants detailed my annual salary for a period of three years, plus annual guaranteed bonuses and guaranteed stock, options in addition to paid up life insurance, automobile allowances and paid vacation.

(4) At the time I entered into the employment agreement with the defendants, I was employed by Cummins Mid-South in Fort Smith, Arkansas. I had been employed by Cummins Mid-South for a period in excess of six years and had tenure. Further, there was detrimental reliance on my part in becoming an employee of the defendants.

(5) That the defendants breached their agreement on February 10, 1988, by terminating my employment without justifiable grounds, and I have suffered damages as a result of this breach.

In April 1989, Maestri again moved for summary judgment on the additional ground that he was not a party to any contract with the appellant and that the appellant's deposition revealed that, as a matter of law, the appellant had no claim for damages to his reputation. A portion of the appellant's deposition states:

Now, my question is did you ever work for Paul Maestri personally?

A: In an employer/employee relationship?

BY MR. WATSON:

Q: Right. Employer/Employee relationship.

A: I'm — the personally. I'm kind of —

Q: Well, who did you work for during the months of April 1987 through February of 1988?

A: I worked for P.A.M. Transport.

Q: OKAY.

A: Or P.A.M. Transportation Services. I did report to Paul Maestri, but I don't think that's what you're asking me, is it?

Q: Reported to him as an employee?

A: Right.

Q: Did you ever work for Mr. Maestri personally?

A: No, I did not.

Q: Did you ever have an agreement or a contract where Mr. Maestri would be personally responsible for your employment?

A: I guess no.

Q: So you were actually employed by P.A.M.; isn't that correct?

A: That's correct.

After hearing arguments on the motions, the circuit court entered summary judgment for Maestri and P.A.M., in which it stated:

> 2. That there is no showing that the separate defendant, Paul A. Maestri, was individually liable to the plaintiff under any employment contract and that any actions taken by him in hiring of the plaintiff was done in the scope of his employment with P.A.M. Transportation Services, Inc.
>
> 3. That the claim of the plaintiff for breach of employment contract is barred by the statute of frauds against both defendants, Paul A. Maestri and P.A.M. Transportation Services, Inc.
>
> 4. That there is no showing of a genuine issue as to slander or statements made with malicious intent by either defendant against the plaintiff.

On appeal, the appellant has not pursued his claims of damage to his reputation. As for the breach of contract claim against Maestri, Maestri did not sign the memorandum, and the appellant's deposition supports a finding that there is no material issue of fact with regard to that claim. The summary judgment for Maestri is affirmed in all respects. The summary judgment for P.A.M. is also affirmed as to the appellant's claim for slander. We reverse as to the appellant's breach of contract action against P.A.M., however, and remand that issue for trial for the reasons discussed below.

In his brief, the appellant has argued that the trial court erred in finding that the written memorandum of the oral contract was insufficient to satisfy the statute of frauds. He argues that the memorandum sufficiently identified the essential terms of the agreement; that the contract is ambiguous and that extrinsic evidence can be introduced to interpret it; and that the representations by the appellee and the appellant's reliance thereon bar the application of the statute of frauds.

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).

Arkansas Code Annotated Section 4-59-101 (Supp. 1989) provides in part as follows:

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

The appellant argues that parol evidence is admissible to explain the memorandum in the case at bar because it is ambiguous. We disagree. In the Restatement (Second) of Contracts Section 131 (1979), it is provided:

> Unless additional requirements are prescribed by the particular statute, a contract within the Statute of Frauds is enforceable if it is evidenced by any writing, signed by or on behalf of the party to be charged, which
>
> (a) reasonably identifies the subject matter of the contract,
>
> (b) is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and
>
> (c) states with reasonable certainty the essential terms of the unperformed promises in the contract.

The generally accepted rule is that the "memorandum must show a completed contract, and if the parties have left an essential part of the agreement for future determination, it shows merely an incomplete contract." 72 Am. Jur. 2d *Statute of Frauds* Section 289 (1974). In 72 Am. Jur. 2d *Statute of Frauds* Section 339 (1974), it is provided in part:

> [T]he general rule is that the memorandum, in order to satisfy the statute, must contain the essential terms of the contract, expressed with such certainty that they may be understood from the memorandum itself or some other writing to which it refers or with which it is connected, without resorting to parol evidence. Under this rule, the memorandum must completely evidence the contract which the parties made by giving all of the essential or material terms of the contract, and must show the promise or obligation which is sought to be enforced. The writing must be such that all of the contract can be collected therefrom, resort cannot be had to the terms of the oral contract to supply deficiencies in the memorandum. A contract in writing which leaves some essential term thereof to be shown by parol is only a parol contract, and is, therefore, not enforceable under the statute of frauds. A memorandum disclosing merely that a contract has been

> made, without showing what the contract is, is not sufficient to satisfy the statute of frauds that there be a memorandum in writing of the contract.

A deficiency in a memorandum cannot, therefore, be supplied by parol evidence. The memorandum must be sufficient in itself to satisfy the statute of frauds; only then can parol evidence be admitted to explain ambiguities. 72 Am. Jur. 2d *Statute of Frauds* Section 296 (1974).

In *Wyatt* v. *Yingling*, 213 Ark. 160, 162-163, 210 S.W.2d 122, 123 (1948), the Arkansas Supreme Court affirmed the principle that a memorandum in writing which leaves an essential term of the asserted contract to be shown by parol evidence is not enforceable under the statute of frauds. In *Boensch* v. *Cornett*, 267 Ark. 671, 674, 590 S.W.2d 55, 56-57 (Ark. App. 1979), we followed this principle. *See also Izard* v. *Connecticut Fire Ins. Co.*, 128 Ark. 433, 435-46, 194 S.W. 1032, 1033 (1917); *Neujahr* v. *Producers Comm'n Ass'n*, 838 F.2d 1003, 1004 (8th Cir. 1988).

■ Here, we agree with the appellees that (1) the memorandum lacks a reference to P.A.M. or Maestri; (2) it is impossible to ascertain the subject matter of the contract; (3) the memorandum does not describe the appellant's employment duties; (4) the memorandum does not specifically list the term of employment; and (5) it is impossible to determine what all of the figures on the memorandum represent. Further, *Neujahr*, *supra*, does not support the appellant's argument that a memorandum is sufficient if it simply provides for salary and insurance. In that case, those items were omitted from the memorandum, and the court found them to be essential terms of the contract. We hold that the memorandum involved in this dispute does not satisfy the statute of frauds.

■ Our inquiry cannot end here, however, because detrimental reliance, alleged by appellant, may bar the application of the statute of frauds. In *Country Corner Food and Drug, Inc.* v. *Reiss*, 22 Ark. App. 222, 225-26, 737 S.W.2d 672, 674 (1987), we stated:

> Even if the statute of frauds were applicable to the employment contract in question, the evidence presented

below reveals sufficient detrimental reliance on the part of appellee to take the contract out of the operation of the statute of frauds. "Where one has acted to his detriment solely in reliance on an oral agreement, an estoppel may be raised to defeat the defense of the statute of frauds." 73 Am. Jur. 2d *Statute of Frauds*, 565 (1974). "An estoppel may be raised to defeat the defense of the statute of frauds although there is no fraud in the inception of the contract." *Id.* at 567. Additionally, we have held that estoppel may prevent the application of the statute of frauds. [*Ralston Purina Co.* v. *McCollum*, 271 Ark. 840, 611 S.W.2d 201 (Ark. App. 1981).]

. . . .

Here, appellee testified that, in reliance upon appellant's promises of employment and benefits, including health insurance coverage for the pregnancy and birth, as well as family health insurance coverage following the child's birth, appellee quit his job, giving up the benefits attendant thereto, and moved his family to Greenbrier, Arkansas. This is sufficient detrimental reliance to remove the employment contract from the operation of the statute of frauds.

In the Restatement (Second) of Contracts Section 139 (1979), it is provided:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.

(2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:

(a) the availability and adequacy of other remedies, particularly cancellation and restitution;

(b) the definite and substantial character of the action

or forbearance in relation to the remedy sought;

(c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise or the making and terms are otherwise established by clear and convincing evidence;

(d) the reasonableness of the action or forbearance;

(e) the extent to which the action or forbearance was foreseeable by the promisor.

See also Lucas v. *Whittaker Corp.*, 470 F.2d 326, 328 (10th Cir. 1972); 73 Am. Jur. 2d *Statute of Frauds* Section 565 (1974).

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. In *Blevins* v. *Safeway Stores*, 25 Ark. App. 297, 300, 757 S.W.2d 569, 570 (1988), we held that the issue of estoppel is generally one of fact. Here, material issues of fact clearly remain to be tried.

We agree, however, with the appellees' argument that the appellant failed to properly raise his claim that the appellees breached the covenant of good faith and fair dealing. *See American Medical Int'l, Inc.* v. *Arkansas Blue Cross and Blue Shield*, 299 Ark. 514, 518, 773 S.W.2d 831, 833 (1989).

The summary judgment against P.A.M. on the breach of contract issue is reversed and remanded for trial.

Affirmed in part; reversed and remanded in part.

CRACRAFT and JENNINGS, JJ., agree.

Deborah Darlene JONES *v.* STATE of Arkansas

CA CR 89-213 786 S.W.2d 851

Court of Appeals of Arkansas
Division II
Opinion delivered April 4, 1990

R. Paul Hughes III, for appellant.

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

JOHN E. JENNINGS, Judge. In 1985 Deborah Jones pled guilty to possession of cocaine and drug paraphernalia and received a five-year suspended sentence conditioned on good behavior. In August 1988, the State filed a petition to revoke her suspended sentence, charging that she had committed burglary and theft. After a hearing in February 1989, the circuit judge revoked her suspended sentence and sentenced her to five years imprisonment with three and one-half years suspended. On appeal it is argued that the evidence was insufficient to support the trial court's decision to revoke appellant's suspended sentence and that the court erred in refusing to exclude certain evidence. We find no error and affirm.

In a revocation proceeding, the State must prove its case by a preponderance of the evidence. *Smith* v. *State*, 9 Ark.

App. 55, 652 S.W.2d 641 (1983). On appeal we do not reverse the trial court's decision to revoke unless it is clearly against the preponderance of the evidence. *Brewer* v. *State*, 274 Ark. 38, 621 S.W.2d 698 (1981). In testing the sufficiency of the evidence, we view the evidence in the light most favorable to the State. *Phillips* v. *State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986). In the case at bar there was evidence that appellant and another woman, Lamone Harris, dropped off two men, Terry Lester and John Anderson, at the home of Mrs. Howard Campbell in Barling, Arkansas. A neighbor had seen the car driving through the area and had called the police. The police arrived in time to find Lester and Anderson coming out of the house, carrying stolen property. The men dropped what they were carrying and fled on foot. While the officers were picking up the property, appellant drove back by the house slowly. As appellant neared the police car, she speeded up and the officers gave chase. There was testimony that they followed Jones' car for up to a mile and a half with the lights and siren on before it stopped. We have said a number of times that flight is a circumstance from which criminal intent may be inferred. *Christee* v. *State*, 25 Ark. App. 303, 756 S.W.2d 565 (1988). We hold that the trial court's finding that appellant participated in the burglary is not clearly against the preponderance of the evidence.

Appellant also contends that the court erred in admitting the testimony of police officers as to statements made by Mr. Capalina, a neighbor, and Ms. Campbell, the victim. No objection was made in either instance and appellant has therefore waived the right to raise these issues on appeal. *Hill* v. *State*, 285 Ark. 77, 685 S.W.2d 495 (1985).

Appellant finally contends that the trial court erred in permitting James Hamilton, an officer with the Barling Police Department, to testify as to his discussions with Lamone Harris. In this instance appellant did make a timely objection on the basis that she would not be able to cross-examine Lamone Harris, who was not present at the hearing. We consider this objection adequate to raise the issue of the confrontation clause. Although the rules of evidence, including the hearsay rule, are not strictly applicable in revocation proceedings, Ark. R. Evid. 1101(b)(3) *see also Felix* v. *State*, 20 Ark. App. 44, 723 S.W.2d 839 (1987), the right to confront the witnesses is. *Gagnon* v. *Scarpelli*, 411

U.S. 778 (1973); *Goforth* v. *State*, 27 Ark. App. 150, 767 S.W.2d 537 (1989). In *Goforth*, relying on *United States* v. *Bell*, 785 F.2d 640 (8th Cir. 1986), we held:

> In a probation revocation proceeding the trial court must balance the probationer's right to confront witnesses against grounds asserted by the State for not requiring confrontation. First, the court should assess the explanation the State offers of why confrontation is undesirable or impractical. A second factor that must be considered, and one that has been focused on by a number of courts, is the reliability of the evidence which the government offers in place of live testimony.

In the case at bar the State gave no reason for Harris's absence and there is no contention that the trial court followed the procedure established by *Goforth*. We conclude that the trial court erred in admitting the evidence, but also conclude that the error was harmless under the circumstances. In *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986), the United States Supreme Court held that a denial of the right to confront the witness may be harmless error. The Court said:

> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684.

In the case at bar, Hamilton testified that Harris said they had been driving and had gone to the Campbell residence prior to dropping the two men off. He testified that Harris said they then drove down toward Lock and Dam 13 and came back, and that's when they were pursued and stopped. Finally, he testified that she said the two men would be looking for them to pick them up.

Subsequently David Dunagin, an attorney with the public defender's officer in Fort Smith, testified without objection that

Anderson and Lester pled guilty in connection with the burglary and were sentenced to imprisonment, but that Lamone Harris received a suspended sentence. He testified that both Harris and Jones had said "they let men off and drove around and that they were going to Fort Smith." He said that one of the girls had said that they had stopped at the house.

The appellant herself testified that she, Harris, Anderson, and Lester went to Barling. She said they stopped at the house and knocked on the door, but no one was home. She testified that they then let the men out because, according to her testimony, they were "having words." She testified that she came back by the house within about fifteen minutes, but that she had not come back to pick the men up.

Under the test enunciated in *Van Arsdall* we hold that the error here was harmless. The statement made by Harris to Hamilton was not "crucial," *see Davis* v. *Alaska*, 415 U.S. 308 (1974), and the testimony was largely cumulative. It is true that Harris told Hamilton that the men would be looking to be picked up, but that inference was readily available from other evidence in the case.

As the Supreme Court said in *Dutton* v. *Evans*, 400 U.S. 74 (1970), quoting from a statement made by Mr. Justice Cardozo in an earlier opinion,

> There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law and set the guilty free.

We hold that any error in the admission of Mr. Hamilton's testimony was harmless under the circumstances presented here.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

Richard Todd SLUSHER *v.* Ganell SLUSHER (now Dunn)

CA 89-291 786 S.W.2d 843

Court of Appeals of Arkansas
Division II
Opinion delivered April 4, 1990

[redacted]

John H. Bradley, for appellant.

Daniel G. Ritchey, for appellee.

JOHN E. JENNINGS, Judge. Richard Slusher appeals from an order of the Mississippi County Chancery Court which awarded to his former wife, Ganell Slusher, the primary custody of the parties' child, Katherine Elizabeth. The sole argument on appeal is that the trial court lacked jurisdiction. We disagree and affirm.

The Slushers were married on November 11, 1983, and the child was born on November 12, 1985. They were divorced by a decree entered in the Mississippi County Chancery Court on September 4, 1987. At that time the parties lived in Blytheville, Arkansas, where Mr. Slusher was stationed in the Air Force.

In the divorce decree the court approved a settlement agreement entered into by the parties and awarded "joint custody" of the child with the parties to have physical custody on an alternating calendar month basis. The same agreement also contained the following provision:

> The agreement regarding joint custody is made with the understanding and intent that both parties continue to reside in this area until the spring of 1988 (approximately April) at which time, both parties anticipate that they will relocate to the Cincinnati, Ohio area.

Mr. Slusher left military service in February of 1988 and moved to Cincinnati, Ohio, to live with his parents. He took the child with him at that time. From late February 1988 until late September 1988 the parties alternated physical custody on a somewhat sporadic basis, and the child spent more time in Ohio than she did in Arkansas.

On September 29, 1988, Mrs. Slusher filed a petition in the Mississippi County Chancery Court to modify the decree of divorce, seeking primary custody of the child. The petition alleged that she had remarried on May 27, 1988, that the parties had attempted to alternate custody on a calendar month basis but that the situation had become unworkable, and that it was not in the best interest of the child that the alternating custody

arrangement continue. Meanwhile, Mr. Slusher filed a petition seeking primary custody of the child in the Court of Common Pleas in Butler County, Ohio, on September 26, 1988. In affidavits attached to his petition, Mr. Slusher alleged that the child lived with him in Ohio, that he had had physical custody of the child since September 4, 1987, that Mrs. Slusher had exercised only "limited visitation," that he was fearful unless a temporary order was granted that Mrs. Slusher would remove the child to "parts unknown," and that Mrs. Slusher had taken the child by force on September 26, 1988.

On September 30, 1988, the Ohio court entered an ex parte order awarding temporary custody of the child to Mr. Slusher. On October 31, 1988, the Ohio court entered an order denying a motion to dismiss filed by Mrs. Slusher. The order recited that the court had attempted to contact the Arkansas chancellor, but did not say how. The court found that neither Ohio nor Arkansas was the home state of the child, but that it could exercise jurisdiction under Ohio Revised Code 3109.22(2)[1] because "[i]t is in the best interest of the child that a Court of this state assumes jurisdiction because the child and his parents, or the child and at least one contestant, have significant connection with this state, and there is available in the state substantial evidence concerning the child's present or future care, protection, training, and personal relationships." The Ohio court found that Mr. and Mrs. Slusher were originally from Ohio and still have family there, and that they were in Arkansas only because of Mr. Slusher's military service.

On November 16, 1988, Mr. Slusher filed a motion to dismiss for lack of jurisdiction in the Mississippi County Chancery Court. On December 2, 1988, the Mississippi County chancellor entered an order denying the motion to dismiss, finding that it had jurisdiction over the custody dispute, and directed that the child be returned to Arkansas. Part of the basis for the court's order was the following stipulation of the parties:

> (a) That both parties, together with the child lived in Arkansas when the Decree of September 4, 1987, was

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[1] This Ohio provision is identical to Ark. Code Ann. § 9-13-203(a)(2) (1987), a part of our Uniform Child Custody Jurisdiction Act.

entered;

(b) That the child was born in Arkansas and resided in this state until February 24, 1988, when the defendant moved to Ohio and took the child with him;

(c) That the child was in Ohio with the defendant except when she was with the plaintiff for the following periods of time:

(1) Three weeks in April, 1988,

(2) Eight days in June, 1988,

(3) July 2nd, to July 30th, 1988,

(4) September 3, to September 6, 1988,

(5) September 23, to October 1, 1988;

(d) That the parties met in Kentucky on September 23, 1988, at which time defendant delivered the child to the plaintiff;

(e) That the delivery of the child to the plaintiff by defendant on September 23, 1988, did not involve physical force;

(f) That on September 30, 1988, the Court in Ohio entered an Order awarding custody of the child to defendant, and this Order was entered without prior notice to plaintiff;

(g) That on October 1, 1988, defendant obtained the custody of the child from plaintiff by virtue of the Ex Parte Order of the Ohio Court entered on September 30, 1988.

The court's order recited that the Arkansas chancellor had written to the Ohio judge on October 28, 1988. The letter stated that the chancellor felt he should determine the jurisdictional issue before proceedings continued in the Ohio court. The chancellor's December 2 order also found that the September 30, 1988, order entered by the Ohio court was invalid for several reasons, including (1) that it was based on a false affidavit, (2) that it was entered without notice to the mother, and (3) that the Arkansas court had not been contacted prior to its entry in violation of the provisions of the Uniform Child Custody Jurisdiction Act, as well as the Parental Kidnapping Prevention Act, 28

U.S.C. § 1738A.

On March 24, 1989, the Mississippi County Chancery Court entered an order modifying the decree of divorce to award primary custody of Katherine to Mrs. Slusher, subject to Mr. Slusher's visitation rights. In that order the court found that it had never relinquished jurisdiction, that the Ohio court was without jurisdiction, that Arkansas was the home state of the child on the date of the commencement of the proceedings in Arkansas, and it was furthermore in the best interest of the child that the Arkansas court retain jurisdiction under Ark. Code Ann. § 9-13-203(a)(2) (1987).

The case is, as the chancellor observed, a typical custody dispute involving questions under the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act. The two acts must be read together, and where there is a conflict the PKPA controls. *Norsworthy* v. *Norsworthy*, 289 Ark. 479, 713 S.W.2d 451 (1986).

Initially, appellant contends that the chancellor's finding, that Arkansas was the home state of the child when the Arkansas proceedings were commenced, is not supported by the record. We disagree. "Home State" is defined by 28 U.S.C. § 1738A(b)(4) as:

> . . . the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

The definition of home state used in the PKPA is identical to that used in the UCCJA, Ark. Code Ann. § 9-13-202(5). Clearly, Arkansas was the home state of the child at the time of the entry of the decree of divorce. When the chancellor entered the decree of divorce providing for joint custody, in the sense that the actual physical custody of the child would be shared by the parties on an equal time basis, Arkansas remained the home state. We do not think that this status was affected by the

fact that the parties did not perfectly observe the provisions providing for transferring the child back and forth on a calendar month basis. To the extent that the child spent more time in Ohio than in Arkansas during the year 1988, the time spent with her father in excess of that provided by the decree was in the nature of a "temporary absence" within the meaning of 28 U.S.C. § 1738A(b)(4). Our holding would seem to be in keeping with the stated policies of the UCCJA to avoid jurisdictional competition and conflict between courts of different states in child custody matters and to discourage continuing controversies over child custody. *See* Ark. Code Ann. § 9-13-201 (1987).

In the case at bar, appellant's conduct was exactly the type which the UCCJA was designed to prevent or counteract. *See Blosser* v. *Blosser*, 2 Ark. App. 37, 616 S.W.2d 29 (1981).

Appellant relies on Ark. Code Ann. § 9-13-206(a):

> A court of this state shall not exercise its jurisdiction under this subchapter if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this subchapter, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

However, unlike the UCCJA, under the PKPA, jurisdiction is given to the "home state" to the exclusion of other jurisdictional considerations. *Garrett* v. *Garrett*, 292 Ark. 584, 732 S.W.2d 127 (1987). Furthermore, the chancellor found that the Ohio proceeding was not held in substantial conformity with the UCCJA, and that finding is supported by the record.

Finally, appellant argues that the statement in the settlement agreement, that both parties "anticipated" that they would move to Ohio sometime in 1988, constituted an agreement between the parties as to the forum in which to litigate future custody disputes and thus the Arkansas chancellor erred in assuming jurisdiction under Ark. Code Ann. § 9-13-207(c)(4). There are two difficulties with this contention. First, we do not think that the provision in the decree can reasonably be read as an agreement on the forum for future litigation. Second, under Ark.

Code Ann. § 9-13-207, it is a matter within the trial court's discretion whether to decline to exercise its jurisdiction when the parties have agreed on another, appropriate forum.

We conclude that the trial court did not err in exercising jurisdiction in this case.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

Dorothy White TONEY, Administratrix of the Estate of Carl Lehman White, Jr. (Deceased) *v.* Carolyn S. WHITE

CA 89-224 787 S.W.2d 246

Court of Appeals of Arkansas
En Banc
Opinion delivered April 11, 1990

Bridewell & Bridewell, by: *Laurie A. Bridewell*, for

appellant.

Robert D. Avery, Ltd., for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Probate Court of Chicot County. It involves the estate of a domiciliary of Arkansas who died intestate on November 11, 1987. During his lifetime the deceased invested in two certificates of deposit in the State of Louisiana — one in his name and that of his daughter, Dorothy White Toney, appellant, and one in his name and the name of Ms. Toney's daughter. The deceased also had two other daughters, Carolyn S. White, appellee, and Judy Richmond. After her father's death, appellant had the proceeds of the two Louisiana certificates of deposit transferred to her account in Georgia.

Appellant, on November 25, 1987, was appointed administratrix of the estate by an Arkansas probate court. In the inventory submitted February 16, 1988, she did not list the two Louisiana certificates of deposit as assets of the estate. Appellee, on July 5, 1988, filed her objections to the inventory and on November 9, 1988, sued appellant in Louisiana for one-third of the money. Following a hearing held December 19, 1988, the probate court, stating that a suit was pending in Louisiana which "will determine whether or not the two certificates of deposit, the subject of this action, is to be included in the inventory of the Estate," ordered the estate to be left open until the case was decided in Louisiana.

Appellant raises the following two points for reversal:

I.

DID THE ARKANSAS PROBATE COURT ERR IN HOLDING THAT LOUISIANA'S SUBSTANTIVE LAW APPLIED IN DETERMINING WHETHER JOINTLY HELD CERTIFICATES OF DEPOSIT IN A LOUISIANA DEPOSITORY AT THE DEATH OF AN ARKANSAS RESIDENT CO-OWNER ARE OWNED BY THE DECEASED'S ESTATE OR BY THE SURVIVING GEORGIA RESIDENT CO-OWNERS?

II.

DID THE ARKANSAS PROBATE COURT ERR IN STAYING PROBATE PROCEEDINGS PENDING A DECISION OF A LOUISIANA COURT IN A LAWSUIT COMMENCED NEARLY ONE YEAR AFTER THE ARKANSAS PROBATE WAS BEGUN AND IN WHICH THE ESTATE WAS NOT MADE A PARTY?

We, however, do not reach the merits of these arguments because the order of the probate court is not a final order.

Even though the parties to this litigation do not raise the issue of the finality of the order, it is a jurisdictional question which the appellate court has the right and duty to raise in order to avoid piecemeal litigation. *Morgan* v. *Morgan*, 8 Ark. App. 346, 652 S.W.2d 57 (1983). For an order to be appealable, it must in some way determine or discontinue the action. Ark. R. App. P. 2. It must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy in order to be final. *Taylor* v. *Taylor*, 26 Ark. App. 31, 759 S.W.2d 222 (1988).

Although the chancellor's order in this case indicates the direction in which he will rule in the future, it does not dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter which is in controversy. It, therefore, is not a final order, and the appeal is dismissed. Even so, we deem it appropriate to note that the essence of the relief appellant is seeking by way of this appeal is akin to that which would be requested by way of a petition for a writ of mandamus. *See Baker* v. *Harrison*, 247 Ark. 377, 445 S.W.2d 498 (1969); *Naylor* v. *Goza*, 232 Ark. 515, 338 S.W.2d 923 (1960); *Road Improvement Dist. No. 1* v. *Henderson*, 155 Ark. 482, 244 S.W. 747 (1922).

Dismissed.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I dissent from the holding by the majority that there is no appealable order in this case and the attempted appeal should be dismissed.

The majority opinion states that the order sought to be appealed is not appealable because "it does not dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy." Rule 2 of the Rules of Appellate Procedure sets out nine separately numbered types of orders of a circuit, chancery, or probate court which may be appealed, and I think the majority has failed to give effect to the second provision of Rule 2 which allows an appeal from:

> 2. An order which in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action.

In *Robinson* v. *Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987), the appellee brought suit for damages resulting from an illegal arrest by the appellant sheriff. Appellant's defense was "good faith" or qualified immunity. The trial court denied the appellant's motion for summary judgment. The Arkansas Supreme Court held that "generally the denial of a motion for summary judgment is a nonappealable order," but since there would be no further proceedings if the appellant was entitled to the claimed immunity, the refusal to grant the motion for summary judgment amounted to a denial of appellant's claimed defense "which would have, if allowed, discontinued the action." Therefore, citing the second provision of Appellate Procedure Rule 2 as its authority, the supreme court considered the merits of the trial court's denial of appellant's motion for summary judgment.

In *Omni Farms* v. *A P & L Co.*, 271 Ark. 61, 607 S.W.2d 363 (1980), the appellant's motion to dismiss the appellee's condemnation suit was denied by the trial court and appellant appealed. The appellee asked the Arkansas Supreme Court to dismiss the appeal because the order was not appealable. The supreme court said the appellee had conceded in oral argument that if construction was allowed to proceed it would be impossible to restore appellant's land to its previous condition in the event it was held on appeal that the appellee did not have the right to condemn. Therefore, it was held that the trial court's order denying appellant's motion to dismiss the condemnation suit "must be regarded as appealable because otherwise the order would divest a substantial right in such a way as to put it beyond the power of

the court to place the party in its former condition." 271 Ark. at 63.

In *Purser* v. *Corpus Christi State National Bank*, 256 Ark. 452, 508 S.W.2d 549 (1974), the appellant filed a counterclaim and setoff in response to a petition seeking to register a foreign judgment against appellant. The trial court dismissed the counterclaim and setoff, and the appellant appealed. The Arkansas Supreme Court held that under the general rule this would not be a final order but under the circumstances of the case, it was an appealable order because it had the effect of a final order. The court said "in determining what constitutes a final order, the requirements of finality must be given a practical rather than a technical approach," and because any relief to which appellant might be entitled in the Arkansas courts would be effectively foreclosed by the dismissal of the counterclaim and setoff, the order of dismissal was held to be an appealable order.

In *Hoggard & Sons* v. *Russell Burial Association*, 255 Ark. 576, 501 S.W.2d 613 (1973), the trial court sustained demurrers to the complaints filed by the appellant but did not dismiss them. The trial court's action was based on a finding that the court had no jurisdiction because the appellant had not exhausted its administrative remedies. The supreme court said the sustaining of a demurrer was ordinarily not an appealable order unless the plaintiff elected to stand on the demurrer and the complaint was dismissed. However, the court said the record in the case before it showed that the trial court considered matters not appearing on the face of the demurrers and, therefore, they should be treated as motions to dismiss. Thus, the order sustaining the demurrers was "tantamount to a dismissal" and because this would "effectively terminate the action" the trial court's order was a final, appealable order. *See* 255 Ark. at 579-80.

In *Safeway Stores* v. *Shwayder Brothers*, 238 Ark. 768, 384 S.W.2d 473 (1964), the trial court sustained a motion to quash the summons served on the appellee. The supreme court said that the argument could be made that this was not an appealable order because the complaint had not been dismissed and a new summons could be obtained; however, this argument did not apply as the summons was quashed because the trial court held that the legislative act which authorized the summons to be issued

was unconstitutional. Therefore, the supreme court said the only relief available to appellant was to appeal and "in that respect the trial court's order was final and appealable." *See* 238 Ark. at 771.

In the instant case, the administratrix of an estate is attempting to appeal from an order made by the probate court of Chicot County, Arkansas. The issue in the probate court is whether two certificates of deposit issued by a savings and loan association in Louisiana belong to the estate of the deceased who died in Arkansas where the probate of his estate is now pending. A suit is pending in Louisiana by one of the deceased's daughters against another daughter of the deceased, but the administratrix of the estate of the deceased is not a party to that suit. Therefore, the suit in Louisiana cannot decide whether the certificates of deposit belong to the estate of the deceased. Moreover, in addition to the fact that the savings and loan association is not even a party to the Louisiana suit, the daughter who is the defendant in that suit had the proceeds of the certificates of deposit transferred to that daughter's account in a bank in Georgia before the suit was ever filed in Louisiana. It should also be noted that the issue of the estate's ownership of the certificates was raised by the filing of objections to the inventory of the estate which did not list the certificates as assets of the estate. The objections were filed in the Chicot Probate Court by the same daughter who later filed the suit in Louisiana.

Faced with the factual situation outlined above, the probate court of Chicot County entered the order from which the administratrix is attempting to appeal in the present matter. The exact finding and order from which the appeal is taken reads as follows:

> The Court further finds that the Estate is to remain open pending the decision of the Courts in Louisiana, upon a case which has been commenced in that State. The decision of the Court in Louisiana will determine whether or not the certificates of deposit, the subject of this action, is to be included in the inventory of the Estate.

I submit the above order is an appealable order under the factual circumstances of this case. The cases of the Arkansas Supreme Court discussed above clearly show that where an order effectively determines a matter, the order will be treated as

appealable under Appellate Procedure Rule 2(a)(2) which provides that an order is appealable if it "in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action." It is also clear to me that the order from which the administratrix is attempting to appeal has effectively determined the issue pending in the probate court by either preventing a judgment from which an appeal might be taken or by discontinuing the action in that court on that issue. Therefore, under the authority of the cases discussed above, I would hold that there is an appealable order in this case.

Specifically, I would hold that the probate court erred in holding that the estate will remain open until the decision of the court in the pending case in Louisiana is made and that the decision of that court will determine whether the proceeds of the certificates of deposit are to be included in the inventory of the estate. I would find that holding to be erroneous and would remand this matter with directions that the Chicot Probate Court determine for itself whether the proceeds belong to the estate. I would not, however, tell the court what law it should use in making that determination because that is a conflict of laws question that may involve factual considerations that will have to be made by the trial court at the time its decision on the estate's interest in the proceeds is made.

In finding that this appeal should be dismissed, the majority opinion suggests that the appellant's relief is by petition for writ of mandamus. This suggestion is apparently made in recognition of the fact that under the existing circumstances the decision of the case pending in Louisiana, to which the administratrix is not a party, will not be binding on the estate. The majority probably also recognizes that the court in Louisiana—as soon as it realizes that the money is in Georgia, the estate is in probate in Arkansas, and neither party to the case lives in Louisiana—is very likely to dismiss the matter without prejudice and let the parties find some place in which to litigate that has some connection with the issue involved. However, I also think the majority's suggestion that mandamus can afford relief is based upon an erroneous assumption.

Three cases are cited by the majority as authority for the suggestion that a writ of mandamus might properly be issued in

this case. The first case, *Baker* v. *Harrison*, 247 Ark. 377, 445 S.W.2d 498 (1969), denied the petition for writ of mandamus. The supreme court said the trial court had granted a continuance until a case in federal court, involving the same parties and the same issues, was decided; that the trial court had found that prejudice could result to the defendant if the continuance was not granted; and that the trial court had wide discretion in the control of its docket. The court held that mandamus should not issue to control the discretion of the trial court unless there was a manifest abuse of that discretion. The second case, *Naylor* v. *Goza*, 232 Ark. 515, 338 S.W.2d 923 (1960), denied the petition for writ of mandamus because the court found nothing in the record to establish that the writ was needed to compel the trial court to hear and decide the case pending before it. The supreme court said "we are confident that if counsel for petitioner will request the . . . Court to set this cause down for hearing on its merits, on a day certain, the request will be complied with . . . ." The third case, *Road Improvement District No. 1* v. *Henderson*, 155 Ark. 482, 244 S.W. 747 (1922), was a case in which the supreme court granted a writ of mandamus directing a trial judge to decide a pending case without waiting until a case pending in federal court had been determined. The opinion states:

> We think the chancellor below made the mistake of law of deciding that he had the discretion to refrain from disposing of a case before him until another court had disposed of a case pending before it; and the result of this erroneous conclusion is a declination to proceed in the exercise of his jurisdiction. Mandamus will therefore lie to compel the exercise of the court's jurisdiction.

155 Ark. at 489.

These cases, cited by the majority as authority that mandamus may be the proper remedy in the instant case, are cases where the trial judge was simply waiting for something else to occur before deciding the case before him. However, that is not the situation here. The judge here was not waiting until some other event occurred before he decided whether the certificates of deposit (or the proceeds thereof) belonged to the estate. The judge here said in his order that "The decision of the Court in Louisiana will determine whether or not the certificates of

deposit, the subject of this action, is to be included in the inventory of the Estate." So, the judge was not simply waiting for the case in Louisiana to be decided before he decided the case in Arkansas. This judge has *decided* and *ordered* that the decision of the court in Louisiana *will determine* this case in Arkansas. Mandamus "to compel the exercise of the court's jurisdiction" is not what is needed in this case. The court *has* exercised its jurisdiction. What is needed here is an appellate court decision saying the trial court erred in holding that the decision in Louisiana would decide this case. That is not properly accomplished by the issuance of a writ of mandamus but by a decision on the appeal before us.

As a practical matter, under Rule 29(1)(f) of the Rules of the Supreme Court and Court of Appeals, cases for mandamus directed to a circuit or chancery court must be filed in the supreme court. *See Tyson* v. *Roberts*, 287 Ark. 409, 700 S.W.2d 50 (1985). Thus, even if mandamus would afford appellant proper relief, this court cannot treat this appeal as a motion for writ of mandamus. Appellant may, of course, file a petition with the Arkansas Supreme Court asking that court to review our decision. *See* Rule 29(6). That petition may ask the supreme court to reverse our holding that there is no appealable order in this case and, apparently, may ask in the alternative that the supreme court treat the petition for review as a petition for writ of mandamus. I also assume the appellant may ask only for review of our decision, and if review is not granted, or if this court's decision is affirmed, appellant could then file a petition with the supreme court asking for mandamus. While all this legal maneuvering may as a practical matter eventually afford appellant relief from the impossible situation with which she is now faced, the legally correct, and by far the most procedurally simple, route to take would be to reverse the trial court's decision and remand this matter for that court to determine whether the proceeds of the certificates of deposit are to be included in the inventory of the assets of the estate.

COOPER, J., joins in this dissent.

Jack D. WALKER and Nowena J. Walker *v.* Donald L. HUBBARD and Betty Lee Hubbard

CA 89-435 787 S.W.2d 251

Court of Appeals of Arkansas
Division II
Opinion delivered April 18, 1990

Martin, Vater, Karr & Hutchinson, by: *Charles Karr*, for appellants.

Willard Crane Smith, Jr., for appellees.

GEORGE K. CRACRAFT, Judge. Jack and Nowena Walker appeal from an order of the Sebastian County Chancery Court quieting title to a tract of land in appellees upon a finding of adverse possession. They contend that the chancellor's finding is clearly against the preponderance of the evidence. We find no error and affirm.

The parties are adjoining property owners in the Village Harbor Subdivision in Fort Smith. Appellees, Donald and Betty Hubbard, acquired title to a tract of land in the subdivision in 1980 and constructed a house thereon. Appellants purchased the vacant lot adjacent to appellees' property in 1987. They completed construction of a house and moved in the following year. In 1988, appellants brought this action to quiet title to their tract of land as against appellees because appellees were claiming to own a strip of land on appellants' property. Appellees answered and, by counterclaim, alleged that they had acquired title to the disputed strip by adverse possession. The trial court found in favor of appellees and quieted title to the disputed strip in them.

It is well settled that, in order to establish title by adverse possession, appellees had the burden of proving that they had been in possession of the property continuously for more than seven years and that their possession was visible, notorious, distinct, exclusive, hostile, and with intent to hold against the true owner. 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. Whether possession is adverse to the true owner is a question of fact. *Hicks* v. *Flanagan*, 30 Ark. App. 53, 782 S.W.2d 587 (1990); *Clark* v. *Clark*, 4 Ark. App. 153, 632 S.W.2d 432 (1982). Although we review 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, giving due deference to his superior position to judge the credibility of the witnesses and the weight to be given their testimony. *Hicks* v. *Flanagan*, *supra*; *Clark* v. *Clark*, *supra*; Ark. R. Civ. P. 52(a).

Here, appellees testified that they had occupied and maintained the strip of land in dispute since at least early 1981. Appellee Donald Hubbard testified that, believing that he owned the area in controversy, he began landscaping it in the fall of 1980. In the following spring, he planted junipers and maple and pine trees on the disputed strip. He thereafter sodded it with zoysia grass and planted rose and forsythia bushes on the tract. He testified that since 1981, he had mowed, raked, edged, and fertilized the area and had always considered the land to be his. Appellants countered and offered evidence that appellees' actions of dominion over the area were not extensive, continuous, or notorious. On this conflicting evidence, the court made the following findings of fact:

> Although the Court is cognizant that the [appellants] introduced an aerial photograph and other photographs in which no trees or shrubs are clearly visible, the Court is not convinced that very small trees and shrubs of the size which were planted in the disputed area would be visible in such photographs if they were present. It is also not convinced that [appellants'] witnesses who testified that they did not remember seeing grass, trees or shrubs on the lot adjacent to [appellees'] property in the early 1980's, would have necessarily realized that the disputed strip was, in fact, on [appellants'] adjacent lot rather than on [appellees'] property. The fact that some witnesses testified that [appellants'] lot was not mowed and construction materials were stored on it prior to the time when [appellant] built his home the Court does not find convincing, as

> the witnesses could and probably were referring to that portion of the [appellants'] lot except for the narrow disputed area adjacent to [appellees'] driveway. The Court believes that a passerby would simply assume that the [appellants'] lot began just to the south of the disputed strip and would not assume that the disputed strip was part of [appellants'] lot.
>
> On the other hand the [appellee] and several witnesses testified unequivocally that the grass, trees and shrubs had been planted in the disputed area and maintained since 1981.
>
> The Court further finds that the planting of grass, trees and shrubs and maintaining them for a period of in excess of seven years is sufficient to put the world on notice that the [appellee] is claiming the property as his own. The [appellee] did not just mow the grass in the adjacent strip; he planted Zoysia grass on most of it and sodded Zoysia grass on a part of the rear portion. He also regularly mowed and edged it, and he planted trees and shrubs. It is obvious even from the aerial photograph that disputed strip adjacent to the [appellees'] driveway is being maintained in a much different manner than is the rest of [appellants'] adjacent lot and it also appears to the Court that the disputed strip appears to be part of [appellees'] property rather than [appellants'].

Appellants argue that because their property was "wild and unimproved" until appellants built their home in 1988, appellees could not claim any portion of the strip by adverse possession. We disagree. There was evidence from which the chancellor could find that appellees had landscaped the land, planting trees, shrubs, and grasses that were not indigenous to the land. Lands that have been so improved cannot correctly be described as wild until they have been allowed to revert to an original state of nature. *Schuman* v. *Martin*, 259 Ark. 4, 531 S.W.2d 26 (1975). Here, there was no such evidence.

Appellants also argue that the evidence shows that appellees only intended to claim to their true boundary line and that their acts were not of a hostile character. We cannot agree. The word hostile, as used in the law of adverse possession, must

not be read too literally. For adverse possession to be hostile, it is not necessary that the possessor have a conscious feeling of ill will or enmity toward his neighbor. *Vaughn* v. *Chandler*, 237 Ark. 214, 372 S.W.2d 213 (1963). Claim of ownership, even under a mistaken belief, is nevertheless adverse.

> The oft-repeated statement that adverse possession is a possession commenced in wrong but maintained in right, does not mean that the possessor must commence his possession with an intentional wrong, for the doctrine of adverse possession is intended to protect one who honestly enters into possession of land in the belief that the land is his own. [Citations omitted.]

Barclay v. *Tussey*, 259 Ark. 238, 241-42, 532 S.W.2d 193, 195 (1976). Here, there was sufficient evidence that appellees' possession was hostile in character, within the meaning of that term as used in the law of adverse possession.

We find no merit in appellants' arguments that, as they, and their predecessors in title, had paid taxes on the lot for more than seven years; as appellees are presumed to claim that land described in their warranty deed; and as appellees never enclosed the disputed strip by a fence, wall, or other barrier, the trial court erred in not quieting title to the disputed tract in appellants. In this case, these facts do not prevent appellees from acquiring title to the disputed tract as all the elements of adverse possession have been met.

From our *de novo* review of the record, we cannot conclude that the chancellor's finding that appellees had acquired title to the tract in dispute by adverse possession is clearly against the preponderance of the evidence.

Affirmed.

JENNINGS and ROGERS, JJ., agree.

Andrew B. CAPPS III d/b/a Roll Services, Inc. *v.* ROLL SERVICE, INC.

CA 89-393 787 S.W.2d 694

Court of Appeals of Arkansas
Division I
Opinion delivered April 18, 1990

Everett O. Martindale, for appellant.

Wallace, Dover & Dixon, by: *W. Michael Rief; Gallagher & Johnson*, by: *Patricia J. Stiles* and *David L. Joslyn*, of counsel, for appellee.

JAMES R. COOPER, Judge. The appellant, Andrew Capps d/b/a Roll Services, Inc., appeals from an order of the Pulaski County Circuit Court dismissing his complaint against the appellee, Roll Service, Inc., a foreign corporation, on the ground that the appellee is not subject to *in personam* jurisdiction under the Arkansas Long-Arm Statute and the Fourteenth Amendment to the United States Constitution.

In January 1989, the appellant sued the appellee for commissions due from sales of the appellee's products and services allegedly generated by the appellant while acting as the appellee's agent. On February 9, 1989, the appellee filed a motion to dismiss for lack of *in personam* jurisdiction. Attached to that motion was the affidavit of William Scannell, the appellee's president.

In response to this motion to dismiss, the appellant argued that the court had personal jurisdiction over the appellee under Ark. Code Ann. Section 16-4-101 (1987), which states in part that personal jurisdiction may be had over a person who transacts business in this state or who contracts to supply services or things in this state. The appellant amended his complaint on March 1, 1989 (although this pleading was not filed until March 17, 1989), and on March 8, 1989. In his first amended complaint, the appellant stated:

> [The appellant] states that [the appellee] did travel to the State of Arkansas in order to transact business and, in fact,

> did meet with [the appellant] with persons from International Paper, Potlatch and Georgia Pacific. These meetings were conducted in the State of Arkansas and resulted in the attached offers being made by [the appellee] to those customers of both parties. These meetings took place the first part of May, 1987.
>
> William Scannell is the owner of [the appellee] and is the person who met with the parties' customers in the State of Arkansas about the beginning of May, 1987.
>
> The attach [sic] proposals did result in contracts between [the appellee] and companies within the State of Arkansas wherein [the appellee] contracted to supply services or items within the State of Arkansas.

On March 15, 1989, the appellee amended its motion to dismiss and stated that "the sales calls alleged by [the appellant] to have taken place in May, 1987, did not result in acceptance of [the appellee]'s proposals to those customers." In its memorandum in support of its amended motion to dismiss, the appellee argued that, although the appellee did make sales calls with the appellant to International Paper, Potlatch, and Georgia-Pacific within the state of Arkansas in May 1987, proposals sent to these companies following the visits were not accepted and did not result in sales. In that memorandum, the appellee alleged that any contracts which the appellee had with these companies resulted from separate negotiations, by way of telephone and mail, between the customers and the appellee. In another affidavit, William Scannell admitted making sales calls with the appellant in Arkansas but denied that these calls resulted in sales.

In his third amended complaint, the appellant stated:

> 1. That as a result of calls on customers of both [the appellant] and now, [the appellee], [the appellee] has made sales of goods and services to said customers for which [the appellee] owes [the appellant] a commission.
>
> 2. That the customers referred to herein are International Paper, Potlatch and Georgia Pacific; that calls were made upon these customers by [the appellant] and [the appellee] within the State of Arkansas and these

calls resulted in the above-mentioned sales.

> 3. That the parties entered into an agreement wherein [the appellant] was to receive sales commissions on any sales of goods or services received by [the appellee] as a result of contacts with customers in Arkansas and [the appellee] has failed and refused to pay said commission; that [the appellant] is entitled to judgment against [the appellee] for the value of commissions owed by [the appellee].

On March 16, 1989, the circuit court sent a letter opinion to counsel for the parties and stated:

> It appears from the facts in this case that [the appellant] made no sales on behalf of [the appellee], either to parties in the state of Arkansas or while he was in the state of Arkansas with [the appellee]. Thus, we have two non residents coming to Arkansas, seeking sales and obtaining none, and leaving the state. [The appellant] then moves into the state of Arkansas and sues [the appellee] in this state based upon the fact that he and a plaintiff's [sic] representative once travelled through this state seeking sales. This Court does not believe this confers jurisdiction upon this state. If this lawsuit is to be filed, it should be filed in [the appellee's] home state. We have neither proper jurisdiction nor venue.

An order of dismissal was entered on June 16, 1989, which stated:

> 2. The contacts which [the appellant] and [the appellee] had with the State of Arkansas are not sufficient to satisfy the jurisdiction requirements of the Arkansas long-arm statute as codified in A.C.A. Sections 16-4-101 et seq.
>
> 3. The contacts which [the appellant] and [the appellee] had with the State of Arkansas are not sufficient to satisfy the minimum contacts requirements of the Fourteenth Amendment to the United States Constitution.

The appellant argues that the circuit court erred in dismissing the complaint and making a finding of fact that the appellee made no sales in Arkansas as a result of the appellant's efforts without first hearing evidence on this issue. The appellant argues that, in testing the sufficiency of a complaint on a motion to dismiss, all reasonable inferences should be resolved in favor of the complaint. We agree. In holding that the appellee's contacts within the state of Arkansas were not sufficient to satisfy the Long-Arm Statute and the Fourteenth Amendment, the circuit judge made a factual finding that the appellee made no sales to three companies in Arkansas as a result of sales calls by the appellant and the appellee within the state of Arkansas. This was error.

In *Rabalaias* v. *Barnett*, 284 Ark. 527, 528, 683 S.W.2d 919, 921 (1985), the Arkansas Supreme Court stated that, "in testing the sufficiency of a complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint." "In reviewing a trial court's decision on a motion to dismiss, we treat the facts alleged in the complaint as true and view them in a light most favorable to the plaintiff." *CDI Contrs., Inc.* v. *Goff Steel Erectors, Inc.*, 301 Ark. 311, 314, 783 S.W.2d 846, 847 (1990). In *CDI Contrs.*, the Arkansas Supreme Court affirmed the trial court's dismissal of the complaint for lack of personal jurisdiction because the facts alleged in the complaint did not satisfy the minimum contacts required by due process. We therefore must determine whether the allegations of appellant's complaint satisfy the minimum contacts requirement.

Arkansas Code Annotated Section 16-4-101(C)(1) (1987) provides in part:

> 1. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a (cause of action) (claim for relief) arising from the person's:
>
> (a) Transacting any business in this state;
>
> (b) Contracting to supply services or things in this state;
>
> . . . .

> 2. When jurisdiction over a person is based solely upon this section, only a (cause of action) (claim for relief) arising from acts enumerated in this section may be asserted against him.

Each question of jurisdiction must be decided on a case-by-case basis. *Meachum* v. *Worthen Bank & Trust Co., N.A.*, 13 Ark. App. 229, 232, 682 S.W.2d 763, 765 (1985), *cert. denied*, 474 U.S. 844 (1985).

In *Meachum* and *Jagitsch* v. *Commander Aviation Corp.*, 9 Ark. App. 159, 655 S.W.2d 468 (1983), we held that, to determine whether a court has *in personam* jurisdiction over a non-resident defendant, a two-part analysis must take place. First, the court must decide whether the appellant's actions satisfy the "transacting business" requirement of Ark. Code Ann. Section 16-4-101 (1987), and, second, whether the exercise of *in personam* jurisdiction is consistent with due process under the Fourteenth Amendment to the United States Constitution. The purpose of the "transacting business" provision of Section 16-4-101 is "to permit the trial court to exercise the maximum personal jurisdiction over non-resident defendants allowable by due process. . . ." *Jagitsch*, 9 Ark. App. at 161, 655 S.W.2d at 470. In making a determination of whether the exercise of *in personam* jurisdiction is consistent with due process, this court has looked at the following factors:

> (1) the nature and quality of the contacts with the forum state; (2) the quantity of contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience to the parties.

Meachum, 13 Ark. App. at 233, 682 S.W.2d at 766; *Jagitsch*, 9 Ark. App. at 163, 655 S.W.2d at 470. *See also Akin* v. *First Nat'l Bank*, 25 Ark. App. 341, 347, 758 S.W.2d 14, 18 (1988), where we stated that "[a] single contract can provide the basis for the exercise of jurisdiction over a non-resident defendant if there is a substantial connection between the contract and the forum state."

In this case, the facts purportedly giving rise to personal jurisdiction are disputed; the parties not only disagree whether

the facts give rise to personal jurisdiction in Arkansas, but whether the facts actually occurred as the appellant has alleged. The appellant argues that the appellee transacted business in this state by contracting to sell equipment and services to customers within this state and by calling on customers with the appellant within this state. The appellee disputes the appellant's assertion that these contacts resulted in sales of the appellee's products and services in Arkansas.

We agree with the appellant that the circuit court erred in dismissing the complaint, because the facts alleged by the appellant, if true, would establish personal jurisdiction over the appellee. Although this case must be reversed and remanded for trial, our decision does not relieve the appellant of his burden of ultimately proving that the appellee had sufficient contacts with this state to establish jurisdiction in Arkansas. In *Hawes Firearm Co.* v. *Roberts*, 263 Ark. 510, 513, 565 S.W.2d 620, 622 (1978), the Arkansas Supreme Court discussed the allocation of this burden: "[i]f the motion [to dismiss] is denied, this does not mean that the plaintiff is relieved from establishing jurisdiction; it merely means that at this point in the proceedings a prima facie case of jurisdiction sufficient to take the cause to trial has been made."

Reversed and remanded.

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

GREAT LAKES CARBON CORPORATION *v.* ARKANSAS PUBLIC SERVICE COMMISSION, et al.

CA 89-272 788 S.W.2d 243

Court of Appeals of Arkansas
En Banc
Opinion delivered April 18, 1990

Ivester, Skinner & Camp, P.A., by: *Hermann Ivester* and *Valerie F. Boyce*, for appellant.

Paul R. Hightower, for appellee Arkansas Public Service Commission.

Turner & Mainard, by: *James C. Mainard*, for appellee Arkansas Valley Electric Cooperative Corporation.

Mitchell, Williams, Selig & Tucker and *Wallace, Dover & Dixon*, by: *Kent Foster*, for appellee Arkansas Power & Light Company.

JAMES R. COOPER, Judge. This case began in December 1988 as a petition for declaratory relief filed by the appellant, Great Lakes Carbon Corporation (GLCC). GLCC sought the

right to terminate electric service provided by Arkansas Valley Electric Cooperative Corporation and to contract for that service with Oklahoma Gas and Electric Company (OG&E). This appeal comes from the Public Service Commission's denial of the petition.

The appellant, Great Lakes Carbon Corporation (GLCC), manufactures graphite electrodes in Franklin County, Arkansas, and sells them to steel producers for use in electric arc furnaces. Most of its real property is physically located in electric service territory allocated to the appellee, Arkansas Valley Electric Cooperative Corporation (AVECC) and a small part is in territory allocated to Oklahoma Gas and Electric Company (OG&E). The tract is contiguous, and the only facilities owned by GLCC which consume electricity in GLCC's manufacturing process are situated in AVECC's service area. It is undisputed that the boundaries of the appellant's land fall within property certificated to both OG&E and AVECC. It is also undisputed that the proposed point of connection with OG&E is within territory exclusively allocated to OG&E on property owned by GLCC. Further, it is not disputed that the electrical energy is proposed to be transported over a mile-long distribution system to be constructed or purchased[1] and owned and operated by GLCC across land owned by GLCC into the service territory exclusively allocated to AVECC and will be consumed in the manufacture of graphite electrodes at GLCC's plant within the boundaries of AVECC's service area. The appellant currently consumes a substantial quantity of electric energy purchased at retail from AVECC under a contract which expires in 1991. Presently, AVECC purchases power from OG&E at wholesale and transmits it across this distribution line to a transformer substation, from which it sells the power to GLCC at retail. The appellant initiated this action for declaratory relief before the Public Service Commission, seeking a ruling that it has the right to terminate the service provided by AVECC and to contract for service with OG&E instead.

The appellee AVECC objected to the appellant's petition on

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[1] If a new line is not constructed, GLCC proposes to purchase from AVECC its existing transmission line which is already connected to OG&E's main line.

the basis that, since the facilities consuming the electricity are physically located within the boundaries of its service territory, the appellant should not be permitted to transport electricity purchased from another utility to the plant. The other appellees in this case were granted intervenor status before the Commission and, along with the Commission, are before us to defend the action of the Commission.

In February 1989, the Public Service Commission staff moved for a summary dismissal of the petition, contending that, as a matter of law, the appellant had no right to contract with OG&E for electric service. The staff of the Public Service Commission was joined in its position by AVECC.

On April 5, 1989, by Order No. 6, an administrative law judge issued an order dismissing the appellant's petition for declaratory order. For purposes of ruling on the staff motion, the administrative law judge accepted the facts stated by GLCC as true, since they were not disputed. The administrative law judge dismissed the appellant's petition on a finding that, as a matter of law, the appellant was not entitled to the relief sought, citing *Southwestern Electric Power Company* v. *Carroll Electric Cooperative Corporation*, 261 Ark. 919, 554 S.W.2d 308 (1977) ("*SWEPCO*"), which interpreted Ark. Code Ann. Section 23-18-101 (1987) (previously codified as Ark. Stat. Ann. Section 73-240). Timely objections to the order of the administrative law judge were filed with the full Commission, which subsequently adopted, without modification, the order of the administrative law judge. Rehearing before the Commission was sought pursuant to Ark. Code Ann. Section 23-2-422 (1987), properly preserving the issues before this Court on appeal. The Commission denied rehearing, hence this appeal by GLCC.

GLCC asserts, first, that the Commission erred in dismissing its petition for declaratory order, contending that summary judgment was improper. Second, GLCC alternatively argues that, even if summary judgment were proper, the decision was contrary to the law.

■ 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).

As noted earlier, the PSC staff moved for summary dismissal of the appellant's petition, conceding all the allegations of the petition as true and contending that GLCC was not entitled to the relief sought as a matter of law. Because there was no dispute as to any issues of fact, the administrative law judge dismissed the petition. GLCC thereafter filed objections and, in support of its objections to the order, attached affidavits of two individuals along with supporting exhibits. The Commission ruled that the evidence proffered should not be considered and adopted the administrative law judge's order as its own. On motion for rehearing, the Commission again refused to consider the two affidavits and exhibits and denied GLCC's request for a rehearing. GLCC contends that the Commission's refusal to consider the affidavits was error.

The affidavits and exhibits were proffered and are part of the record before this Court. One is from John Sutton, who is plant manager for the appellant. The other is from Dave Harrington, executive director of the Arkansas Industrial Development Commission. Essentially, Harrington supported GLCC's position, claiming that the purported cost savings GLCC could realize in its electrical energy costs would be good for the economy and promote plant expansion. Sutton's affidavit provided more details about the plant's operations, payrolls, expansion possibilities, property taxes, etc. He said he believed his company could save about $400,000.00 per year by purchasing its power from OG&E instead of AVECC and pointed that, in his opinion, AVECC is simply a middle-man, because AVECC purchases its wholesale power from OG&E and then resells it to GLCC. In his affidavit, Sutton warned of possible unemployment due to high energy costs and competition, and he claims that AVECC agreed with GLCC in October 1977 that it would relinquish its territory if

GLCC wanted to purchase its power from OG&E. The appellant seems to contend that AVECC had bound itself to give up some of its exclusive franchise territory and should be held to that agreement, although the only supporting evidence of such an agreement is a "trip report," an internal memo summarizing the results of a meeting between representatives of GLCC and AVECC.

We note that the affidavits were not before the Commission when it ruled on the motion to dismiss. Although the appellant objected to the dismissal motion, it did not raise by way of affidavit or other proof any issues of fact beyond that which was alleged in its Petition for Declaratory Order. Given that the Commission had no factual dispute before it, the issue to be determined was one of law governed by the provisions of Ark. Code Ann. Section 23-18-101 (1987) and *SWEPCO, supra.* Summary relief was, therefore, appropriate in light of the undisputed facts in this case.

Since summary relief was appropriate in this particular case, we now turn to the merits of the issue. Arkansas Code Annotated Section 23-18-101 (1987) provides as follows:

> Notwithstanding any provisions of law or the terms of any certificate of convenience and necessity, franchise, permit, license, or other authority granted to a public utility or electric cooperative corporation by the state or a municipality, no public utility or electric cooperative corporation shall furnish, or offer to furnish, electric service at retail and not for resale in any area allocated by the Arkansas Public Service Commission to another electric cooperative corporation or public utility.

Southwestern Electric Power Co. v. *Carroll Electric Cooperative Corporation, supra,* interpreted the above statute and, in light of the statute's plain language, is dispositive of this case. In that case, Beaver Water District, a regional water distribution organization, built water treatment facilities in an area certificated for electric service to Carroll Electric Cooperative Corporation by the Arkansas Public Service Commission. For seven years, Beaver purchased its electric energy for the facility from the Southwestern Power Administration (SPA), a federal agency which is authorized to distribute surplus electric energy from

federal generating facilities. To enable it to obtain delivery of the power provided by SPA, Beaver had constructed a line from its facility in the area certificated to Carroll to a connection point outside Carroll's area located in a territory certificated to appellant Southwestern Electric Power Company (SWEPCO). Apparently, this arrangement under federal law caused no problem through 1972, when SWEPCO and Beaver contracted for SWEPCO to provide electric service directly to Beaver. Beaver then requested Carroll to waive its rights to serve Beaver's facilities in Carroll's territory. Carroll thereafter commenced an action for declaratory judgment, seeking a ruling that the contract between SWEPCO and Beaver was void. Carroll prevailed, based on Ark. Stat. Ann. Section 73-240 (Supp. 1975) (now Ark. Code Ann. Section 23-18-101 (1987)), which provides, in part, that utility service may not be undertaken by a public utility in an area allocated to another electric cooperative or public utility. In affirming the trial court, the Arkansas Supreme Court approved the "place and purpose of use" doctrine in determining cases such as this. The Court stated: "[w]hile there appears to be no previously decided case in Arkansas, other jurisdictions have recognized that the place and purpose of the use of electric energy is controlling, rather than the place of connection."

■ Citing *Capital Electric Power Association* v. *Mississippi Power & Light Company*, 218 So.2d 707 (Miss. 1968), the Court quoted with approval from the Mississippi Supreme Court's opinion:

> "The explicit policy under our Act has been one of 'exclusive' service area. If Mississippi Power & Light cannot service Whittington Hall directly, certainly to do so would be a violation of the Act. Any right to serve Whittington Hall must come from rights statutorily possessed by the Company."

Southwestern Electric Power Co., 261 Ark. at 923, quoting *Capital Electric Power Association*, 218 So.2d at 714. The Arkansas Supreme Court also observed that the Mississippi court quoted with approval the decision of the Tennessee Supreme Court in *Holston River Electric Co.* v. *Hydro Electric Corporation*, 17 Tenn. App. 122, 66 S.W.2d 217 (1933), and observed

about both the *Capital Electric* and *Holston* cases that ". . . the sound reasoning that the place of delivery of the electric current is not controlling, but rather the place and the purpose of its use must be the controlling factor is without question." *Southwestern Electric Power Co.*, 261 Ark. at 923. Therefore, Arkansas follows the "place and purpose of use" analysis in cases such as these.

The appellant, in an excellent brief, contends that the "place of connection" rule should apply in this particular fact situation. It argues that *SWEPCO* is distinguishable from the case at bar because *SWEPCO* did not deal with a customer transporting and distributing power over its own contiguous tract of property located in the service territories of two different utilities, as here. Appellant argues that, because the customer in *SWEPCO* had no physical presence in the second utility's service area, it had no corresponding right to demand service from that utility and the utility had no right or obligation to serve the customer. However, the *SWEPCO* case did deal with a customer located in one utility's territory which proposed to transport electricity from the second utility into that territory over lines traversing the property of third parties. While we appreciate the distinctions the appellant makes, we do not think these distinctions are crucial and, from a functional standpoint, are irrelevant.

We are unable to adopt the appellant's contention that a determination as to which rule[2] controls in cases such as this should be made on a case-by-case basis in consideration of the particular facts of each case. Although identical facts rarely, if ever, appear in any two cases, the Arkansas Supreme Court has decided the issue before us contrary to the appellant's position, expressly adopting the "place and purpose" rule and rejecting the "place of connection" rule, and we find the points on which the

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[2] An excellent and comprehensive discussion of the various tests regulatory commissions and courts apply in cases such as this may be found in *Public Service Co.* v. *Public Utility Comm'n*, 765 P.2d 1015 (Colo. 1988). The "point of delivery" or "point of connection" rule is what appellants argue should apply in this case. That rule, applied most often in Pennsylvania cases [e.g., *Stockertown Light Heat and Power Co.* v. *Pennsylvania Edison Co.*, PUR 1926B 201 (Pa. PSC 1925); *Borough of Schuylkill Haven* v. *Pennsylvania Power and Light Co.*, 3 PUR NS 127 (Pa. PSC 1934)], holds that the physical location of the electric meter determines which utility provides service to the customer.

appellant seeks to distinguish *SWEPCO* to be unpersuasive. The Supreme Court's logical analysis of the issues involved is equally applicable to the undisputed facts in the case at bar.

Accepting all the allegations in the appellant's petition as established, and even in consideration of the aforementioned affidavits, the appellant is not entitled to the relief it seeks as a matter of law. *SWEPCO, supra.* There were no allegations that AVECC was unable or unwilling to provide reliable electrical service to the appellant's facilities, all of which are situated within the physical boundaries of AVECC's exclusive franchise territory. Since the place and purpose of the use of the electricity to be consumed by the appellant is by facilities located wholly within AVECC's territory, that undisputed fact alone, in light of Ark. Code Ann. Section 23-18-101 (1987) and *SWEPCO, supra,* requires that AVECC be afforded the opportunity to furnish electrical service to the appellant.

Affirmed.

Wardell WASHINGTON *v.* STATE of Arkansas

CA CR 89-204 787 S.W.2d 254

Court of Appeals of Arkansas
Division I
Opinion delivered April 18, 1990
[Rehearing denied May 30, 1990.]

Hale, Young, Green & Nixon, by: *Milas H. Hale III*, for appellant.

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

JAMES R. COOPER, Judge. The appellant was charged with three counts of committing forgery in violation of Ark. Code Ann. § 5-37-201 (1987). At the close of the State's case, the trial court granted the appellant's motion for a directed verdict as to two of the counts. The jury convicted the appellant on the remaining count and, after finding that he was an habitual offender, sentenced him to thirty years in the Arkansas Department of Correction. On appeal he argues three points for reversal: 1) that the trial court erred in refusing to dismiss the charge because he was tried in violation of his right to a speedy trial; 2) that the trial

court erred in allowing a book on how to commit forgery to be introduced into evidence; and 3) that the evidence is insufficient to support the verdict. We affirm.

Pursuant to *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), we first consider the sufficiency of the evidence, including any erroneously admitted evidence, before considering other arguments. At the close of the State's case, the appellant moved for a directed verdict. The appellant did not put on any evidence and the trial court granted the appellant's motion as to two of the counts.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. On appeal in criminal cases, we review the evidence in the light most favorable to the State and affirm if there is any substantial evidence to support the conviction. *Harris* v. *State*, 15 Ark. App. 58, 689 S.W.2d 353. 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. *Johnson* v. *State*, 7 Ark. App. 172, 646 S.W.2d 22 (1983). According to Ark. Code Ann. § 5-37-201 (1987):

> (a) A person forges a written instrument, if with the purpose to defraud, he draws, makes, completes, alters, counterfeits, possesses, or utters, any written instrument that purports to be or is calculated to become or to represent if completed the act of a person who did not authorize that act.
>
> . . .
>
> (c) A person commits forgery in the second degree if he forges a written instrument that is:
>
> (1) A deed, will, codicil, contract assignment, check, commercial instrument, credit card, or other written instrument that does or may evidence, creates, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status.

The record reveals that the appellant and Donna Sales were both charged with the three counts of forgery. Entered into evidence was the transcript of Ms. Sales's guilty plea in which she

admitted that she forged and passed the three checks and that the appellant was her accomplice. When Ms. Sales testified at the trial, she denied that the appellant was her accomplice, but she admitted that she implicated him when she pled guilty. She also admitted that she did so when she talked with Little Rock Detective David Ebinger while she was incarcerated in the Arkansas Department of Correction.

Etta Mae Horton, a vice-president with First National Bank in West Memphis, Arkansas, testified that in 1985 and 1986 a person known as Jewell Small had an open account at the bank. She also stated that three checks, numbers 278, 287, and 289, were drawn on the account of Jewell Small and that the account was closed in January 1986.

Pamela Merrell testified that in 1987 she had an account with First Federal in Little Rock. After being shown the three checks and their corresponding deposit slips, she stated that she did not know anything about the checks and did not authorize anyone to deposit them or withdraw funds out of her account.

Sandra Anderson testified that on September 18, 1987, she was employed by First Federal Savings of Arkansas at the Westchase Plaza Branch. On that date a woman matching the description of Ms. Sales presented a check to her in the amount of $610.00. The check, number 289, listed Pamela Merrell as the payee and was drawn on the account of Jewell Small. The woman deposited the check and received $450.00 back in cash. The woman returned a few days later and Ms. Anderson and a co-worker, Irene Fuller, recognized her and started the surveillance camera.

According to Ms. Fuller, when the woman returned, she presented check number 287 in the amount of $650.00 and requested that it be cashed. That check also listed Pamela Merrell as the payee and was drawn on the account of Jewell Small. Ms. Fuller refused to cash the check, alerted the police, and the woman left. She identified photographs taken by the surveillance camera as being photographs of the woman who presented the two checks.

Karen Scarborough testified that she worked at First Federal's Rodney Parham Branch in September 1987 and that check

number 278 in the amount of $595.00 was presented to her. She stated that she gave cash back in the amount of $400.00. Check number 278 had the same payee and was drawn on the same account as the other two checks.

Ms. Sales testified that she forged and passed the checks and that the photographs taken by the surveillance camera were photographs of her. She stated that the checks were given to her by a friend named Lisa and that the appellant had never touched them. However, Jim Beck, a latent fingerprints examiner with the Arkansas State Crime Laboratory, testified that a fingerprint on check number 278 matched the appellant's fingerprint. He did not find any other prints belonging to the appellant. (The trial court later granted the appellant's motion to dismiss the charges relating to the checks numbered 287 and 289).

Officer Bill Rives of the Little Rock Police Department stated that, in 1983, he arrested Pamela Washington who was in the appellant's car and that pursuant to the arrest he seized a black satchel. According to Officer Rives, the satchel had been in the care and custody of the Little Rock Police Department since 1983.

David Ebinger testified that, at Ms. Sales's request, he interviewed Ms. Sales in June 1988 at the Department of Correction Women's Unit. According to Detective Ebinger, Ms. Sales admitted that she got the three checks involved in this case from the appellant, that the appellant told her which account she should deposit them in, supplied her with the account numbers, drove her to the banks to deposit the checks, and told her how much "cash-back" she should request.

He also stated that Ms. Sales told him about a book the appellant had on how to conduct fraudulent activity with banking establishments. The book she described fit the description of a book found in the black satchel recovered by the police in 1983. According to Detective Ebinger, the book contains descriptions of the same type of cash-back scheme involved in the present case. This book was entered into evidence, over the objections of the appellant, as was a handwritten lawsuit filed by the appellant in federal court in which the appellant asserted that book belongs to him and sought its return.

We find the evidence to be sufficient to support the appellant's conviction. We also find that the fingerprint on check #278 which matched the appellant's is sufficient corroboration of Ms. Sales's testimony. *See Maynard* v. *State*, 21 Ark. App. 20, 727 S.W.2d 858 (1987). Even though Ms. Sales recanted her prior statements regarding the appellant's involvement, these inconsistencies were for the jury to resolve. *See Johnson* v. *State*, 298 Ark. 617, 770 S.W.2d 128 (1989).

Next, the appellant argues that his right to a speedy trial was violated. The appellant filed a motion to dismiss arguing that he was denied his right to a speedy trial and the trial court held a hearing on this issue. According to the record of that hearing, a bench warrant was issued for the appellant's arrest on October 2, 1987, for the forgeries committed on September 18 and 21, 1987. However, the appellant was arrested for unrelated forgery charges in Pine Bluff on December 21, 1987. Detective Ebinger testified that he was present when the appellant was arrested in Pine Bluff and that he requested that the Jefferson County authorities notify him when the Pine Bluff charges were disposed of, and that the appellant be turned over to him at that time.

The appellant was tried and convicted of the Pine Bluff charges on August 22, 1988, and on that date he was served with a warrant stemming from the Little Rock forgery charges. The appellant was transported to Little Rock and he waived plea and arraignment in Little Rock Municipal Court on August 23, 1988. However, the federal government had also placed a detainer on the appellant on December 21, 1987, and, on August 30, 1988, the appellant was placed in the custody of the United States Marshall's office because the appellant had violated his federal parole.

On September 23, 1988, a felony information was filed charging the appellant with the offenses which occurred in Little Rock and, on November 7, 1988, the Warrants Division of the Pulaski County Sheriff's Office received a bench warrant. Wayne Overton, an employee in the Warrants Division, testified that he notified the federal government of the warrant and placed a detainer on the appellant on November 22, 1988. The appellant was picked up from federal custody on March 7, 1989.

The appellant's hearing on his motion to dismiss was held

April 24, 1989. The appellant agreed to waive his speedy trial rights from April 24 to the time for trial so that the trial court could consider his speedy trial arguments. The appellant was tried on May 9, 1989.

The State concedes that because the appellant was charged after October 1, 1987, the twelve-month limitation contained in the amended version of Ark. R. Crim. P. 28.1 applies. The appellant contends that this twelve-month period began to run on December 21, 1987, when the Little Rock authorities placed a detainer on him after he was arrested in Pine Bluff. The State contends that the twelve-month period began to run when the appellant was arrested after his Pine Bluff trial on August 22, 1988.

We find that the time limitation began to run on August 22, 1988, the date the appellant was arrested. Time generally begins to run when the appellant either is arrested or charged in circuit court. Arkansas Rule of Criminal Procedure 28.2 provides:

> The time for trial shall commence running, without demand by the defendant, from the following dates:
>
> (a) from the date the charge is filed, except that if prior to that time the defendant has been continuously held in custody or on bail or lawfully at liberty to answer for the same offense or an offense based on the same conduct or arising from the same criminal episode, then the time for trial shall commence running from the date of arrest;

Therefore, because the appellant was not charged with the forgeries in Little Rock until after he was arrested on August 22, 1988, the time limitation began to run when he was arrested.

We find no merit in the appellant's contention that the time began to run when he was arrested in Pine Bluff on December 21, 1987, because that arrest arose out of a separate criminal episode. Although Detective Ebinger did request that he be notified when the Pine Bluff charges were disposed of, there is nothing in the record which indicates that the appellant was being held in Pine Bluff solely because Little Rock authorities requested it. The appellant was clearly being held in Pine Bluff pursuant to the charges in Pine Bluff, and the time period could not begin to run

on the Little Rock charges until he was either charged with them or arrested for them. *See Hall* v. *State*, 281 Ark. 282, 663 S.W.2d 926 (1984), and *Mackey* v. *State*, 279 Ark. 307, 651 S.W.2d 82 (1983) (incarcerated appellant's time began to run from date charged).

In light of our holding, we do not need to discuss whether the time the appellant was in federal custody was excludable pursuant to Ark. R. Crim. P. 28.3 because the appellant was tried within twelve months of August 22, 1988.

The appellant's last argument concerns the introduction into evidence of the book on how to commit forgeries. However, the book is not a part of the record in this case and we cannot determine whether its introduction was prejudicial. Although there is a copy of the handwritten lawsuit the appellant filed in federal court which requests the return of the book, the appellant's lawsuit was dismissed and at the time of trial the book was apparently still in the custody of the police department. Furthermore, the appellant does not offer an explanation as to why the book is not in the record and there is no indication that the appellant took any steps to insure that it was made part of the record. The appellant has the duty to provide a complete record from which the appellate court can determine an asserted error. *Stone* v. *State*, 290 Ark. 204, 718 S.W.2d 102 (1986). Because the appellant has failed to include the book in the record we cannot address his argument.

Affirmed.

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

Reynaldo MEEKINS *v.* STATE of Arkansas

CA CR 90-81 787 S.W.2d 258

Court of Appeals of Arkansas
En Banc
Opinion delivered April 18, 1990

Darrell F. Brown & Associates, by: *Darrell F. Brown*, for appellant.

No response.

PER CURIAM. Reynaldo Meekins was found guilty of delivery of a controlled substance, marijuana. He has lodged the record on appeal and now seeks to have this court set an appeal bond in a reasonable amount so that he may be released pending disposition of the appeal.

Our supreme court in *Perry* v. *State*, 275 Ark. 170, 628 S.W.2d 304 (1982), recognized that appeal bonds are governed by Arkansas Rules of Criminal Procedure 36.5, 36.6, and 36.7. Under the authority of that case, and the rules cited, appeal bonds are normally decided by the trial court in the first instance. Appellant here does not allege that he made a request to the trial court to set bond while jurisdiction lay there. As appellant failed to move to have the trial court set bond, this court will not consider his request. The motion is, therefore, denied.

Kathleen BALFANZ *v.* ESTATE OF Glen F. BALFANZ, Deceased

CA 89-362 787 S.W.2d 699

Court of Appeals of Arkansas
Division I
Opinion delivered April 25, 1990

Larry W. Horton, for appellant.

Evans, Farrar, Reis & Love, by: *Kenneth P. Elser*, for appellee.

JAMES R. COOPER, Judge. The appellant in this probate case is the surviving wife of Glen F. Balfanz, who was also survived by two children of another marriage, Judith Palmer and Glen Balfanz, Jr. The decedent's will provided for his entire estate to pass in trust for life for the benefit of the appellant, with the remainder to pass to his son, Glen Balfanz, Jr. The only asset in the decedent's estate which was subject to probate was a Merrill Lynch Cash Management Account consisting of stocks and securities having a date of death value of $150,057.00. The account had a margin indebtedness against it of $83,378.26,

leaving a net value of $66,678.74. The appellant elected to take against the will, and asserted entitlement under the dower statute to one-third of the gross value of the account without deduction for the margin indebtedness. The probate court rejected this argument and concluded that, because the estate had no general assets from which to pay the margin indebtedness, the appellant was entitled to dower only in the net value of the account. Accordingly, the probate court awarded the appellant dower in the amount of $22,224.00. From that decision, comes this appeal.

For reversal, the appellant contends that the probate court erred in concluding that she was not entitled to one-third of the gross value of the stock in the account. We affirm.

The probate judge's conclusion that the appellant was entitled to dower only in the net value of the account after the margin indebtedness had been paid was based on *Hewitt* v. *Cox*, 55 Ark. 225, 15 S.W. 1026 (1891). *Hewitt* presented a question concerning a wife's dower in pledged personalty, specifically, whether bond indebtedness should be satisfied by the husband's administrator before the wife's dower interest in the bonds was calculated. The Arkansas Supreme Court held that:

> The wife does not acquire, by marriage, an inchoate right of dower in the personal property of her husband. He can sell, pledge, mortgage and dispose of it, free from any claim of hers, at pleasure. Her right to dower in it does not accrue until he dies, and then she only takes dower in such interest in it as he had at his death. All liens on it, when he died, take precedence of her dower. She takes dower subject to the liens existing at his death, and has no right to call on the administrator to redeem the property. She is entitled to one-third in value, or one-half if he leaves no children, as dower, and no more; and in the assignment of dower the husband's right to redeem should only be valued in the appraisement of the encumbered property.

Hewitt v. *Cox*, 55 Ark. at 236 (citations omitted).

The appellant argues that *Hewitt* effectively has been overruled by subsequent cases holding that the whole of the personal estate must be considered in determining dower. She principally relies on *Wilcox* v. *Brewer*, 224 Ark. 546, 274 S.W.2d

777 (1955), which held that, as between a widow and the heirs at law of an estate which has sufficient general assets to pay all debts, the widow takes dower in the full value of stock pledged to secure a debt without reduction for the indebtedness, which is to be discharged out of the general assets of the estate.

The *Wilcox* Court reached this result in reliance on Act 140 of 1949, now codified at Ark. Code Ann. § 28-53-113 (1987), which provides that:

> As between the distributees, secured debts shall be discharged out of the general assets of the estate, subject to the right of the decedent to provide otherwise by will. However, nothing in this section shall preclude a secured creditor from having recourse to his security for satisfaction of the debt.

See Wilcox, 224 Ark. at 548. However, both *Wilcox* and Ark. Code Ann. § 28-53-113 (1987) are applicable only in cases where secured debts may be discharged out of the "general assets" of the estate, defined as "unpledged personal property of the estate." *Wilcox*, 224 Ark. at 547, n. 1. The estate in the case at bar consists only of the Merrill Lynch account which secures the margin indebtedness. Here, there are no general assets from which to discharge the indebtedness, and neither *Wilcox* nor Ark. Code Ann. § 28-53-113 (1987) is applicable.

The appellant also cites *Whitener* v. *Whitener*, 227 Ark. 1038, 304 S.W.2d 260 (1957), for the proposition that she is entitled to her dower interest absolutely as against collateral heirs. However, the *Whitener* Court based its decision on Ark. Stat. Ann. § 61-206 (1947), now codified at Ark. Code Ann. § 28-11-307 (1987), which defines the dower interest of a wife when the decedent leaves no children, and which provides that under such circumstances she is entitled to one-half of the personal estate absolutely as against collateral heirs. In contrast, the case at bar involves the extent of a wife's dower interest where the decedent did leave a surviving child, a question to be resolved by reference to Ark. Code Ann. § 28-11-305 (1987), and the cases which have construed it. *See Thompson* v. *Union & Mercantile Trust Co.*, 164 Ark. 411, 262 S.W. 324 (1924); *Hewitt* v. *Cox*, *supra*. Here, where the decedent left surviving children, the estate possessed no general assets, and the property was security

for a debt incurred prior to the decedent's death, we hold that *Hewitt* is controlling, and that the probate judge did not err in awarding the appellant dower limited to the net value of the account.

Affirmed.

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

Roger CALVIN *v.* DIRECTOR OF LABOR and Markham Inn, Inc.

E 88-147 787 S.W.2d 701

Court of Appeals of Arkansas
En Banc
Opinion delivered April 25, 1990

Greene Law Offices, by: *Robert E. Adcock*, for appellant.

Bruce H. Bokony, Acting Director of Labor, for appellee.

JAMES R. COOPER, Judge. In this unemployment compensation case, the Appeals Tribunal found that the appellant voluntarily left his last work without good cause connected to the work. The Board of Review adopted the findings and conclusions of the Appeals Tribunal. On appeal to this court, the appellant argues that the Board's finding that the appellant left his last work without good cause is erroneous and that its decision is not supported by substantial evidence.

In unemployment compensation cases, we review the evidence in the light most favorable to the appellee, and if there is any substantial evidence to support the decision by the Board of Review, it must be affirmed. *Haig* v. *Everett*, 8 Ark. App. 225, 650 S.W.2d 593 (1983). Substantial evidence is defined as such relevant evidence as a reasonable person might accept as adequately supporting the conclusion. *Id.* The proper standard in determining good cause to leave one's work is set out in *Teel* v. *Daniels*, 270 Ark. 766, 606 S.W.2d 151 (1980), as a cause which would reasonably impel the average able-bodied qualified worker to, in good faith, give up his or her employment.

According to the record, the appellant was employed by the appellee, Markham Inn, for twenty-two years as an assistant manager. In 1985 the appellee began experiencing financial difficulties which eventually led to the appellant's annual salary being cut in 1987 from $20,000.00 to $16,500.00. During the same time period, the appellant's employment responsibilities increased and he was required "to do everything."

In March 1988, Markham Inn hired a new management firm to run the Inn. The new management took over a majority of the appellant's old duties and assigned him other tasks such as washing and driving a van, picking up trash, and keeping the sidewalks clean. In his telephone hearing, the appellant admitted that he quit because, "[H]e-he wouldn't give me a job—he wasn't going to let me to stand around. . . ." The appellant also expressed dissatisfaction because the new manager would not tell him what his job was going to be. The appellant quit on March 20, 1988.

In *Morton* v. *Director of Labor*, 22 Ark. App. 281, 742 S.W.2d 118 (1987), we found that a claimant's reduction in work responsibility was not sufficient cause for quitting employment. While in the present case the appellant expressed a belief that the new manager wanted him to quit, he also admitted that the manager had not told him he was going to be fired and that the new manager just did not know what the appellant's new job was going to be. Although the appellant had suffered a reduction in salary, that was one year before the new management was hired. There is no evidence in the record to suggest that the appellant would be subjected to further salary reductions or that the new management would not, given a reasonable amount of time, find a suitable position for the appellant.

The appellant also contends that the evidence is not substantial because the only evidence presented by the employer was a statement from an "authorized representative" of the appellee which stated in pertinent part:

> The reason for the separation from employment was that the employee quit. The employee was a long-time, valued employee who choose [sic] to resign.

The appellant cites *Richards* v. *Daniels*, 1 Ark. App. 331, 615 S.W.2d 399 (1981), and argues that this hearsay statement does not constitute substantial evidence. Although we agree with the appellant's statement of legal principle, we do not think that the Board wholly relied on this hearsay statement in making its determination. Most of the evidence relied on by the Board was presented by the appellant and we find that its decision is supported by substantial evidence. Even where this Court might likely have reached a different conclusion, we have no choice other than to affirm if the decision reached by the Board is supported by substantial evidence. *Grigsby* v. *Everett*, 8 Ark. App. 188, 649 S.W.2d 404 (1983).

Affirmed.

CORBIN, C.J., and JENNINGS, J., dissent.

DONALD L. CORBIN, Chief Judge, dissenting. I dissent from the majority opinion. I find that there is not substantial evidence in the record to support the Board's finding that Mr. Calvin voluntarily left his employment without good cause connected to

the work.

My review of the record convinces me that the circumstances surrounding appellant's decision to quit his job constitute good cause pursuant to Arkansas Code Annotated Section 11-10-513 (1987). Appellant was assistant manager of Markham Inn for 22 years performing all managerial duties commensurate with that position until the Inn hired the management firm. By appellant's unrebutted testimony, he booked conventions and meetings, performed all ordering and auditing duties, worked the front desk, made bank deposits, and filled in for absent employees. As a manager, appellant was on call 24 hours a day, 7 days a week. Because the Inn had been experiencing financial difficulties, appellant testified that he would fill-in on weekends performing whatever duties required to efficiently run the Inn such as emptying trash, since the maintenance man only worked Monday through Friday.

Under the new management, appellant's office was taken away from him, as well as *all* of the managerial duties he had performed for 22 years. Under the new management, appellant was relegated to performing all the quasi-janitorial, maintenance duties, and was expected to work 7 days per week. Appellant's testimony reveals that management did not ask him to resign but he attempted numerous times to discuss this situation with the management because he felt that he was being forced to leave his position. His attempts to clarify his job standing were unsuccessful because management refused to answer his questions or set out his definite job duties for the future.

The Board's decision is predicated upon the finding that appellant "quit his job because he did not know what his job responsibilities would be under the new manager." The Board does concede, however, that appellant was required under the new management to perform duties he had never performed before such as yard work, housekeeping, and driving the van. It also concedes that management "did not inform him [appellant] of his job duties or his work schedule after inquiries were made by the claimant [appellant]."

Here, although the Board made its decision after stating that it considered certain factors, including appellant's prior training and experience, I cannot agree that it did so. This employee was

demoted from a long-standing management position to that of "flunky." Upon the facts of this case, I believe that the circumstances would impel the average able-bodied qualified worker to give up his employment in good faith and that he took appropriate steps to prevent the mistreatment from continuing. There is no substantial evidence in the record to indicate that appellant's action was not justifiable; therefore, I would reverse. Precedent establishes good cause to quit in situations similar to the present case. *See e.g.*, *The Ladish Co.* v. *Breashears*, 263 Ark. 48, 563 S.W.2d 419 (1978); *Barker* v. *Stiles*, 9 Ark. App. 273, 658 S.W.2d 416 (1983).

For the reasons stated above, I dissent from the majority decision.

JENNINGS, J., joins in this dissent.

Dan NOWELL *v.* Debby NOWELL

CA 89-316 787 S.W.2d 698

Court of Appeals of Arkansas
Division II
Opinion delivered April 25, 1990

Skokos, Coleman & Rainwater, P.A., by: *Randy Coleman*,

for appellant.

Ivester, Skinner & Camp, P.A., by: *J. Kendal Cook*, for appellee.

JAMES R. COOPER, Judge. The appellant, Dan Nowell, and the appellee were married on December 9, 1978, and were divorced on April 12, 1989. In dividing the marital property, the chancellor awarded the appellee 56 ½ shares of Roadway Express Company stock which the appellant had earned as part of an employee benefit package. On appeal, the appellant argues that the trial court erred in awarding this stock to the appellee. We reverse and remand.

The appellant testified that he began working for Roadway Express in 1977, and he left their employ in 1984. Beginning in 1977, the company distributed shares of stock on a quarterly basis, to the appellant's account in an employee retirement plan. When the appellant left Roadway, in 1984, he forfeited the stock from that year, 1984, and also the stock accrued during the previous five years, leaving 150 shares. The appellant rolled the 150 shares over into an Individual Retirement Account in his name only. At trial, the appellant contended that only the stock which accumulated between December 9, 1978, and January 1, 1979, was marital property because the remaining stock was acquired prior to the marriage.

The chancellor found that the appellant, acquiring stock at the rate of 75 shares per year for eight years, accrued 600 shares of stock over the eight years of his employment with Roadway. Because the appellee was married to the appellant for approximately six of the eight years he worked for Roadway, the chancellor found the appellant's non-marital proportionate share of the stock to be over 150/600 or one-fourth. He then found that three-fourths of 150 shares, or 113 shares, was marital property and then awarded appellee one-half of the 113 shares which equalled 56½ shares.

The appellant argues on appeal that the chancellor erred in dividing these shares because, with the exception of stock "earned" from December 9, 1978, the date of the marriage, to December 31, 1978, the end of the quarter, the 150 shares of stock were non-marital property acquired prior to the marriage. We

agree with the appellant's argument.

According to Ark. Code Ann. § 9-12-315 (1987), property acquired prior to the marriage remains the party's sole and separate property. *See Reed* v. *Reed*, 24 Ark. App. 85, 749 S.W.2d 335 (1988). Although the chancellor found that the appellant had accumulated 600 shares between 1977 and 1984, this finding is not relevant because the only stock remaining after he left the company was the 150 shares acquired in 1977 and 1978. The appellant continued to accumulate stock from 1979 to 1984, but all these shares were fortified when he left the company. Thus, the only stock left in the retirement account consisted of 150 shares acquired in 1977 and 1978, the majority of which is non-marital property. Furthermore, most of the 150 shares retained their status as non-marital property after the marriage because the appellant did not co-mingle the stock with other marital property. We hold that the appellee is only entitled to her *pro rata* share of stock acquired in the last quarter of 1978, subsequent to the marriage. The appellant urges us to award the appellee a pro-rated 4½ shares of stock based on the 150 shares being equally distributed over the eight quarters. Because we cannot determine on this record whether the company distributed the stock equally over the eight quarters of 1977 and 1978, we must reverse and remand for further proceedings consistent with this opinion. Although the only issue addressed is the equal division of the stock, the chancellor is not precluded from making an equitable distribution upon finding that an equal distribution would be inequitable in accordance with Ark. Code Ann. § 9-12-315 (1987).

Reversed and remanded.

CRACRAFT and JENNINGS, JJ., agree.

GRACE DRILLING COMPANY *v.* DIRECTOR OF LABOR and Gary Ramsey

E 89-31 790 S.W.2d 907

Court of Appeals of Arkansas
Division I
Opinion delivered May 2, 1990

Friday, Eldredge & Clark, by: *Oscar E. Davis, Jr.*, for appellant.

Bruce H. Bokony, for appellee.

DONALD L. CORBIN, Chief Judge. Appellant, Grace Drilling Company, appeals a decision of the Arkansas Board of Review which found that appellee, Gary Ramsey, was entitled to benefits under Section 5(b)(1) of the Arkansas Employment Security Law, Arkansas Code Annotated Section 11-10-514(a)(1) (Supp. 1989), finding he was discharged from his last work for reasons other than misconduct connected with the work. We reverse.

Appellee was employed by appellant as a driller for approximately nine years prior to being discharged for failing a drug screening test by testing positive for cannabinoid, the principal marijuana metabolite. After being discharged, appellee filed for and was granted unemployment benefits by the Arkansas Employment Security Division. Appellant appealed to the Appeals Tribunal which reversed the Agency's decision and denied appellee benefits. On appeal to the Board of Review, the decision of the Appeals Tribunal was reversed. The Board allowed appellee benefits after finding that the evidence failed to establish that he was intoxicated at work, therefore, his discharge was for reasons other than misconduct connected with his work.

Appellant raises two points for reversal which will be consolidated for purposes of this appeal. Essentially, appellant contends that there is no substantial evidence to support the Board's decision. In an appeal of an employment security case, findings of fact by the Board of Review are deemed conclusive if

they are supported by substantial evidence. *Edwards* v. *Stiles*, 23 Ark. App. 96, 743 S.W.2d 12 (1988). Whether an employee's actions constitute misconduct in connection with work sufficient to deny unemployment benefits is a question of fact for the Board. *Sadler* v. *Stiles*, 22 Ark. App. 117, 735 S.W.2d 708 (1987). Whether the findings of the Board of Review are supported by substantial evidence is a question of law, and, on appeal, we may reverse a finding of the Board of Review which is not supported by substantial evidence. *Edwards*, 23 Ark. App. at 100, 743 S.W.2d at 14.

Arkansas Code Annotated Section 11-10-514(a)(1) (Supp. 1989) provides that an individual shall be disqualified for benefits if he is discharged from his last work for misconduct in connection with the work. This court has stated that in order for an employee's action to constitute misconduct so as to disqualify him, the action must consist of deliberate violation of the employer's rules, acts of wanton or willful disregard of the standard of behavior which the employer has a right to expect of his employees. *Exson* v. *Everett*, 9 Ark. App. 177, 656 S.W.2d 711 (1983). *See also Feagin* v. *Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983). This court has stated that mere inefficiency, unsatisfactory conduct, failure of good performance as a result of inability or incapacity, inadvertence, ordinary negligence or good faith error in judgment are not considered misconduct for unemployment benefit purposes unless they are of such a degree of recurrence as to manifest culpability, wrongful intent, evil design, or intentional disregard of an employer's interest. *Arlington Hotel* v. *Employment Security Division*, 3 Ark. App. 281, 625 S.W.2d 551 (1981).

The record reveals that in 1987 appellant developed a national safety program, part of which involved drug screening of employees on a random basis. The policy prohibited its employees from possessing or being under the influence of alcohol, drugs, controlled substances, drug paraphernalia or any combination thereof, on any of its facilities. The policy defines "under the influence" as:

> [b]eing unable to perform work in a safe and productive manner, being in physical or mental condition which creates a risk to the safety and well-being of the individual,

> other employees, the public, or Company property; or having any detectable level of alcohol, drugs or controlled substances, or any combination thereof, in the body.

The policy expressed appellant's interest in the safety and well-being of all its employees and stated its objective as doing all possible to provide a safe work site. Pursuant to this policy, appellee was terminated June 20, 1988, after failing a drug screening test administered on a random basis by a corporate drug screening officer.

Terry Lovegrove, office manager for appellant, testified that the program was initiated due to the high accident rate and risk factors relating to the nature of the drilling business and the desire to ensure the safety of the drilling crews. He acknowledged that at the time the policy was implemented, employees were given the option of signing the agreement or being discharged. It was undisputed that appellee's job performance had been satisfactory and his dismissal was wholly predicated upon the positive drug test. Appellee testified that he agreed to be bound by the terms of appellant's drug testing policy which he read and signed. He further acknowledged that he was aware that a positive test for a controlled substance could result in his immediate termination. Appellee denied actually smoking marijuana yet admitted that he had been in an automobile on numerous occasions with individuals who were smoking. It is well settled that the determination of credibility of witnesses and the drawing of inferences is for the Board and not this court. *W.C. Lee Constr.* v. *Stiles*, 13 Ark. App. 303, 683 S.W.2d 616 (1985).

Due to the dangerous nature of the drilling industry it was not unreasonable for appellant to implement a drug policy. The issue of drug testing in the work environment presents public policy considerations, the import of which cannot be minimized. The evidence establishes that appellant's policy clearly prohibited being under the influence of illegal drugs on its premises. It further provides that any positive result for drug testing may result in immediate discharge from employment. In part, the stated objective of the policy is to assist in maintaining a safe working environment for its employees.

Pursuant to the definition set out above an employee could be under the influence by being unable to perform work

safely thereby creating a risk to himself, others, or property; *or* having any detectable level of alcohol or drugs in the body. Our review of the record reveals that appellee's positive test result is sufficient to satisfy that portion of the definition prohibiting any detectable level of drugs in the body. This action constitutes misconduct which disqualifies him from benefits as it represents a deliberate violation of appellant's rules and willful and wanton disregard of the standard of behavior which appellant had a right to expect of appellee, its employee. Based on the foregoing, there is no substantial evidence to support the Board of Review's finding that appellee was discharged for reasons other than misconduct in connection with his work.

Reversed.

COOPER and MAYFIELD, JJ., agree.

IN THE MATTER OF THE ADOPTION OF J.L.T. and M.M.T.

CA 89-444 788 S.W.2d 494

Court of Appeals of Arkansas
Division II
Opinion delivered May 2, 1990

The Madden Law Firm, by: *Mary E. Cress*, for appellants.

Phil Stratton, for appellees.

JAMES R. COOPER, Judge. The appellants in this adoption case filed a motion on January 27, 1988, to set aside a final decree of adoption entered on January 5, 1982, more than six years prior to the motion to set aside. In the petition, one of the appellants, Mary Lou Chance Ives, alleged that she is the natural mother of the two adopted children and that the adoptive parents, appellees, her mother and step-father, obtained her consent to the adoption by fraud. The other appellant, Mark Edward Jones, alleged that he was the natural father of the children and he asked the probate court to set aside the adoption because he had not received notice. The probate court found that Mr. Jones had no standing to challenge the adoption and that Ms. Ives's consent was informed, knowing and was given without fraud. Although the appellants argue six points on appeal, they can be consolidated into two issues: 1) that the trial court erred in finding that Ms. Ives's consent was not obtained by fraud; and 2) that the trial court erred in finding that Mr. Jones was not entitled to notice of the adoption and had no standing to challenge the adoption. We affirm.

In adoption proceedings, this Court reviews the record

de novo, but we will not reverse the probate judge's decision unless it is clearly erroneous or against the preponderance of evidence, after giving due regard to his opportunity to determine the credibility of the witnesses. *Brown* v. *Johnson*, 10 Ark. App. 100, 661 S.W.2d 443 (1983). In cases involving minor children a heavier burden is cast upon the court to utilize to the fullest extent all its power of perception in evaluating the witnesses, their testimony, and the children's best interests. This Court has no such opportunity, and we know of no case in which the superior position, ability, and opportunity of the probate court to observe the parties carry as great a weight as one involving minor children. *In re Adoption of Milam*, 27 Ark. App. 100, 766 S.W.2d 804 (1987).

The appellants, Mr. Jones and Ms. Ives, argue that the trial court erred in finding that Ms. Ives's consent was not obtained by fraud. In the case of a final adoption decree, consent to adopt may be withdrawn upon a proper showing of fraud, duress or intimidation. *Dale* v. *Franklin*, 22 Ark. App. 98, 733 S.W.2d 747 (1987).

Ms. Ives testified at the hearing that at the time she signed the consent she was illiterate, she could not read the consent, and that her mother read the consent to her and assured her she could have the children back when she was in a better position to care for them. She also stated that her mother told her to come to her mother's house on the day of the hearing and they would go to the hearing together. According to Ms. Ives, when she got to her mother's house, her mother had left and Ms. Ives did not attend the hearing. However, Ms. Ives admitted that she alone took the consent to the bank, signed it in the presence of a notary, and had it notarized. She also stated that while she wanted to trust her mother, she had some reservations about the consent but that she did not ask anyone else to read it to her. She also admitted that she knew that the adoption meant she was giving legal custody of the children to her mother, and that she had voluntarily given care and control of the children to her mother.

The probate court expressed concern over the fact that Ms. Ives could not read when she signed the consent but found no fraud on the part of the appellees because Ms. Ives took the consent to the bank and found a notary, had her signature

properly notarized, and returned the consent to her mother. The court also found that Ms. Ives's mother did not exert any force or undue influence on her and that, although Ms. Ives knew of the court date, she failed to appear. In light of the probate court's superior opportunity to judge the credibility of the witnesses, we cannot say that its findings on this issue are clearly erroneous or against the preponderance of the evidence. *Brown* v. *Johnson*, *supra*.

The appellants next argue that the trial court erred in finding that Mr. Jones did not have standing to challenge the adoption. They contend that Mr. Jones was entitled to notice of the adoption proceedings and that the failure by the appellees to give him notice violated the Due Process Clause of the United States Constitution.

Both Ms. Ives and Mr. Jones testified at the hearing in 1988 that Mr. Jones was the father of the two children and that they had never married. Mr. Jones stated that he lived with Ms. Ives after the first child was born and lived with her again for about four months after the second child was born. He stated that even though he was a "drunken bum" he took care of the children as best he could. He admitted that he had been in prison twice; the first time when he was seventeen or eighteen years old, and the second time in 1982. He stated further that he did not receive any notice of the adoption and that he first learned of it in 1983 after he was released from prison. He believed that both of the appellees knew he was the father of the child and knew his whereabouts at the time of the adoption. Mr. Jones did not take any legal action to legitimize the children until 1988.

Because the adoption took place in 1982, the law in place then is the relevant law. The Revised Uniform Adoption Act was adopted by our legislature in 1977. *See* Ark. Stat. Ann. §§ 56-201 to 56-221 (Supp. 1981) and Ark. Code Ann. §§ 9-9-201 to 9-9-223 (1987). Section 56-212(a)(2) (now codified at Ark. Code Ann. § 9-9-212 (1987)) provides that twenty days notice shall be given to any person whose consent is required under the Act, or a person whose consent is not required under clauses (1), (2), (6), and (9) of § 56-207. (Ark. Code Ann. § 9-9-207). According to § 56-207(3) (not one of the clauses mentioned in § 56-212), consent is not required of the father of a minor if the

father's consent is not required by § 56-206(a)(2). Under § 56-206(a)(2) (Ark. Code Ann. § 9-9-206(a)(2)) consent is required of:

> (2) the father of the minor if the father was married to the mother at the time the minor was conceived or at any time thereafter, the minor is his child by adoption, he has custody of the minor at the time the petition is filed, or he has otherwise legitimated the minor according to the laws of the place in which the adoption proceeding is brought;

It is clear that under § 56-206(a)(2) Mr. Jones's consent was not required because, by his own admission, he never married Ms. Ives, never had custody of the children, and never sought to adopt or legitimate the children until six years after the adoption. Therefore, because Mr. Jones's consent was not required, he was not entitled to notice. *See In re: Adoption of S.J.B.*, 294 Ark. 598, 745 S.W.2d 606 (1988) (reaching the same result construing Ark. Code Ann. §§ 9-9-206 and 207 (1987)).

Although *In re: Adoption of S.J.B.*, *supra*, was decided under the Code rather than Arkansas Statutes, the provisions discussed are identical. That case held that our statutory scheme of excluding certain putative fathers from the right to consent and receive notice does not violate Due Process. Citing *Lehr* v. *Robertson*, 463 U.S. 248 (1983) the Arkansas Supreme Court stated:

> [U]ntil an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child does not acquire substantial protection under the Due Process Clause. Said in other words, when the father acts like a father and takes on some of the responsibilities of fatherhood, he is entitled to be treated as a father. The *Lehr* Court expressly stated: "But the mere existence of a biological link does not merit equivalent constitutional protection."

294 Ark. at 602. While we agree with the appellants' assertion that Mr. Jones's contacts with the children were more than a mere biological link, they do not rise to a level that requires Due Process protection. Prior to the adoption Mr. Jones only lived with Ms. Ives sporadically and only supported the children when

she lived with him. There is no evidence in the record that he visited the children or supported them outside the short periods of time the appellants lived together. He did not pay any of the medical bills associated with their births or take any steps to legitimate the children. We simply cannot say that Mr. Jones had sufficient custodial, personal, or financial relationships with the children to entitle him to notice.

The appellants cite Ark. Stat. Ann. § 56-138 (Ark. Code Ann. § 9-9-501 (1987)) for the proposition that Mr. Jones is a "birthparent." However, that section is part of the Voluntary Adoption Registry statutes which provide for a mutual consent registry and allows for the names of adoptees and birthparents to be disclosed in certain circumstances. We fail to see how § 56-138 is relevant to the issues raised in this case.

Affirmed.

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

Frank CHESHIRE *v.* WALT BENNETT FORD, INC.

CA 89-452 788 S.W.2d 490

Court of Appeals of Arkansas
Division II
Opinion delivered May 2, 1990
[Rehearing denied June 6, 1990.*]

*Appellee's motion for rule on the clerk is moot.

Steve Uhrynowycz, for appellant.

Wallace, Dover & Dixon, for appellee.

JOHN E. JENNINGS, Judge. On July 11, 1984, appellant Frank Cheshire bought a 1983 Ford Ranger truck from the appellee Walt Bennett Ford, Inc. Appellant subsequently defaulted on the note and appellee repossessed the truck on July 18, 1985. On July 28, 1986, appellee purchased the truck from itself

at private sale for $1,600.00, and filed this suit against appellant for the $6,800.00 deficiency.

After a non-jury trial the circuit judge awarded a deficiency judgment to appellee, holding that the sale was commercially reasonable because appellee had solicited and obtained four sealed competitive bids from automobile wholesalers and that its own bid was higher than the others.

On appeal Cheshire contends that because appellee impermissibly bought the collateral from itself at private sale, it is barred as a matter of law from obtaining a deficiency judgment. He also contends that the court erred in finding that appellee gave reasonable notice of sale and in finding that the collateral was sold in a commercially reasonable manner.

The disposition of collateral by the creditor after repossession is governed by Ark. Code Ann. § 4-9-504(3) (1987):

> (3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms, but every aspect of the disposition including the method, manner, time, place, and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods, no other notification need be sent. In other cases, notification shall be sent to any secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations, he may buy at private sale.

The Arkansas Supreme Court has interpreted the last sentence of this code provision with specific regard to used cars as collateral. In *Norton* v. *National Bank of Commerce of Pine Bluff*, 240 Ark. 143, 398 S.W.2d 538 (1966), the court held that a used car did not fall within the category of collateral "of a type customarily sold on a recognized market." In *Carter* v. *Ryburn Ford Sales, Inc.*, 248 Ark. 236, 451 S.W.2d 199 (1970), the supreme court held that used automobiles were not collateral "of a type which is the subject of widely distributed standard price quotations" and that "a secured party is not complying with the Commercial Code when he purchases a used automobile at his own private sale." It is therefore clear that appellee here did not comply with the disposition provision of the code in buying this collateral from itself at private sale.

In *Norton* and *Carter* the supreme court held that the effect of this kind of violation of the code is to create a presumption that the collateral was worth at least the amount of the debt, thereby placing upon the creditor the burden of proving the amount that should reasonably have been obtained through a sale conducted according to law. Appellant contends, however, that this rule was changed by the supreme court's decision in *First State Bank of Morrilton* v. *Hallett*, 291 Ark. 37, 722 S.W.2d 555 (1987), and certainly language in that case supports appellant's position. In *Hallett* there was an admitted failure on the part of the creditor to give proper notice of sale to the debtor. The supreme court affirmed the trial court's holding that the creditor was not entitled to a deficiency judgment under the court's earlier decision in *Rhodes* v. *Oaklawn Bank*, 279 Ark. 51, 648 S.W.2d 470 (1983). In *Rhodes* the court had said:

> When a creditor repossesses chattels and sells them without sending the debtor notice as to time and date of sale, or as to a date after which the collateral will be sold, he is not entitled to a deficiency judgment, unless the debtor has specifically waived his rights to such notice.

This principle has been called the "absolute bar rule." *See* 2 J. White & R. Summers, *Uniform Commercial Code* § 27-19 at 629 (3d ed. 1988). The *Hallett* court relied primarily on *Rhodes* and on *Atlas Thrift Co.* v. *Horan*, 27 Cal. App. 3rd 999, 104 Cal. Rptr. 315 (1972).

The *Hallett* court characterized *Norton* and *Carter* as "an earlier line of cases which took a different approach to this issue," and said "[w]e think *Rhodes* represents the right approach and, although it did not expressly overrule these cases, its effect was to change our law." The court in *Hallett* continued:

> The creditor's right to a deficiency judgment is not merely subject to whether the debtor has a right to damages under § 85-9-507, but instead depends on whether he has complied with the statutory requirements concerning disposition and notice.
>
> . . . .
>
> The *Horan* court concluded: "The rule and requirement are simple. 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."
>
> 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. Here, [the creditor] failed to comply with the code's procedures for disposition of collateral and is therefore not entitled to a deficiency judgment under the code.

Hallett, 291 Ark. at 41-42 (citations omitted.)

The quoted language supports the position that any violation of the code related to disposition of the collateral will absolutely bar a deficiency judgment, but *Hallett*, like *Rhodes* and *Horan*, was a case which involved failure to give notice.

Although the broad language in *Hallett* is dicta, we would follow it were there not other indications of the direction in which the supreme court intends to go. As noted in *Hallett*, the court in *Rhodes* did not expressly overrule *Norton*, *supra*. Indeed the *Rhodes* court said:

> When a creditor repossesses chattels and resells them in a manner not consistent with the code it is his responsibility to prove the sale was commercially reasonable before he is entitled to a deficiency judgment. *Harper* v. *Wheatley*, 278 Ark. 27, 643 S.W.2d 537 (1982). *See also Universal C.I.T.*

> v. *Rone*, 248 Ark. 665, 453 S.W.2d 37 (1970). We remanded *Harper* to the trial court for a determination of commercial reasonableness because such proof was disallowed at trial. *The matter of lack of notice was not decided in Harper.*

Rhodes, 279 Ark. at 54-55 (emphasis added).

It would thus seem that the *Rhodes* court expressly reaffirmed the rule established in *Norton* for cases involving code violations other than failure to give notice. Finally, in *Hallmark Cards, Inc.* v. *Peevy*, 293 Ark. 594, 739 S.W.2d 691 (1987), the supreme court had occasion to restate its holding in *Hallett*: "We held clearly that the right to any deficiency judgment was dependent upon the secured party having complied with the notice requirement." When *Hallett* is read in conjunction with *Rhodes* and *Peevy*, it appears that the "absolute bar rule" is applicable only to those cases in which there has been failure to give notice. It follows that when there has been some other violation of the Commercial Code, the creditor may still obtain a deficiency judgment if he meets the burden imposed by the rule in *Norton.*

Section 4-9-504 requires that "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" in absence of a waiver of notification by the debtor. Here, after repossession of the truck, appellee sent a letter by certified mail, return receipt requested, to appellant at a North Little Rock address, informing him that the truck would be sold at private sale on or after August 17, 1985. Appellant challenged the reasonableness of this notice, apparently because it was mailed to an address other than that shown on the contract of sale. While appellant admitted that he no longer lived at the address shown on the contract, he denied living at the North Little Rock address. The North Little Rock address to which the notice was sent was the location from which the truck was repossessed, was where appellant's wife lived, and was considered by appellee to be appellant's "last known address." The trial court found that appellee sent reasonable notice in compliance with section 4-9-504(3). That factual finding is not clearly against a preponderance of the evidence. *See* Ark. R. Civ. P. 52.

Whether a sale was conducted in a commercially reasonable manner is also a question of fact. *Womack* v. *First State Bank of Calico Rock*, 21 Ark. App. 33, 728 S.W.2d 194 (1987); *Farmers and Merchants Bank* v. *Barnes*, 17 Ark. App. 139, 705 S.W.2d 450 (1986); *Henry* v. *Trickey*, 9 Ark. App. 47, 653 S.W.2d 138 (1983). Phil Schmidt, appellee's assistant general manager, testified about the truck's repossession and resale. He stated that the truck had "excessive milage" and was in poor condition. Appellee reconditioned the truck by having dents fixed, touching up the paint and detail stripes, fixing the seats and upholstery, having a bed liner installed to cover scratches and wear, and by replacing a battery and tire. The truck was immediately put on appellee's used car lot for retail sale. He testified that the truck's having a diesel engine made it "a little harder to resell than a gasoline engine." Schmidt testified that he knew of two or three deals on the truck that fell through when the prospective buyers couldn't get financing. He testified that after the truck remained unsold it "depreciated to the point that we had to put it on our line to wholesale." He stated that appellee regularly notified area wholesalers of sales, and that wholesalers would come and look at as many as 30-50 units and then bid on the vehicles. Normally, sealed bids are submitted, with the vehicles going to the highest bidder. Schmidt testified that four wholesalers submitted bids on this truck, in amounts of $1000, $1300, $1350, and $1500. Appellee also bid on the truck, and its bid of $1600 was the highest, and in Schmidt's opinion was "fair and reasonable." The trial court found that appellee took sealed competitive bids and that appellee's bid was $100 higher than the others, and that the collateral was disposed of at private sale in a commercially reasonable manner. Again we cannot say that these findings were clearly against the preponderance of the evidence.

Affirmed.

CRACRAFT and ROGERS, JJ., agree.

Susan PALMER *v.* STATE of Arkansas

CA CR 89-110 788 S.W.2d 248

Court of Appeals of Arkansas
En Banc
Opinion delivered May 2, 1990

John Joplin, for appellant.

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

MELVIN MAYFIELD, Judge. On July 13, 1988, the appellant pleaded nolo contendere to a charge of theft of property, and under the authority of Ark. Code Ann. § 5-4-104(e)(1) (1987), imposition of sentence was withheld for a period of four years on certain conditions. On January 6, 1989, a petition to revoke was filed which charged appellant with violating the conditions of her suspended imposition of sentence by contributing to the delinquency of a minor. After a hearing the court entered an order containing the following provisions:

> [T]he suspended sentence imposed upon the Defendant on July 13, 1988, shall remain in effect as originally stated with the following additional conditions:
>
> That the Defendant is to serve 90 days in the Sebastian County Adult Detention Center.
>
> That the Defendant is to pay the previously ordered fine and court cost at the rate of $100 per month beginning 60 days after release from jail . . . .

At the hearing, the state presented evidence to show that appellant, who was 25 years old, was intimate with Quincy Newton, a 14-year-old boy. Quincy's mother testified she had filed charges against appellant when she heard that Quincy and appellant were having an affair. Quincy's parents are separated. His mother said that on one occasion, when she had to work at night, she told Quincy to stay with his father. Quincy packed his clothes in a paper sack and left home, but his mother found out he had not gone to his father's house. When Quincy returned sometime later, without the clothes he packed, he told his mother that they were in the appellant's truck. Quincy's mother went

with him to the appellant's truck, which was parked near appellant's apartment, and got the clothes. Quincy's mother also testified that she had heard an audio tape made by one of Quincy's friends, in which Quincy and appellant were discussing going to a motel. A handwritten love letter, signed "Love U Susan," which the mother found in Quincy's pocket as she was preparing to wash, was introduced into evidence. And there was evidence that although his mother did not give Quincy permission to go with appellant, Quincy had said he was going with appellant without his mother's permission.

Quincy's father testified that he had custody of Quincy "off and on" during the school year, and there were occasions when he had gone to pick up Quincy after school and had been told that Quincy had left with appellant. He said he waited there for a while and then left. He admitted, however, that he arrived after school was dismissed for the day and he did not know whether Quincy had missed any classes.

Sergeant Robert Hicks testified that when Mrs. Jones filed the charges against appellant Hicks interviewed appellant and she admitted having had sexual relations with Quincy four or five times. Hicks further testified that Quincy had told him that he had a sexual relationship with appellant; however, Quincy testified that he and appellant were just good friends.

Appellant argues that this evidence is insufficient to show that she contributed to the delinquency of a minor. We do not agree. Ark. Code Ann. § 5-27-205 (1987) provides:

> (a) A person commits the offense of contributing to the delinquency of a minor if, being an adult, he knowingly aids, causes, or encourages a minor to:
>
> (1) Do any act prohibited by law; or
>
> (2) Do any act that if done by an adult would render the adult subject to prosecution for an offense punishable by imprisonment; or
>
> (3) Habitually absent himself, without good or sufficient cause, from his home without the consent of his parent, stepparent, foster parent, guardian, or other lawful custodian; or

> (4) Habitually absent himself from school when required by law to attend school; or
>
> (5) Habitually disobey the reasonable and lawful commands of his parent, stepparent, foster parent, guardian, or other lawful custodian.

There is evidence that appellant violated subsections (a)(3) and (5) of the above section by knowingly aiding, causing, or encouraging a 14-year-old minor to habitually absent himself, without sufficient cause, from his home without the consent of his mother and to habitually disobey his parent's reasonable and lawful commands. One of the conditions of appellant's suspended sentence was that she not violate any federal, state, or municipal law. Ark. Code Ann. § 5-4-309 (1987) provides that if the court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with the conditions of his suspension or probation, it may revoke the suspension or probation. In testing the sufficiency of the evidence we must view it in the light most favorable to the state. *Reese* v. *State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988). We find there was sufficient evidence to revoke appellant's suspended imposition of sentence.

The sufficiency of the evidence is the only issue raised by the appellant in this case. However, in view of *Howard* v. *State*, 289 Ark. 587, 715 S.W.2d 440 (1986), and its holding that an illegal sentence is a matter of subject matter jurisdiction, we consider whether the trial court's modification of its previous order was legal.

On July 13, 1988, on appellant's plea of nolo contendere, the trial court had withheld imposition of sentence for four years on certain conditions. When one of the conditions was violated, the court was authorized under Ark. Code Ann. § 5-4-309(f) (1987), to enter a judgment of conviction and impose any sentence that might have been imposed originally, subject to the limits set out in section 5-4-309(f). Rather than impose such sentence, the trial court chose to follow the provisions of Ark. Code Ann. § 5-4-306(b) (1987) which states:

> During the period of suspension or probation, the court, on motion of a probation officer or the defendant, or on its own motion, may modify the conditions imposed on

> the defendant or impose additional conditions authorized by § 5-4-303.

As suggested by the original commentary to this section (*see* 1989 edition of the Criminal Code which contains the commentaries), since the court retains jurisdiction of the case when it suspends imposition of sentence, it also has the power to modify conditions of a suspension. Thus, the court was authorized to modify the conditions which were imposed when the imposition of sentence in this case was suspended, or to impose additional conditions, as long as the conditions were changed as authorized by Ark. Code Ann. § 5-4-303 (1987). Subsection (c)(10) of section 5-4-303 provides the court may require that a defendant: "Satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience."

The trial court obviously wanted to give the appellant another chance at rehabilitation before imposing a sentence on the charge of theft of property. In *Fortner* v. *State*, 255 Ark. 38, 498 S.W.2d 671 (1973), the court said: "We have a host of precedents for the proposition that the question of revocation addresses itself to the discretion of the trial court." 255 Ark. at 39. We find no abuse of discretion in the trial court's modification of the conditions previously imposed on the appellant in the instant case. The requirement that appellant serve 90 days in the Sebastian County Detention Center does not exceed the period authorized as a condition of suspension or probation in Ark. Code Ann. § 5-4-304 (1987) and appellant has not previously been ordered to serve any time under this section as a condition of her suspended imposition of sentence on her plea to the theft of property charge.

Affirmed.

CRACRAFT and COOPER, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. The appellant in this criminal case was ordered to serve 90 days in jail as an additional condition of a suspended sentence imposed six months beforehand. Although I do not disagree with the majority's conclusion that the evidence is sufficient to support some action by the trial court, I dissent because the imposition of a jail sentence as a

subsequent additional condition of a previously-imposed suspended sentence is an unauthorized disposition.

Although the question of whether a circuit court acted in excess of its authority is not a matter of subject-matter jurisdiction *per se*, the Arkansas Supreme Court has treated it as such. *See, e.g.*, *Howard* v. *State*, 289 Ark. 587, 715 S.W.2d 440 (1986); *Lambert* v. *State*, 286 Ark. 408, 692 S.W.2d 238 (1985). Therefore, it is proper, as the majority notes, to raise on our own the question of an illegal sentence despite the absence of an objection below. *Jones* v. *State*, 27 Ark. App. 24, 765 S.W.2d 15 (1989).

Arkansas Code Annotated § 5-4-306(b) (1987) defines the manner in which a court may alter the conditions of suspension or probation after the period of suspension or probation has begun. It provides that:

> During the period of suspension or probation, the court, on motion of a probation officer or the defendant, or on its own motion, may modify the conditions imposed on the defendant or impose additional conditions authorized by § 5-4-303.

The statutory language is explicit. Once the period of suspension or probation has begun, the court may either (1) modify the conditions previously imposed, or (2) impose additional conditions. Under the statutory scheme, confinement is by definition an additional condition:

> (a) If the court suspends the imposition of sentence on a defendant or places him on probation, it may require, *as an additional condition* of its order, that the defendant serve a period of confinement. . . .

Ark. Code Ann. § 5-4-304(a) (1987). However, while confinement is plainly an additional condition according to the unambiguous language of the statute, it is not an additional condition authorized by § 5-4-303.

To me, the conclusion is inescapable: the statutory scheme does not permit a court to alter previously-imposed conditions by ordering confinement after the period of suspension or probation has begun. The wisdom of this restriction is questionable, and I

readily concede that the result reached by the majority provides a flexibility which may be beneficial to the courts and defendants alike. Nevertheless, our role is not to legislate, but instead to apply the statutes which the legislature has seen fit to enact according to their plain and unambiguous meaning.

I believe that the majority has departed from that role by construing the statutes involved in such a way as to affirm the trial court's action. This was wrong for several reasons. First, the statutes are unambiguous and require no construction or interpretation. Second, even if statutory construction had been required, we lack jurisdiction to perform that function under Rule 29 of the Rules of the Supreme Court and the Court of Appeals. Finally, even if these statutes actually required construction and we were authorized to do so, the construction adopted by the majority would be erroneous.

The legislative intent to draw a distinction between the prosaic, general conditions enumerated in § 5-4-303 and the incomparably more severe condition of incarceration is crystal clear. Nor can it be argued that confinement is an additional condition authorized by § 5-4-303. Apparently recognizing this, the majority characterizes the 90-day jail sentence in this case as a "modification" under § 5-4-303(c)(10), which permits the trial court to require the defendant to "[s]atisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty. . . ."

Leaving aside the question of whether or not a 90-day jail sentence is a condition not unduly restrictive of the appellant's liberty, to treat confinement as a permissible modification under the general language of § 5-4-303, is to render § 5-4-304 utterly meaningless. It is an elementary rule of statutory construction that a statute should be construed so that every word is given effect, if possible, and any construction which would render one or more clauses meaningless is to be avoided. *Second Injury Fund* v. *Yarbrough*, 19 Ark. App. 354, 721 S.W.2d 686 (1986).

The majority notes that the trial court sought to give the appellant another chance at rehabilitation, and I agree that revocation questions are discretionary with the trial court. However, the trial court's right to exercise discretion is limited by legislatively authorized dispositions, and as noted earlier, I

believe the legislative intent is clear.

Finally, even though the trial court *might* have found a basis to revoke the appellant's suspended imposition of sentence, it *did not*, so therefore I would reverse and remand this case to allow the trial judge to impose such additional conditions as are authorized under Ark. Code Ann. § 5-4-303.

I respectfully dissent.

CRACRAFT, J., joins in this dissent.

John NOGGLE *v.* ARKANSAS VALLEY ELEC. COOP. and Federated Rural Electric Insurance Corporation

CA 89-394 788 S.W.2d 497

Court of Appeals of Arkansas
En Banc
Opinion delivered May 9, 1990

Daily, West, Core, Coffman & Canfield, by *Michael C. Carter*, for appellant.

Friday, Eldredge & Clark, by: *Scott J. Lancaster*, for appellee.

GEORGE K. CRACRAFT, Judge. John Noggle appeals from an order of the Arkansas Workers' Compensation Commission determining that his "permanent partial disability rate" was limited to $154.00 per week under Ark. Code Ann. § 11-9-501(d)(1) (1987). He contends that the Commission has misinterpreted the provisions of that statute and that he is entitled to receive weekly benefits in a higher amount. We find no error and affirm.

The case was submitted to the Commission on a stipulated record. It was agreed that appellant sustained a compensable scheduled injury resulting in the loss of vision in his right eye, for which he was entitled to compensation at the permanent partial disability rate for a period of 105 weeks. *See* Ark. Code Ann. § 11-9-521(a)(14) (1987). It was further stipulated that at the time of the injury his average weekly wage was $517.20. The only issue for us to determine is whether the Commission correctly computed the "permanent partial disability rate" at which appellant is to be paid.

The issue on this appeal arises from changes made in the workers' compensation law by § 2 of Act 10 of 1986. The 1986 amendment sought to integrate into our law over an eighteen-month period the concept of calculating total disability rates by percentages of the "average state wage," as defined in Ark. Code Ann. § 11-9-102(18) (1987), rather than the average weekly wage of the worker. The amendment also, over a period of time, serves to increase the percentages on which total disability rates are to be computed and to remove the maximum limitations on weekly payments. Separate and slightly different provisions were made for the calculation of permanent partial disability rates. Arkansas Code Annotated § 11-9-501 (1987), as amended, now provides in pertinent part as follows:

Limitations on compensation—Death and disability.

(a) 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;

(b) Compensation payable to an injured employee for disability, *other than permanent partial disability as specified in subsection (d) of this section*, and compensation payable to surviving dependents of a deceased employee, the *total disability rate*, shall not exceed sixty-six and two-thirds percent (66-⅔%) of the employee's average weekly wage with a twenty dollar ($20.00) per week minimum, subject to the following maximums:

(1) For disability or death due to an injury occurring on and after July 1, 1987, through December 31, 1988, the maximum weekly benefits payable shall be one hundred eighty-nine dollars ($189);

(2) For disability or death due to an injury occurring on and after January 1, 1989, through December 31, 1989, the maximum weekly benefits payable shall be sixty-six and two-thirds percent (66-⅔%) of the state average weekly wage;

(3) For a disability or death which results from an injury occurring during a calendar year beginning on or after January 1, 1990, the maximum weekly benefit payable shall be seventy percent (70%) of the state average weekly wage.

* * *

(d) Compensation payable to an injured employee for permanent partial disability, including scheduled permanent injuries (the permanent partial disability rate), which results from an injury occurring on or after July 1, 1986, shall not exceed sixty-six and two-thirds percent (66-⅔%) of the employee's average weekly wage, with a twenty

> dollar ($20.00) per week minimum, subject to a maximum of one hundred fifty-four dollars ($154). *However*, if the employee's *total disability rate* for the injury would be two hundred five dollars and thirty-five cents ($205.35) per week or greater, then the maximum permanent partial disability rate shall be seventy-five percent (75%) of the employee's total disability rate.

(Emphasis added.)

The Commission ruled that the appellant's "permanent partial disability rate" was limited to $154.00. It reasoned that allowing a claimant's permanent partial disability rate to exceed that sum under subsection (d) was dependent upon a determination that his "total disability rate" would exceed the sum of $205.35 per week. The Commission further reasoned that, as the maximum total disability rate applicable to an injury occurring on July 14, 1987, was $189.00, *see* Ark. Code Ann. § 11-9-501(b)(1), the proviso of subsection (d) allowing one's permanent partial disability rate to exceed $154.00 per week had no application.

Appellant contends that the permanent partial disability rate must be determined exclusively by the terms of subsection (d). He contends that with this interpretation the rate would be calculated as follows: 66-⅔% of his average weekly wage of $517.20 equals $344.80; as that sum exceeds $205.35, the proviso of subsection (d) becomes applicable, and his weekly permanent partial disability rate should be 75% of $344.80, or $258.60.

The fallacy of appellant's position lies in the fact that the proviso in subsection (d) is dependent upon a determination of his "total disability rate," which is not defined in subsection (d) but rather in the provisions of subsection (b):

> *Compensation payable to* an injured employee . . . [on account of total disability], and *compensation payable to* surviving dependents of a deceased employee, the *total disability rate*, shall not exceed sixty-six and two-thirds percent (66-⅔%) of the employee's average weekly wage with a twenty dollar ($20) per week minimum, subject to the following maximums:
>
> (1) For disability or death due to an injury occurring

> on and after July 1, 1987, through December 31, 1988, the maximum weekly benefits payable shall be one hundred eighty-nine dollars ($189). . . .

(Emphasis added.) It is well settled that ambiguities and conflicting interpretations of workers' compensation statutes must be resolved in favor of the claimant due to the remedial nature of such legislation. *Northwest Tire Service* v. *Evans*, 295 Ark. 246, 748 S.W.2d 134 (1988). Statutes that are plain and unambiguous, however, will not be construed to mean anything other than what they say. *Hinchey* v. *Thomasson*, 292 Ark. 1, 727 S.W.2d 836 (1987). Different sections of a statute must be construed together and full effect given to each section if it is possible to do so. *See Love* v. *Hill*, 297 Ark. 96, 759 S.W.2d 550 (1988).

We find no ambiguity in the statute in question or any conflict between its provisions. The proviso of subsection (d) is limited by the total disability rate, which is defined in another subsection of that statute. The wording of the statute is clear and the intent of the legislature appears clearly expressed. We agree with appellant that this construction prohibits any worker injured during the period between July 1, 1987, and December 31, 1988, from ever being compensated at a permanent partial disability rate in excess of $154.00. However, this is clearly what the statute says, and it is not our function to question the wisdom of the legislature.

Affirmed.

WEINGARTEN/ARKANSAS, INC. *v.* ABC INTERSTATE THEATRES, INC., Plitt Southern Theatres, Inc., and Warco, Inc.

CA 89-5 789 S.W.2d 1

Court of Appeals of Arkansas
Division II
Opinion delivered May 9, 1990
[Supplemental Opinion on Denial of Rehearing July 5, 1990.*]

Rose Law Firm, A Professional Association, by: *Richard T. Donovan* and *James H. Druff*, for appellant.

Eichenbaum, Scott, Miller, Liles & Heister, P.A., by: *Leonard L. Scott* and *Frank S. Hamlin*, for appellees ABC Theatres and Plitt Southern Theatres, Inc.

MELVIN MAYFIELD, Judge. Appellant, Weingarten, brought this action as landlord of some commercial property in Little Rock against appellees, ABC Interstate Theatres, Inc., Plitt Southern Theatres, Inc., and Warco, Inc. The action involved a 1975 lease wherein Weingarten leased 12,000 square feet in the Markham Plaza Shopping Center to appellee ABC for a term of twenty-five years. The lease was subsequently assigned to Plitt and, later, to Warco. Warco failed to pay rent after July 1986, and Weingarten brought suit for immediate possession of the premises without termination of the lease and for unpaid back rent. In the second amended complaint, Weingarten stated:

*Jennings, J., would grant rehearing. Rogers, J., not participating.

"[Weingarten] is entitled to and must obtain immediate possession of the premises, in order to mitigate damages by cleaning and generally making such repairs and improvements as are necessary and to show the premises to prospective tenants." In May of 1987, the court entered an order granting possession to Weingarten. Prior to trial, Weingarten refused to relet the premises to another interested theatre chain under the same terms as the original lease and, after making substantial changes in the property, subsequently relet the premises to two businesses at higher rentals for shorter durations.

On February 8, 1988, ABC and Plitt filed a counterclaim for declaratory judgment, alleging that Weingarten had failed to mitigate its damages and that its conduct constituted a constructive termination of the lease and assignments. Specifically, ABC and Plitt alleged that Weingarten had failed to accept a willing lessee at a rent equal to the amount listed in the original lease and that Weingarten treated the property as its own without regard to any leasehold estate. According to ABC and Plitt, Weingarten could not completely change the nature of the physical premises and still require appellees to be liable for the remainder of the lease.

After trial before the court, judgment was entered for Weingarten in the amount of $56,878.00, but the court found that Weingarten breached its duty to mitigate damages in May of 1987, when it was awarded a writ of possession. The judgment contained the following conclusions of law:

> 2. Under Arkansas law there is a duty on the landlord to mitigate damages upon a tenant's default. The burden to prove failure of the duty is upon the tenant.
>
> 3. Weingarten's duty to mitigate damages arose on May 5, 1987, the date Weingarten was awarded a Writ of Possession.
>
> 4. Weingarten breached the duty of mitigation when it failed and refused to rent the premises to Leroy Mitchell and/or corporations of which he was an executive officer, all of whom were financially responsible, upon the same terms as the Warco lease. Accordingly, all damages ceased accruing as of May 5, 1987.

. . . .

> 6. Weingarten's remodeling and reletting of the premises did not result in an abandonment of the premises, or acceptance of surrender thereby of the lease. However, defendants are entitled to a declaratory judgment giving them credit against any future liability under the lease to the extent of payments made by present and future tenants. The counterclaim should be otherwise dismissed with prejudice.

On appeal, appellant argues the following points: (1) under Arkansas law, a landlord is not under a duty to mitigate damages upon the tenant's abandonment of the premises; (2) even applying contract principles of law to this case, appellant was under no obligation to mitigate its damages; (3) even if the general rule against mitigation in such instances is overruled, the new standard should not be applied retroactively; (4) if this court retroactively imposes a duty of mitigation on landlords, this duty should be limited to residential leases; and (5) if Weingarten did have a duty to mitigate, it satisfied that duty by making a reasonable good faith effort to relet the premises.

In their cross-appeal, ABC and Plitt argue that the trial court erred in finding that Weingarten's actions with regard to the premises did not amount to an acceptance of surrender of the leasehold. Because we agree with appellees' argument on their cross-appeal, we need not address arguments made by appellant on direct appeal.

In *Hayes* v. *Goldman*, 71 Ark. 251, 254-55, 72 S.W. 563, 564 (1903), the Arkansas Supreme Court stated:

> A surrender has been said to be the yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, whereby the estate for life or years is by mutual agreement drowned in the estate in reversion or remainder. 18 Am. & Eng. Enc. Law (2d Ed.) 355. A surrender may be made by agreement of parties or by operation of law, and when made the estate of the lessee terminates, and the relation of landlord and tenant cases [sic]. There was no express agreement for a surrender in this case, and the only question we have is whether there

was evidence sufficient to go to the jury on the question as to whether there was a surrender by operation of law.

Now, any acts which are equivalent to an agreement on the part of a tenant to abandon, and on the part of the landlord to assume possession of the demised premises on his own account, amount to a surrender of the term, by operation of law. 1 Washburn, Real Property, (6th Ed.) Section 739; *Williamson* v. *Crossett*, 62 Ark. 393; *Kneeland* v. *Schmidt*, 78 Wis. 345; *Talbot* v. *Whipple*, 96 Mass. 180; 18 Am. & Eng. Enc. Law, (2d Ed.) 364.

An express agreement to accept the surrender need not be shown, for the landlord's assent may be implied by operation of law from the manner in which he uses the property after its abandonment by the tenant. 2 Wood, Landlord & Tenant, (2d Ed.) 1173.

If the landlord takes charge of the property after the tenant has abandoned it merely to protect it from injury, or if, knowing that the tenant does not intend to return, he rents it for the account of the tenant, these acts may not show assent on his part, but if after an abandonment he takes possession, and rents the premises on his own account, this is conclusive evidence of a surrender. *Williamson* v. *Crossett*, 62 Ark. 393; *Underhill* v. *Collins*, 132 N.Y. 269, and other cases cited above.

The law on this point is stated in a recent edition of a work on the subject as follows: "When a tenant abandons premises, and returns the keys to the landlord, the latter may accept the keys as a surrender of possession, thereby determining the tenant's estate, and relet the premises on his own account, or he may accept the keys and resume possession conditionally by notifying the tenant or other person returning the keys that he will accept the keys but not the premises, and relet them on the tenant's account, in which case the tenant may be held for any loss in rent caused by his abandonment and the subsequent reletting." 2 McAdam, Land. & Ten (3d Ed.) 1283.

71 Ark. at 254-55. Thus, we see that an agreement to terminate the lease need not be express but may be implied. The matter has

been more fully explained as follows:

> The question whether or not there has been such an acceptance as will release the tenant is primarily a question of the landlord's intention, and is usually one of fact. An express acceptance need not be shown in order to release the tenant; the landlord's consent may be implied from circumstances and unequivocal acts equivalent to an agreement on the landlord's part to accept and inconsistent with the continuance of the lease. However, the landlord's acts must go beyond entering the premises and exercising the rights of an owner to keep them safe from damage or doing things reasonably necessary to minimize damages. Thus an acceptance will be implied where the landlord takes possession of the premises and uses them for his own purposes, as where he remodels them so as to make them unavailable for the purposes for which they were leased and untenantable for the period of remodeling, or where he relets them before the tenant vacates, and ordinarily is implied where he tears down all the buildings on the premises.
>
> It has also been held that an acceptance will be implied where the landlord unqualifiedly takes absolute possession of the premises unless he expresses an intention to hold the lessee for rent or the lease authorizes such action. It has further been adjudicated that if the landlord wishes to prevent an acceptance by operation of law he must either by word or act, convey to the tenant notice that he is resuming possession for the tenant's benefit and not his own benefit, but, where the landlord's conduct is inconsistent with his notice that he is acting for the tenant, re-entry will be an acceptance. [footnotes omitted]

52 C.J.S. *Landlord & Tenant* Section 493, at 433 (1968). *See also Consolidated Sun Ray, Inc.* v. *Oppenstein*, 335 F.2d 801, 810-11 (8th Cir. 1964); *Bove* v. *Transcom Electronics*, 353 A.2d 613, 616 (R.I. 1976); *Roosen* v. *Schaffer*, 621 P.2d 33, 36 (Ariz. App. 1980); *Vineyard Village — Georgia, Inc.* v. *Crum*, 221 S.E.2d 208, 210 (Ga. App. 1975).

In the instant case, the appellant admitted that it made over $200,000.00 worth of alterations to the premises after it obtained

the writ of possession, even though the evidence shows that it could have rented the property to a tenant on the same terms as the original lease. Moreover, when the appellant finished remodeling, the premises could no longer be used for the purpose for which they were leased to appellees. Although these facts were either admitted or not in dispute, the trial court's conclusions of law held that appellant's actions in obtaining possession of the leased property and the remodeling and reletting of that property did not amount to a surrender of the lease and acceptance of the leased property. Therefore, instead of holding that appellant's future liability had ended, the trial court held only that appellees were entitled to credit against future liability under the lease to the extent of payments made by the present or future tenants.

Under the authority of the cases cited above, we believe that appellant's conduct with respect to the property was so inconsistent with its claim to be acting for appellees that it amounted to an acceptance of surrender of the lease. Accordingly, we affirm the trial court's judgment holding appellees liable for the lease rentals due before May 5, 1987, but reverse as clearly erroneous that portion of the judgment holding appellees liable for any obligation on the lease after May 5, 1987.

Affirmed in part; reversed in part.

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

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
JULY 5, 1990

791 S.W.2d 721

Rose Law Firm, A Professional Association, by: *Richard T. Donovan*, for appellant.

No response.

MELVIN MAYFIELD, Judge. The appellant has filed a petition for rehearing in which it contends that our opinion did not address the effect of contractual provisions on our holding that appellant "impliedly" accepted surrender of the premises. We did not discuss this point directly because we thought our opinion made it clear that we found under the facts in this case when applied to the case of *Hays* v. *Goldman*, 71 Ark. 251, 72 S.W. 563 (1903), from which we quoted, that "appellant's conduct with respect to the property was so inconsistent with its claim to be acting for appellees that it amounted to an acceptance of surrender of the lease." 31 Ark. App. 109, 789 S.W.2d 1.

We did not think it necessary to cite authority that parties are as free to change their contracts (or leases) as they are to make them. Even if appellant had a written provision in its lease that it would not, or could not, accept the surrender of the lease, we still think it could do so unless the other party would not agree to that action.

In addition, the case cited in the petition for rehearing, *Knight* v. *OMI Corporation*, 568 P.2d 552 (Mont. 1977), as authority for the proposition asserted on rehearing, holds that a lease may give the landlord the *right* to reenter and resume possession of the leased premises and still hold the tenant liable for subsequently accruing rents for any deficiency resulting from reletting, but the language must be clear. In the cited case the language was held not to be clear because of conflicting provisions.

In the instant case, if we did not find appellant's conduct so inconsistent with its claim that it did not accept surrender of the property, we would have to hold the provisions of the lease in such conflict that the holding in the *Knight* case would cause us to reach the same result we reached in our original opinion.

Rehearing denied.

JENNINGS, J., would grant.

ROGERS, J., not participating.

Robert C. BALDRIDGE *v.* STATE of Arkansas

CA CR 89-265 789 S.W.2d 735

Court of Appeals of Arkansas
Division II
Opinion delivered May 16, 1990

Henry Morgan and *Janet Wheeler*, Public Defenders for Clark and Pike Counties, for appellant.

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

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Clark County Circuit Court. Appellant, Robert C. Baldridge, appeals from a judgment and commitment order entered upon the state's petition to revoke, sentencing him to five years in the Arkansas Department of Correction. We reverse.

Appellant, age 17, was convicted on August 1, 1986, upon a plea of guilty to forgery in the second degree by uttering, drawing, or possessing two checks totaling $25.00. A five-year probated sentence was issued thereon on August 15, 1986, subject to certain terms and conditions. Additionally, appellant was required to pay court costs and restitution. A petition for revocation was filed September 15, 1988, alleging that appellant violated the terms of his probated sentence by failing to report to his probation officer as directed and to pay costs, restitution, and supervision fees as ordered. A hearing was set for October 3, 1988, on the petition to revoke. Pursuant to a bench warrant for appellant's arrest, he was returned to Arkansas on May 4, 1989. Appellant was arraigned and on June 5, 1989, a public defender was appointed to represent appellant. A pretrial hearing was held on June 15, 1989, at which time it was determined that the revocation hearing was set for the following day. Defense counsel objected upon the basis that the state had not complied with his motion for discovery. The hearing was continued until July 5, 1989, and the trial court found appellant in violation of the terms of his probation. Appellant's probated sentence was revoked and he was sentenced to five years in prison. Another hearing was held July 10, 1989, on appellant's motion for reconsideration and the relief sought by appellant was denied by the court. Appellant appeals from the order sentencing him to five years imprisonment.

Appellant raises the following five points for reversal: 1) The trial court erred in allowing his revocation hearing to be held beyond sixty days of his arrest; 2) the trial court erred in finding that he violated the terms of probation when the uncontroverted testimony was that he was financially unable to make his restitution payments and afford transportation to report in person; 3) the trial court erred in refusing to list the reasons for revocation in writing; 4) the trial court erred in allowing a computer printout into evidence showing alleged arrearages in fees and restitution; and 5) the trial court erred in failing to give

him credit for jail time served while waiting for the revocation hearing.

We find that appellant's second argument warrants reversal and because we find error on this point, we will not address appellant's remaining points.

Appellant contends that his inability to report in person to his probation officer and to pay costs, restitution, and fees imposed as a condition of his probated sentence was due to excusable circumstances. Arkansas Code Annotated Section 5-4-309 (1987) provides, in pertinent part, as follows:

> (d) If the court finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his suspension or probation, it may revoke the suspension or probation at any time prior to the expiration of the period of suspension or probation.

In a revocation proceeding, the state must prove its case by a preponderance of the evidence, *Cavin* v. *State*, 11 Ark. App. 294, 669 S.W.2d 508 (1984), and on appellate review, we do not reverse the trial court's decision unless it is clearly against the preponderance of the evidence. *Phillips* v. *State*, 25 Ark. App. 102, 752 S.W.2d 301 (1988). Once the state introduces evidence of non-payment in a revocation hearing, the defendant then bears the burden of going forward with some reasonable excuse for his failure to pay. *Reese* v. *State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988).

At the revocation hearing in the case at bar, the state offered evidence through Wesley Hathcoat, appellant's probation officer, that appellant was in arrears in paying his various fines and fees, and that he also failed to appear in person to his probation officer. Evidence was presented that in three years appellant paid $150.00 in restitution and $60.00 in fees although the terms of his probation required him to pay $87.25 in court costs, $298.53 in restitution, and $15.00 per month in supervisory fees. Mr. Hathcoat stated that he had no objection to appellant moving to Texas and that he was in contact with appellant after his move. He testified that appellant called him approximately four times regarding his inability to make payments; however, he could not recall exactly how many times because he did not make written

notations of the calls.

Appellant, who was 20 years old at the time of the hearing, testified it was very difficult for him to obtain employment in Longview, Texas, where he resided with his mother and three younger siblings. He testified that his mother has cancer and is unable to work and he is the only provider for the family other than receipt of some government assistance. Appellant testified that he worked at any and all types of manual labor which he could find, and gave his mother every penny to help meet family expenses. He also stated that he did not have a car and had to hitchhike or walk to get to any work he could obtain. Appellant acknowledged that he owed the money; however, stated that his circumstances were such that he was unable to pay the money as scheduled. Appellant stated that he told his probation officer from the start that it would be difficult for him to make the required payments. He further testified that he contacted his probation officer by telephone and by letter on several occasions to explain his inability to make the payments and later received a letter telling him not to contact his probation officer at home but to appear in person instead. Appellant testified that he was unable to appear in person as he had no transportation nor could he afford a bus fare to Arkansas.

At the revocation hearing, appellant testified that he was needed by his family and wanted to work for the county doing any necessary labor to pay off his debt instead of going to prison. He presented the testimony of Cecil Catlett, a retired friend of the family, who told the court that appellant could live with him if allowed to work off his fine. The court revoked appellant's probation and refused to allow him to work off his fine in lieu of going to prison. In the record, the court stated as follows:

> He [appellant] offers to drive a garbage truck or what have you for the county to pay off all this makes me wonder whether he's suggesting that we fire some of the help the county has now and hire him in their place, if he's going to benefit the county any.

Appellant contends that *Drain* v. *State*, 10 Ark. App. 338, 664 S.W.2d 484 (1984) and the United States Supreme Court case of *Bearden* v. *Georgia*, 102 S.Ct. 3482 (1983) upon which

Drain relied, support his argument that his failure to pay as scheduled was not willful but due to his inability to pay.

Here, the court concluded upon the above facts that appellant inexcusably failed to comply with the terms of his probation. We cannot conclude that this decision is supported by the evidence. Evidence was presented that appellant was a child burdened with adult responsibilities of being the primary provider for his ill mother and younger siblings. Appellant did make some payments; however, he admittedly was in arrears. Both appellant and his probation officer related that appellant made numerous attempts to explain his inability to pay his fees as ordered. Additionally, the record reveals that appellant worked performing any available job in an attempt to meet the bare necessities of life for himself and his family. He had no transportation or money with which to afford transportation from Texas to Arkansas to appear in person to his probation officer. Based on the foregoing, the trial court's decision that appellant inexcusably failed to comply with probation conditions is clearly against a preponderance of the evidence.

Reversed.

COOPER and JENNINGS, JJ., agree.

Carroll Ray PETTY *v.* STATE of Arkansas

CA CR 89-325 788 S.W.2d 744

Court of Appeals of Arkansas
Division II
Opinion delivered May 16, 1990

William R. Simpson, Jr., Public Defender, by: *Jerry J. Sallings*, Deputy Public Defender, for appellant.

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

DONALD L. CORBIN, Chief Judge. This appeal comes to us from Pulaski County Circuit Court. Appellant, Carroll Ray Petty, pled guilty to two counts of forgery in the second degree and was placed on probation December 1, 1988, for five years with supervision for two years. His probation was conditioned upon compliance with written conditions of probation. In March of 1989, the state filed a petition for revocation of appellant's

probation alleging numerous violations of probation conditions. On August 25, 1989, appellant filed a motion to dismiss based on Arkansas Code Annotated Section 5-4-310(b)(2) (1987) which requires revocation hearings to be held "within a reasonable period of time, not to exceed 60 days, after the defendant's arrest." At the hearing on August 28, 1989, the court denied appellant's motion to dismiss, found that appellant violated the conditions of probation imposed in 1988, and sentenced him to the remaining four years of probation and ordered payment of fines, fees, and restitution. We affirm.

Pursuant to *Anders* v. *California*, 386 U.S. 738 (1967), appellant's counsel has filed a motion to be relieved as counsel and a brief concluding that there is no merit to this appeal. Appellant was notified of his right to file a *pro se* brief in accordance with Rule 11(h) of the Rules of the Supreme Court and Court of Appeals and he has not done so within the thirty days permitted. The state concurs that this appeal has no merit. We agree.

The issues which might arguably support an appeal include the sufficiency of the evidence to revoke appellant's probation and the court's denial of appellant's motion to dismiss. Pursuant to *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), we first address the sufficiency of the evidence to revoke appellant's probation. At the hearing, testimony was presented by appellant's probation officer that appellant did not report to him for a five month period even though the terms of his probated sentence required him to do so on a monthly basis. The officer also testified that appellant did not make one payment as ordered toward restitution, fees, and costs. Appellant acknowledged that he owed the money but testified that he was unable to pay because he could not find a job. He also testified that he did not report to his probation officer because he was "embarrassed."

In a hearing on a petition to revoke probation, the burden is upon the state to prove the violation of a condition of the probated sentence, and, on appellate review, the trial court's findings are upheld unless they are clearly against a preponderance of the evidence. *Carson* v. *State*, 21 Ark. 249, 731 S.W.2d 237 (1987). Here, the state offered evidence of noncompliance which appellant did not dispute. Therefore, we cannot say that the court's finding that appellant inexcusably violated the terms

of his probation is clearly against the preponderance.

The next issue which might arguably support an appeal is the court's denial of appellant's motion to dismiss. Appellant argued that the court erred since his revocation hearing was conducted on the 61st day after his arrest in violation of Arkansas Code Annotated Section 5-4-310 which requires the hearing within 60 days. The record indicates that appellant was arrested on June 29, 1989, and the hearing conducted August 28, 1989. In computing the time period as 61 days, appellant obviously counted the day of his arrest. The specific wording of Arkansas Code Annotated Section 5-4-310(b)(2) states that the hearing must be held within 60 days "after" the defendant's arrest. Therefore, for purposes of computation, counting would begin on the day following appellant's arrest, June 30, 1989, followed by 31 days in July, and 28 days in August for a total of 60 days. We cannot conclude that the court erred in overruling appellant's motion since the hearing was conducted in compliance with Arkansas Code Annotated Section 5-4-310.

We agree that no reversible error was committed in these proceedings.

Affirmed.

COOPER and JENNINGS, JJ., agree.

Robbie FOX *v.* Florella FOX

CA 89-417 788 S.W.2d 743

Court of Appeals of Arkansas
Division II
Opinion delivered May 16, 1990

Pat Hall, for appellant.

Spencer, Spencer, Depper & Guthrie, by: *David F. Guthrie*, for appellee.

JAMES R. COOPER, Judge. The parties in this child custody case were divorced by a decree dated May 10, 1989. Custody of the parties' children was granted to the appellee. From that decision, comes this appeal.

For reversal, the appellant contends that the chancellor erred in granting custody to the mother on the basis of her sex. We agree, and we reverse and remand.

The record shows that the chancellor conducted a hearing on child custody in which the parties presented evidence that would support a finding that either parent would be fit to exercise custody over their two girls, age four and ten. At the conclusion of the hearing, the chancellor made the following findings from the bench:

> . . . I would not really worry and be troubled if these two

> girls were in the custody of either one of you. You've satisfied me that they would be well cared for by either one of you and I think both of you know that. I'm not saying that your relationship with Mr. Allen doesn't have any relevance here because it does. Moral attitudes and so forth do have some relevance and should be considered in trying to decide when the decision has to be made of where custody is, of which parent should have custody and I have taken that into account. But also involved, in my opinion, and people may differ on this — in my opinion, girls of the age of four and ten, maybe more with four than ten, have and should have a relationship with their mother that you can't give them, and that I don't think any father can give them. *That's extremely important and to me that has to be overcome to reach the conclusion that custody should not be with the mother.* I haven't been able to get past that here today.

[Emphasis supplied].

It is clear from the chancellor's remarks that his general view that young girls should be raised by their mothers was given the force of a presumption in deciding the custody issue. This was contrary to Ark. Code Ann. § 9-13-101 (1987), which provides that:

> In an action for divorce, the award of custody of the children of the marriage shall be made without regard to the sex of the parent but solely in accordance with the welfare and best interests of the children.

This statute abolished any gender-based presumption or legal preference with respect to child custody actions. *Drewry* v. *Drewry*, 3 Ark. App. 97, 622 S.W.2d 206 (1981). Under its terms, the chancellor must abandon generalizations and decide questions of custody on an individualized basis: the question is not whether young girls should, in general, be placed in the custody of their mothers, but rather whether the welfare and best interests of these particular children would be best served by granting custody to this particular mother or father. Because of the unparalleled importance of the chancellor's observations in child custody cases, we remand for the chancellor to make this determination. *See Watts* v. *Watts*, 17 Ark. App. 253, 707

S.W.2d 777 (1986).

Reversed and remanded.

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

Goldie ZUERCHER, Deceased *v.* EMERSON ELECTRIC COMPANY

CA 89-454 789 S.W.2d 467

Court of Appeals of Arkansas
Division II
Opinion delivered May 23, 1990
[Rehearing denied June 27, 1990.]

Jay N. Tolley, for appellant.

Croxton & Boyer, by: *Ronald L. Boyer*, for appellee.

DONALD L. CORBIN, Chief Judge. This appeal comes to us from the Arkansas Workers' Compensation Commission. Appellant, Goldie Zuercher, now deceased, appeals from an August 31, 1989, decision of the full Commission which held that appellee, Emerson Electric Co., is not liable for weekly benefits subsequent to appellant's February 17, 1988, death. We affirm.

Appellant was employed by appellee on February 11, 1987, the day she sustained a crush amputation to the right index finger at the level of the distal joint. James S. Beckman, Jr., a plastic reconstructive surgeon, saw appellant in the emergency room the

day of the accident and later performed a cross-finger flap procedure. Dr. Beckman, in a report dated May 12, 1987, stated that he released appellant to return to work on May 10, 1987, and that he expected that she would have a 5% permanent partial impairment to the hand below the elbow. In June of 1987 appellee made a prepayment of weekly indemnity benefits attributable to permanent partial disability in the amount of a 5% impairment to the hand. In a report dated November 16, 1987, Dr. Beckman made a final disability impairment rating of 58% to the right hand.

Appellant died February 17, 1988, of causes unrelated to the compensable injury. Appellee paid no more benefits after appellant's death.

The case was tried before an administrative law judge on a stipulated record and in an opinion dated March 13, 1989, appellant was found to be entitled to weekly benefits from November 17, 1987, until only February 17, 1988. The administrative law judge also held that appellee was entitled to credit against the amount paid in June 1987 as prepayments and, as that amount exceeded its liability, no additional benefits would be payable.

The full Commission in an opinion dated August 31, 1989, affirmed and adopted the opinion of the administrative law judge. From that decision comes this appeal.

Appellant for reversal argues that the full Commission erred as a matter of law in its finding that appellant was not entitled to benefits after her death.

Appellant in support of this argument asserts that she incurred a 58% impairment entitling her to 87 weeks of benefits or $13,398.00, and that appellee paid only $3,062.50. Appellant contends that the difference must be paid under Arkansas Code Annotated Section 11-9-704(e) (1987) because that is the amount of benefits owed her "preceding her death."

Appellant claims that as long as the permanent character of the injury is certain, the claimant is entitled to receive all of the benefits even though these benefits are not immediately payable. However, she cites no authority for this proposition. Instead, she claims that in the Arkansas Workers' Compensation Act there is

neither a provision which would allow for the survival of a claim such as hers nor is there a provision prohibiting its survival. We disagree.

The portion of Arkansas Code Annotated Section 11-9-704 relevant to this appeal provides:

> (e) AWARD AFTER DEATH. No compensation for disability of an injured employee shall be payable for any period beyond his death. However, an award of compensation for disability may be made after the death of the injured employee for the period of disability preceding death.

Appellant here is asking for compensation for disability for a period beyond her death. She received compensation for the period preceding her death. The language of the statute clearly prohibits the payment of compensation which appellant seeks.

The Arkansas Supreme Court in *McCaa Chevrolet Co.* v. *Bounds*, 207 Ark. 1043, 183 S.W.2d 932 (1944), addressed the same question of whether the installments of monthly disability payments, due to an injured employee under the provision of the Arkansas Workers' Compensation Law, which matured after the death of the employee, became part of the assets of the employee's estate. The court, noting that it had not been theretofore called upon to decide that exact question, reviewed the decisions of other courts of last resort and analyzed the text of the Arkansas Workers' Compensation Law. The supreme court concluded that the liability to an employee from his employer for compensation for disability, as created by this law, does not survive to the employee's estate after his death.

We find the aforementioned statute and *McCaa* dispositive of the issue raised on appeal. We, therefore, find no merit to appellant's argument and affirm.

Affirmed.

COOPER and JENNINGS, JJ., agree.

Harold Stephen ROREX *v.* STATE of Arkansas

CA CR 89-130 790 S.W.2d 180

Court of Appeals of Arkansas
Division II
Opinion delivered May 23, 1990

John Wesley Hall, Jr., P.C., for appellant.

Steve Clark, Att'y Gen., by: *Sandra Bailey Moll*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Appellant, Harold Rorex, was found guilty by a jury of raping his two stepchildren and was sentenced by the court to thirty years imprisonment. Mr. Rorex contends on appeal that the trial court erred in refusing to permit him to exercise a peremptory challenge after the jury had been selected and in refusing to permit him to cross-examine the children about alleged prior sexual contact. We find no error and affirm.

Voir dire was completed on the Monday before the Wednesday of trial. The jury was "drawn and struck," questions were asked of the panel by both the court and counsel, and only a few jurors were questioned individually. The names of potential witnesses were read and the members of the panel were asked if they were related to any witness.

On the morning of trial, the prosecutor and the defense attorney met with the court in chambers, at which time defense counsel asked that the court permit him to exercise an unused peremptory challenge to excuse a juror already selected, Audie Hall. Two alternate jurors had been selected. Counsel advised the court that the juror "had not revealed" that "she actually knows and works with one of the defendant's witnesses." He told the court that Audie Hall worked with the appellant's wife, Cindy Rorex, at a large factory and that she "sees her every day." During the course of his statement to the court he said that he

"would be perfectly willing to call Cindy Rorex in here to testify about the proximity that she works to Mrs. Hall." The state argued against excusing the juror and the court declined to do so.

Appellant first argues that if, after the jury has been selected, counsel for one side seeks to exercise a remaining peremptory challenge, it is error for the trial court to refuse to permit the challenge absent a showing by the other side that "the alternate juror would be prejudiced." For this proposition appellant quotes the following language from *Nail* v. *State*, 231 Ark. 70, 328 S.W.2d 836 (1959):

> [A] litigant is not entitled to a particular juror. This being true, there is no valid reason to refuse the request to excuse one who has already been taken, even though a defendant's challenges have been exhausted, *unless it first be shown that the defendant will be prejudiced by the service of the venireman accepted in lieu of the juror excused.*

(Emphasis in original.)

Unquestionably the rule is that whether or not a peremptory challenge may be exercised after the juror has been accepted by both sides is a matter directed to the sound discretion of the trial court. *Daugherty* v. *State*, 3 Ark. App. 112, 623 S.W.2d 209 (1981). We reverse only for abuse of that discretion. Our standard of review is the same regardless of whether the court permits the challenge as in *Nail* or declines to permit it as in *Daugherty* and in *Jefferies* v. *State*, 255 Ark. 501, 501 S.W.2d 600 (1973). The language taken from *Nail* and relied upon by the appellant, when read in context, stands only for the proposition that where the trial court has permitted the belated exercise of a peremptory challenge, an appellant must demonstrate prejudice to obtain a reversal. *See also Watson* v. *State*, 291 Ark. 358, 724 S.W.2d 478 (1987).

The question then is whether the trial court has abused its discretion. Appellant argues the court abused its discretion in refusing to permit him to put on proof that the juror was "not impartial." The record reflects, however, that counsel never directly asked the court for permission to call Cindy Rorex as a witness in chambers, nor did the trial judge tell counsel he would not permit it. Counsel did not ask that the juror be re-examined.

Finally, during voir dire none of the jurors were asked if they knew or worked with any of the witnesses and, indeed, no questions at all were addressed to this juror individually. Under the circumstances presented we find no abuse of the discretion entrusted to the trial court. *See Nail*, 231 Ark. at 81.

Also on the morning of trial and in chambers defense counsel asked that he be permitted to cross-examine the victims and to question other unnamed witnesses about possible prior acts of sexual conduct on the part of the children. The trial judge refused to permit it.

The ruling was undoubtedly correct. The rape shield statute, now Ark. Code Ann. § 16-42-101 (1987), was intended to shield victims of rape or sexual abuse from the humiliation of having their personal conduct, unrelated to the charges, paraded before the jury and the public when such conduct is irrelevant to the defendant's guilt. *Flurry* v. *State*, 290 Ark. 417, 720 S.W.2d 699 (1986). Ark. Code Ann. § 16-42-101(b) provides that evidence of specific instances of the victim's prior sexual conduct is not admissible. Subsection (c) establishes a procedure for the court to permit an exception to the rule. In *Jackson* v. *State*, 284 Ark. 178, 679 S.W.2d 210 (1985), the court said:

> The evidence is admissible if its relevancy is proved through the procedure set out in the statutes. Under the rules provided, a written motion must be filed by the defendant stating the relevant evidence being offered and the purpose for which the evidence is believed relevant. A hearing is held *in camera*. The court then determines if the offered proof is relevant to the fact in issue, and if its probative value outweighs its inflammatory or prejudicial nature. The defendant or his attorney is subject to sanctions for failure to file such a motion if a willful attempt is made to make any reference to the victim's prior sexual conduct in the presence of the jury.
>
> Here, the record reflects that no such motion was filed. Not only was the proper procedure not followed, there was no proffer of the type of evidence the appellant was trying to present. The failure to proffer evidence so this court can determine if prejudice results from its exclusion precludes

> review of the evidence on appeal.

Jackson 284 Ark. at 483-84 (citations omitted). Similarly, in the case at bar there was no attempt to comply with the procedures set out in the statute and no proffer. We agree with the statement of the court in *Allen* v. *State*, 700 S.W.2d 924 (Tex. Crim. App. 1985):

> If a defendant claims a victim's past sexual conduct is relevant, it is up to the defendant to make a preliminary showing that the issue is material to an issue in the case. This is not raised by merely asserting that it is so. There must be a showing of a reasonable basis for believing that the past sexual conduct is pertinent. If there is no such showing, questions concerning past sexual conduct are to be excluded.

Under the circumstances presented, the trial court was right in ruling as he did.

Affirmed.

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

William Ray SOSSAMON *v.* STATE of Arkansas

CA CR 89-98 789 S.W.2d 738

Court of Appeals of Arkansas
Division I
Opinion delivered May 30, 1990

[redacted]

[redacted]

Condit, Peek & Young, by: *Bruce A. Condit*, for appellant.

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

MELVIN MAYFIELD, Judge. This is an appeal by William Ray Sossamon who was convicted of possession of marijuana and sentenced to six years in the Arkansas Department of Correction.

On March 20, 1987, at approximately 8:30 p.m., Deputy Sheriff Allen Jordan obtained a warrant to search all the "buildings, structures, or vehicles" situated on certain described property. The affidavit for warrant was based on previously conducted surveillance and a tip from a confidential informant who told Jordan that the informant had seen marijuana and "crystal" at appellant's residence on the property "within the past four hours." There is evidence that the warrant was executed immediately; that the appellant was not at home but his girl

friend was there; and that she told the officers that appellant had taken her car and gone to Oklahoma to pick up a supply of marijuana. In the search, officers found scales, marijuana seeds, marijuana pipes and other drug paraphernalia, but no crystal. They waited at the house for the appellant to return and when he did, they searched the car he was driving. In the back seat, covered with a blanket, they found a bag containing marijuana. Appellant filed a motion to suppress this evidence, but the motion was denied. Several arguments are advanced urging that the court erred. We will discuss each argument presented.

Appellant first complains that at the suppression hearing the prosecution was allowed to introduce copies of the search warrant and affidavit because the originals had disappeared. Appellant says this violated the "best evidence" rule and the copies should not have been admitted because it was not shown what had happened to the originals and because there was a question as to the authenticity of the copies. He contends the affidavit for the search warrant appears to have been signed on March 22 but the warrant was issued and served on March 20.

Ark. R. Evid. 1002 provides:

> Requirement of original. — To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

Ark. R. Evid. 1003 provides:

> Admissibility of duplicates. — A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity or continuing effectiveness of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

We cannot agree with appellant that there was a genuine question about the authenticity of the copies of the affidavit and warrant. An examination of the copy of the warrant in the record clearly shows that it was signed by the circuit judge on March 20, 1987. Deputy Sheriff Jordan testified that he obtained the warrant on March 20, 1987, and made the search the same day. The date of the affidavit is not as clear as the date of the warrant; however, it is

either March 20 or March 22. The trial judge found that the affidavit was dated March 20, and the return on the warrant shows it was executed on March 20, 1987. We do not think the trial court erred in admitting into evidence the copy of the affidavit and the copy of the warrant.

Appellant also complains that the affidavit for the search warrant was deficient in several respects. He contends that the affidavit did not contain a sufficient description of the premises to be searched because, although it gave precise directions as to how his rural home was to be reached, it failed to adequately describe the house. The affidavit contained the following language:

> the said premises being located at Rt. 1 Box 342A7 further described from the city limits of Texarkana Arkansas travel Hwy. 71 South to Hwy. 237 (Blackmon Ferry Rd.) turn right on Hwy. 237 and travel 5 miles. Turn right on black top road (Pleasant Hill Rd.) and travel 1 mile. Turn left on dirt road which is East and adjacent to Smileys Barbecue and travel .2 miles to a brown house on the right side of the road. The house will have a brown roof and small porch in front of the house . . . .

In *Nichols* v. *State*, 273 Ark. 466, 469, 620 S.W.2d 942 (1981), the Arkansas Supreme Court answered the argument that the search warrant was invalid "for failure to describe with sufficient particularity the place to be searched," by saying:

> The affidavit gave detailed directions for leaving the courthouse and traveling specified roads to reach the field where the marijuana was being grown.

See also Watson v. *State*, 291 Ark. 358, 367, 724 S.W.2d 478 (1987). We think the description in the instant case was sufficient.

Next, appellant argues that the affidavit for the warrant failed to substantiate the credibility of the confidential informant. The affidavit stated:

> This Deputy has received information that marijuana and other controlled substances are being sold at this residence. Informant states that he has seen marijuana and crystal at

> this residence within the past four hours. This informant has furnished information in the past that has led to the arrest and conviction of two subjects for possession of marijuana. Deputies of the Miller County Sheriff's Dept. has conducted surveillance of this residence on several occasions and has observed known drug users frequent residence for a short time and leave.

Ark. R. Crim. P. Rule 13.1(b), in effect at the time this warrant was obtained, provided in pertinent part:

> If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained.

In *Watson* v. *State*, 291 Ark. 358, 724 S.W.2d 478 (1987), the Arkansas Supreme Court stated:

> In *Illinois* v. *Gates*, 462 U.S. 213 (1983), the two-pronged test of *Aguilar* and *Spinelli* [*Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 394 U.S. 410 (1969)] was replaced by a different test—"a practical, common sense decision," based on all the circumstances, including the veracity and basis for knowledge of persons supplying information. It is sufficient if "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Under *Gates* it is the duty of the reviewing court simply to insure that the magistrate issuing the warrant had a substantial basis for concluding that probable cause existed.

291 Ark. at 363. Parenthetically, we note that, in response to *Illinois* v. *Gates*, Ark. R. Crim. P. Rule 13.1(b) was amended by a Per Curiam of the Arkansas Supreme Court dated February 5, 1990, to add the following language:

> An affidavit or testimony is sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place. Failure of the affidavit or testimony to establish the veracity and bases of knowledge of persons providing

> information to the affiant shall not require that the application be denied, if the affidavit or testimony viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

See 301 Ark. 635, 783 S.W.2d 840. We find the affidavit in the instant case sufficient to show the existence of probable cause.

Next, appellant argues that the affidavit does not justify the need for a nighttime search. The affidavit stated that, "If this warrant is not served at night there is a danger drugs will be sold or moved." Ark. R. Crim. P. Rule 13.2(c) provides, in pertinent part:

> Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., ... Upon a finding by the issuing judicial officer of reasonable cause to believe that:
>
> (i) . . .
>
> (ii) the objects to be seized are in danger of imminent removal;
>
> (iii) . . .
>
> the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or night, ...

The affidavit supporting the warrant in this case stated that sheriff's deputies had observed known drug users enter this house, stay a short time and leave; the confidential informant had observed contraband in the house a short time before the warrant was issued; and the deputy executing the affidavit believed there was a danger the drugs would be sold or moved. This information provided a sufficient basis for the nighttime search. *See Holloway* v. *State*, 293 Ark. 438, 738 S.W.2d 796 (1987), supplemental opinion on denial of rehearing, 293 Ark. at 450; *Boyd* v. *State*, 13 Ark. App. 132, 680 S.W.2d 911 (1984), and *Lewis* v. *State*, 7 Ark. App. 38, 644 S.W.2d 303 (1982).

Next, appellant argues that the judicial officer who

issued the warrant failed to keep a written summary of the proceedings and testimony taken before him. As the affidavit was not lost, but accompanied the warrant, no harm resulted. *Watson* v. *State, supra*, 291 Ark. at 366.

Appellant also complains that the return was not signed until after the suppression hearing. There is no dispute that the warrant was immediately executed and the return filed. The failure of the return to be signed immediately is merely an insignificant technicality, not a fatal defect. Ark. R. Crim. P. Rule 16.2(e) provides that a motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based is substantial, or if otherwise required by the Constitution of the United States or of this state. These constitutions prohibit unreasonable searches and seizures and, under both of them, affidavits for search warrants should be tested and interpreted in a commonsense and realistic manner. *Baxter* v. *State*, 262 Ark. 303, 556 S.W.2d 428 (1977); *Lewis* v. *State, supra*. Technical challenges to a search warrant are not favored lest police officers are discouraged from obtaining warrants. *Watson* v. *State, supra*, 291 Ark. at 367. Moreover, as the actions of the officers pursuant to this warrant were made in good faith, the validity of the warrant should be upheld. *United States* v. *Leon*, 468 U.S. 897 (1984). We find the trial court's ruling on the motion to suppress should be sustained.

Appellant also challenges the trial court's action in overruling his objection to the verdict form which enhanced his punishment for simple possession, second offense, to the punishment for a Class D felony. Appellant was charged by information with possession of a controlled substance with intent to deliver, a Class C felony punishable by four to ten years imprisonment and/or up to a $25,000.00 fine. Appellant requested and received an instruction on the lesser included offense of simple possession, a Class A misdemeanor.

He contends, however, that the court erred in submitting, over his objection, a verdict form that enhanced the punishment range on the misdemeanor from one year in the county jail and a $1,000.00 fine to that of a Class D felony, punishable by not more than six years in prison and a $10,000.00 fine. He argues this was error for four reasons: (1) no motion was made to amend as

required by Ark. Code Ann. § 16-85-407 (1987) and he was convicted and sentenced for a crime and under a penalty range for which he was never charged; (2) allowing the enhanced penalty to be submitted to the jury without amendment of the information and without notice to him was prejudicial; (3) allowing the enhancement from a misdemeanor to a Class D felony changed the nature and degree of the offense; and (4) because his previous conviction, which he admitted on the witness stand, was in Oklahoma, he has not previously been convicted "under the Arkansas Statute" and thus his conviction was not subject to enhancement. In support of this last proposition, appellant points to *McIlwain* v. *State*, 226 Ark. 818, 294 S.W.2d 350 (1956), in which it was held that one not previously convicted in Arkansas under its uniform narcotic drug act is not guilty of a felony as a second and subsequent offender even though he has been previously convicted on narcotic charges in other states.

We find no merit to appellant's contention that the information was not amended. During the appellant's testimony, he admitted, in response to questions asked by his own attorney, that he had been convicted in Oklahoma for possession of marijuana. The judge instructed the jury on possession with intent to deliver, which was the charge set out in the information, and on the lesser included offense of possession, second offense. However, the punishment the judge told the jury they could assess is found in Ark. Code Ann. § 5-64-401(c) (1987) which provides in pertinent part:

> Any person convicted of a first offense for the violation of this subsection is guilty of a Class A misdemeanor. Provided any person who is convicted of a second offense for a violation of this subsection is guilty of a Class D felony.

Stripping the appellant's argument down to the point of merit, we are presented with the contention that the court erroneously instructed the jury on the punishment permissible if they found him guilty of possession of marijuana, second offense.

The penalty for a Class D felony is found in Ark. Code Ann. § 5-4-401(5) (1987) and authorizes a sentence not to exceed six (6) years. However, Ark. Code Ann. § 5-64-401(c), quoted

above, provides that the first offense must be for "a violation of this subsection." Since appellant's first offense was under the law of Oklahoma, he is correct in his argument that under the analogous situation in *McIlwain* v. *State, supra*, a conviction in some other state does not violate "this subsection." In other words, as the court said in *McIlwain*, "the appellant has not previously been convicted under the Arkansas statute and is therefore a first offender under the language quoted above."

The appellee, however, relies upon Ark. Code Ann. § 5-64-408(b) (1987) which provides that an offense is considered a second or subsequent offense if the offender has been convicted under any statute of the *United States or of any state*, relating to drug possession. But the problem is that subsection (c) of that section also provides that it "does not apply to offenses under § 5-64-401(c)." Both § 5-64-401(c) and § 5-64-408(b) came from Act 590 of 1971, and Section 8 of Article IV of that act (now Ark. Code Ann. § 5-64-408) stated that it did not apply to Section 1(c) of Article IV (now Ark. Code Ann. § 5-64-401(c)). Thus, we cannot agree with appellee's contention that § 5-64-408(b) allows the appellant's Oklahoma conviction to be counted as a conviction for enhancement purposes in this case.

First offense possession of marijuana in Arkansas is a Class A misdemeanor, *see* Ark. Code Ann. § 5-64-401(c) (1987), and the penalty for a Class A misdemeanor is not to exceed one (1) year, Ark. Code Ann. § 5-4-401(b)(1) (1987). Therefore, we reduce appellant's sentence for the Class A misdemeanor to imprisonment for one year to be served, as provided in Ark. Code Ann. § 5-4-402(2) (1987) for defendants convicted of a misdemeanor, in the county jail or other authorized institution designated by the trial court.

Affirmed as modified and remanded.

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

Michael L. PATTON *v.* BROWN AND ROOT, INC. and Highlands Insurance Company

CA 89-493 789 S.W.2d 745

Court of Appeals of Arkansas
Division II
Opinion delivered June 6, 1990

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

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

JAMES R. COOPER, Judge. The parties in this workers' compensation case stipulated that the appellant received a compensable injury while working for the appellee Brown and Root Construction Company in Louisiana, and that, if the Arkansas Workers' Compensation Commission had jurisdiction, the appellant was entitled to stipulated permanent partial disability benefits. The parties also stipulated that, for jurisdictional purposes, the only contact with Arkansas was that the appellant was a permanent resident of Arkansas. The only issue before the Commission was whether his Arkansas residency was a sufficient basis for the Commission to exercise its jurisdiction. The Commission held that it was not. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in concluding that the employee's Arkansas residency alone was not a sufficient basis to invoke the Commission's jurisdiction.

We affirm.

The appellant is a welder who performs work for several construction companies in any of several different states. He is a resident of Arkansas, and was injured while working for the appellee Brown and Root in Louisiana.

Normally, the question of whether the Workers' Compensation Commission has jurisdiction of a claim is a mixed question of law and fact insofar as the Commission's factual findings regarding jurisdiction are subject to the substantial evidence standard of review. *International Paper Co.* v. *Tidwell*, 250 Ark. 623, 466 S.W.2d 488 (1971). Here, however, the parties stipulated that the only contact with Arkansas is the appellant's residency, and the question before us is therefore one of law. *See id.*

There must be a statutory basis for entertaining a claim before the Workers' Compensation Commission can exercise jurisdiction. *Tidwell, supra.* The Arkansas Workers' Compensation Act does not specify what extrastate situations it covers. *Id*; R. Leflar, *American Conflicts Law*, § 161 (3d ed. 1977). However, an employer's liability under the Act is based upon disability or death from an injury arising out of and in the course of employment, Ark. Code Ann. § 11-9-401 (1987), and "employment" is defined as every employment (subject to specified exceptions) *carried on in the state.* Ark. Code Ann. § 11-9-102 (1987).

Therefore, the application of the Arkansas Workers' Compensation Act is limited by its terms to harms arising out of employments carried on in Arkansas. This statutory provision must be applied liberally in favor of a claimant in light of the humane purposes of the act. The *Tidwell* court so applied the act when it held that the Arkansas Workers' Compensation Commission had jurisdiction where an employment contract is entered into in Arkansas between an Arkansas resident and an employer who is localized as a resident or who maintains an office which exercises general superintendence and control over the employment which is not carried on at a fixed location, even though the injury occurred in a state in which the parties contemplated that the employment would be entirely performed. *Tidwell*, 250 Ark. at 633. Similarly, the Supreme Court liberally construed the act in *Missouri City Stone, Inc.* v. *Peters*, 257 Ark. 917, 521 S.W.2d

58 (1975). The *Peters* court found that the Commission had jurisdiction where the employee, an Arkansas resident, was hired by a telephone call placed to him at his Arkansas residence; where the employer maintained an office in Arkansas and paid the employee by checks drawn on an Arkansas bank; and where the injury occurred on the job site in Oklahoma. Finally, in *Midwest Dredging Co.* v. *Etzberger*, 270 Ark. 936, 606 S.W.2d 619 (Ark. App. 1980), we found substantial evidence to support the Commission's finding that the contract of hire was concluded in Arkansas, and held that this was sufficient to confer jurisdiction on the Commission.

By liberally applying the provisions of the Workers' Compensation Act, the *Tidwell, Peters*, and *Etzberger* courts concluded that the Commission was authorized to exercise jurisdiction under the circumstances of those cases. We are unable to do so in the case at bar. As we have noted, the act limits coverage to injuries arising out of employments carried on in the state, Ark. Code Ann. §§ 11-9-102 and 11-9-401 (1987), and the cases cited above all contain circumstances which, viewed in the light of liberal construction, connect the employment, and not merely the employee, to Arkansas. As noted, by stipulation of the parties, the only circumstance in the case at bar bearing on jurisdiction is that the appellant is an Arkansas resident, and facts connecting the state with the employment *per se* are entirely lacking. Therefore, the statutory basis required for the Commission's jurisdiction is absent, *see Tidwell, supra*, and we hold that the Commission correctly decided that the appellant's Arkansas residency, standing alone, is not a sufficient basis to invoke its jurisdiction.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

Kelley RIDER *v.* JULIAN MARTIN, INC. and Fireman's Fund Insurance Co.

CA 89-366 789 S.W.2d 743

Court of Appeals of Arkansas
Division II
Opinion delivered June 6, 1990
[Rehearing denied July 5, 1990.]

James A. McLarty, for appellant.

Barber, McCaskill, Amsler, Jones & Hale, P.A., by: *Michael L. Alexander* and *Tim A. Cheatham*, for appellee.

JAMES R. COOPER, Judge. In this workers' compensation case, the appellant, Kelley Rider, injured his back on June 22, 1985, while unloading a truck. He contacted his employer, the appellee Julian Martin, Inc., and told it of his injury. He missed three days of work, returned the truck to Arkansas, and missed the following week of work. Prior to returning to Arkansas, the appellant was treated by Dr. Frank Pochik of Detroit, Michigan, but because the doctor was a personal friend, he did not charge the appellant for his services. After the appellant called his employer and gave notice of the injury, the employer filed an A-8 form, Employer's First Report of Industrial Injury, on July 15, 1985. The appellant testified that he believed that in order to receive compensation he had to "meet" a $250.00 deductible and therefore he did not file a claim for workers' compensation until October 15, 1987. The appellees controverted the claim, asserting that the statute of limitations had run.

The administrative law judge found that the appellees were

estopped from raising the statute of limitations defense because the employer had not posted, in a conspicuous place, Form A-6, entitled Compensation Notice and Instructions to Employers and Employees. The Commission reversed the administrative law judge, finding that the facts did not warrant estopping the appellee from asserting the defense of the statute of limitations. On appeal, the appellant argues that the Commission erred in dismissing his claim because the appellees should be estopped from raising the defense of the statute of limitations. We reverse and remand.

Arkansas Code Annotated § 11-9-702(a) (1987) provides in pertinent part:

> A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the commission within two (2) years from the date of the injury.

While it is clear that the appellant did not file his claim within the statutory time period, we agree with the appellant's argument that the appellees should be estopped from asserting the statute of limitations.

According to Ark. Code Ann. § 11-9-407(a) (1987), the employer has a duty to "keep posted in a conspicuous place in and about his place of business typewritten or printed notices in accordance with a form prescribed by the commission." The form prescribed by the Commission is Form A-6. Thus the issue before us is whether there is substantial evidence to support the Commission's finding that the A-6 was appropriately displayed.

On appeal, we must review the evidence in the light most favorable to the Commission's decision and uphold that decision if it is supported by substantial evidence. Before we may reverse a decision by the Commission, we must be convinced that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission. *St. John* v. *Arkansas Lime Co.*, 8 Ark. App. 278, 651 S.W.2d 104 (1983).

In the case at bar, Tammi Cornett, the employee for Julian Martin responsible for workers' compensation claims, testified for the appellant. She stated that she began working for the

company in January 1986 and that she personally posted an A-6 in the employees' lounge. She also stated that an A-6 was not posted in the drivers' lounge but she later admitted that she was not sure whether an A-6 was posted there. According to Ms. Cornett, the employees' lounge is used mainly by the office employees and the drivers' lounge is used by the truck drivers. She added that the drivers rarely entered the employees' lounge. The appellant testified that he was a truck driver for the appellee, that he did not see an A-6 in the drivers' lounge "or anyplace else at JMI," and that he had never worked for an employer who carried workers' compensation prior to working for the appellee.

We think that the case of *McGehee Hatchery* v. *Gunter*, 237 Ark. 450, 373 S.W.2d 401 (1963), is analogous to the present case. Although the facts in *McGehee* are quite different, the Court pointed out that the posting of the notices was for the benefit of the employee and the purpose was to inform the employee that he was covered by workers' compensation. The Court in *McGehee* refused to allow the employer to benefit from its failure to post the required notices.

In the present case, the appellant testified that he never saw an A-6 form anywhere on the employer's premises. At that point, we think it was incumbent on the appellees to offer evidence to show that the required notice had been posted as required by Arkansas law. Although there was evidence that Ms. Cornett posted an A-6 form sometime after January 1986, the appellees put on no proof whatsoever to show that an A-6 form was posted prior to or at the time of the appellant's injury in 1985. In the absence of such evidence, we conclude that the Commission's decision is not supported by substantial evidence. We reverse and remand to the Commission to determine whether the appellant has established a causal connection between his injury and his employment, and to determine benefits if it finds such a causal connection.

Reversed and remanded.

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

Michael WEAVER *v.* TYSON FOODS and Second Injury Fund

CA 88-436 790 S.W.2d 442

Court of Appeals of Arkansas
En Banc
Opinion delivered June 6, 1990

McKenzie, McRae, & Vasser, for appellant.

Lavender, Rochelle, Barnette & Dickerson, for appellee Tyson Foods.

David L. Pake, for appellee Second Injury Trust Fund.

MELVIN MAYFIELD, Judge. The claimant, Michael Weaver, appeals a decision of the Workers' Compensation Commission in which it was determined that he had a fifty percent (50%) permanent partial disability as a result of (1) a work-related injury which occurred on September 29, 1986, and (2) a preexisting physical impairment resulting from childhood polio. The Commission based the 50% rating upon the finding of a 20% anatomical impairment and a 30% loss of earning capacity.

The Commission's opinion stated:

> Weaver's treating physician apportioned 15% of his present anatomical impairment to the pre-existing condition and 5% to the compensable injury. It is obvious that the two conditions when combined (20%) produce a disability greater than that which would have resulted from the last injury alone (5%). We therefore find that the Second Injury Fund is liable for the 30% wage loss portion of the award under Ark. Code Ann. § 11-9-525 (1987) and that the employer is responsible only for the 5% anatomical impairment sustained in the compensable injury. The

> Fund is entitled to a credit for the pre-existing 15% impairment.

It is from this portion of the Commission's decision that Weaver appeals, contending that the Commission "erred in holding that the Second Injury Fund was entitled to a fifteen percent (15%) credit for a preexisting, nonwork related impairment." The dispute on appeal is about the law—not the facts.

The Second Injury Fund statute in effect at the time of appellant's injury resulted from an amendment enacted by the General Assembly in Section 4 of Act 290 of 1981. It was codified as Ark. Stat. Ann. § 81-1313 (i) (Supp. 1985), and now as Ark. Code Ann. § 11-9-525 (1987). Quoting from Act 290, the portion of Section 4 pertinent to this case provides as follows:

> (i) (1) The Second Injury Fund established herein is a special fund designed to insure that an employer employing a handicapped worker will not, in the event such worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker was in his employment. The employee is to be fully protected in that the Second Injury Fund pays the worker the difference between the employer's liability and the balance of his disability or impairment which results from all disabilities or impairments combined. It is intended that latent conditions, which are not known to the employee or employer, not be considered previous disabilities or impairments which would give rise to a claim against the Second Injury Fund.
>
> Commencing January 1, 1981, all cases of permanent disability or impairment where there has been previous disability or impairment shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a permanent partial disability or impairment, whether from compensable injury or otherwise, receives a subsequent compensable injury resulting in additional permanent partial disability or impairment so that the degree or percentage of disability or impairment caused by the combined disabilities or impairments is

> greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of combined disabilities or impairments, the employer at the time of the last injury shall be liable only for the degree or percentage of disability or impairment which would have resulted from the last injury had there been no pre-existing disability or impairment. After the compensation liability of the employer for the last injury, considered alone, which shall be no greater than the actual anatomical impairment resulting from said last injury, has been determined by an administrative law judge or the Commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by the administrative law judge or the Commission and the degree or percentage of disability or impairment which existed prior to the last injury plus the disability or impairment resulting from the combined disability shall be determined and compensation for that balance, if any, shall be paid out of a special fund known as a Second Injury Fund provided for in Section 47 (Ark. Stats. 81-1348).

To understand the Second Injury Fund statute, it is necessary to keep in mind the definitions of certain terms. The statutory definitions are unchanged and now appear at Ark. Code Ann. § 11-9-102 (1987). Others have been judicially construed in cases from this court and the Arkansas Supreme Court. As it currently stands, both parties agree that the following definitions apply:

> 1. *Impairment*: A nonwork-related condition suffered prior to the recent compensable injury that need not involve a loss of earning capacity. *Mid-State Construction Co.* v. *Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).
>
> 2. *Disability*: Incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. Ark. Code Ann. § 11-9-102(5). Disability means loss of earning capacity due to a work-related injury. *Second Injury Fund* v. *Fraser-Owens, Inc.*, 17 Ark. App. 58, 702 S.W.2d 828

(1986). *Accord Mid-State Construction Co.* v. *Second Injury Fund, supra*, 295 Ark. at 5.

3. *Injury*: Only accidental injury arising out of and in the course of employment, including occupational diseases and occupational infections arising out of and in the course of employment. Ark. Code Ann. § 11-9-102(4).

4. *Anatomical Impairment*: The anatomical loss as reflected by the common useage of medical impairment ratings. *Second Injury Fund* v. *Fraser-Owens, Inc., supra.*

Appellant argues that the first paragraph of the Second Injury Fund statute quoted above provides that the injured worker will not be penalized because the Second Injury Fund is a party. He also quotes from *Mid-State Construction Co.* v. *Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988), where the court stated:

> The employee is to be fully protected in that the Second Injury Fund pays the worker the difference between the employer's liability and the balance of his disability or impairment which results from all disabilities or impairments combined.

295 Ark. at 4. The appellant then contends that if the employer had been held to be fully liable in the present case, he (the appellant) would have received a permanent partial disability award of 50%. He thinks the Second Injury Fund should be liable for 45% of the award and Tyson Foods should be liable for 5%. We think this argument overlooks the basic purpose of the statute. "The primary rule in construing a statute is to ascertain and give effect to the intent of the General Assembly and this intent is obtained by considering the entire act." *Henderson* v. *Russell*, 267 Ark. 140, 144, 589 S.W.2d 565 (1979).

The underlying purpose of the Second Injury Fund statute is to limit the employer's liability to the amount of disability or impairment suffered by the employee during his employment with that employer, *and to thereby encourage hiring of the handicapped. See Mid-State Construction Co.*, 295 Ark. at 3. When it is determined that through the *combination* of a preexisting condition *and a current compensable injury* the

claimant has sustained a disability *greater* than would have resulted from either of them alone, the statute provides that the claimant shall be fully compensated *for his current disability*. But the statute does not provide that the Second Injury Fund shall compensate the claimant for his preexisting condition. There are several obvious reasons for this. If the preexisting condition was the result of a compensable injury, the claimant has presumably already been fully compensated for it. But if the preexisting condition was from a nonwork-related injury, a congenital defect or disease process, it is not covered by the workers' compensation law and neither the employer nor the Second Injury Fund is liable. To hold otherwise would make workers' compensation general disability insurance. Also, since the Fund is funded by a premium tax on insurance carriers and self-insured employers, the increased benefit payments would increase the premiums to be paid and tend to discourage the hiring of handicapped workers whose general disability insurance benefits would be paid through the Second Injury Fund.

Therefore, the Commission was correct when it applied its expert understanding and held Tyson Foods liable for the claimant's 5% anatomical impairment from his recent injury and the Second Injury Fund liable for the 30% disability rating resulting from the combination of the physical impairment caused by the polio and the wage loss disability resulting from the recent compensable injury.

The first paragraph of the statute, emphasized by the appellant, provides for Second Injury Fund *liability*, but the second paragraph details the formula for calculating the *amounts* payable by the Fund. In *Mid-State Construction Co.* v. *Second Injury Fund, supra*, the Arkansas Supreme Court said:

> It is clear that liability of the Fund comes into question only after three hurdles have been overcome. First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to that injury the employee must have had a permanent partial *disability* or *impairment*. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status.

295 Ark. at 5.

After the three liability hurdles have been overcome, the second paragraph explains the payment calculation in detail, and if there is any conflict between the paragraphs, the specific provision would control. *Thomas* v. *Easley*, 277 Ark. 222, 640 S.W.2d 797 (1982); *Scott* v. *Greer*, 229 Ark. 1043, 320 S.W.2d 262 (1959). After stating that "if the employee is entitled to receive compensation on the basis of combined disabilities or impairments, the employer at the time of the last injury shall be liable only for the degree or percentage of disability or impairment which would have resulted from the last injury had there been no preexisting disability or impairment," the last sentence in the second paragraph states:

> (1). After the compensation liability of the employer for the last injury, considered alone, which shall be no greater than the actual anatomical impairment resulting from said last injury, has been determined by an adminstrative law judge or the Commission,
>
> (2) the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by the administrative law judge or the Commission, and
>
> (3) the degree or percentage of disability or impairment which existed prior to the last injury plus the disability or impairment resulting from the combined disability shall be determined
>
> (4) and compensation for that balance, if any, shall be paid out of a special fund known as a Second Injury Fund . . . .

Describing these four steps in terms of the calculation to be made, we apply them to the instant case.

A. Determine the anatomical impairment which resulted from the last injury. (The answer is 5%.)

B. Determine the disability attributable to all injuries or conditions existing at the time the last injury was sustained. (This is the preexisting disability or impairment, and the answer is 15%.)

C. Determine the degree or percentage of the combined disability or impairment. (The answer is 50%.)

D. Determine the *balance* which shall be paid by the Second Injury Fund. (This is determined by adding A and B and subtracting that total from C.)

Expressed in terms of a mathematical formula, the calculation would be performed as follows:

$$C - (A + B) = D \text{ (Second Injury Fund liability).}$$

Inserting the figures of the present case into the formula, it comes out like this:

$$50\% - (5\% + 15\%) = 30\%$$

We find the calculation made by the Commission reached the correct answer. This is not a factual determination. It is a mathematical determination, based upon an interpretation of the law, using figures that are not in factual dispute. While we prefer to make our calculation by using the formula set out above, the Commission reached the same result by giving the Fund "credit" for the preexisting impairment. At any event, the Commission reached the right result and its decision is affirmed.

Boyd FOWLER, et al. *v.* ARKANSAS PUBLIC SERVICE COMMISSION

CA 90-201 790 S.W.2d 183

Court of Appeals of Arkansas
En Banc
Opinion delivered June 8, 1990

Stanley, Harrington & Mars, A Professional Association, by: *Thomas A. Mars* and *Michele A. Harrington*; and *Shirley E. Guntharp*, for appellant.

Gilbert L. Glover, for appellee.

PER CURIAM. On March 30, 1990, Boyd Fowler, Billy Caradine, and Stephen Yocum (intervenors) filed a petition for rehearing of a portion of Order No. 1 in Arkansas Public Service Commission Docket No. 90-036-U, which overruled their objection to the PSC staff's participation in the case as a party. By Order No. 12, dated April 30, 1990, the Commission denied the petition for rehearing. On May 8, 1990, the intervenors filed a notice of appeal to this Court, asserting that the Commission erred in its decision regarding staff participation in the docket. Also, on the same day, the intervenors filed a motion for an expedited appeal in this case, citing Ark. Code Ann. Section 23-2-423(d). On May 24, 1990, Arkla, Inc., filed a motion to intervene in this case.

On May 31, 1990, the staff of the Public Service Commission filed a motion to dismiss the intervenor's appeal and for an extension of time to file the record in this case. The staff motion asserts that Order No. 12 is not a final and appealable order. On June 4, 1990, the intervenors filed a response to that motion in which they assert that: (1) Ark. Code Ann. Section 23-2-423 is a statutory exception to the "final order" doctrine; (2) that Rule 2 of the Arkansas Rules of Appellate Procedure is inapplicable here as it only applies to appeals from circuit, chancery, or probate courts; (3) that they are aggrieved by Order No. 12, have standing to appeal, and must do so under Section 23-2-423 or waive their objection. However, the intervenors agree that this court should not hear this appeal on an interlocutory basis but should take the matter under advisement until a final order on the merits is entered.

Because the order appealed from is not a final order, we dismiss the appeal, thus rendering moot the other motions filed herein.

As noted in numerous cases, the general rule is that, for an order to be appealable, it must be a final order, Ark. R. App. P. 2, and, to be final, the order must dismiss the parties from the court, discharge them from the action, or conclude their rights as to the subject matter in controversy. *Corning Bank* v. *Delta Rice Mills, Inc.*, 281 Ark. 342, 663 S.W.2d 737 (1984); *Gina Marie Farms* v. *Jones*, 28 Ark. App. 90, 770 S.W.2d 680 (1989); *Mid-State Construction* v. *Sealy*, 26 Ark. App. 186, 761 S.W.2d 951 (1988); *Banquet Foods* v. *McGlothin*, 26 Ark. App. 130, 760 S.W.2d 880 (1988); *Hernandez* v. *Simmons Industries*, 25 Ark. App. 25, 752 S.W.2d 45 (1988); *Samuels Hide and Metal Co.* v. *Griffin*, 23 Ark. App. 3, 739 S.W.2d 698 (1987); *Epperson* v. *Biggs*, 17 Ark. App. 212, 705 S.W.2d 901 (1986).

In the case at bar, only one issue has been disposed of by Order No. 12, the order appealed from, and that is whether the PSC staff should be allowed to participate in the case as a party. The Arkansas Supreme Court, in *Heber Springs Lawn and Garden, Inc.* v. *FMC Corporation*, 275 Ark. 260, 628 S.W.2d 563 (1982), stated:

> The relief apparently sought in appellants' motion

> dated February 13, 1981, was that the court dismiss the matter under the doctrine of forum non conveniens. The allegation was that Pulaski County would be the more convenient forum. The court overruled the motion and notice of appeal was filed by appellants.
>
> We hold that the order appealed from was interlocutory in nature. We recently addressed the question of an appeal from a trial court's interlocutory order in the case of *Hyatt* v. *City of Bentonville*, 275 Ark. 210, 628 S.W.2d 326 (1982). In that case we held that absent a final or appealable order, the appeal to us must be dismissed. In order to avoid piecemeal litigation or confusion in the lower court's handling of a matter, we must not interrupt the proceedings of a trial court. Denial of the motion did not dispose of any of the issues nor release any of the parties and was not final as to anything except that the trial would be held in Cleburne County. Once a final order has been entered, an appeal can be taken, and the question of venue and jurisdiction, once put in issue, is not lost by continuing through a trial of the matter. *Wilson* v. *Wilson*, 270 Ark. 485, 606 S.W.2d 56 (1980). For the foregoing reasons, this appeal is dismissed.

Although the cases heretofore cited are appeals from courts, or from the Workers' Compensation Commission, we think the final order rule should be applicable in the case at bar. In *Festinger* v. *Kantor*, 264 Ark. 275, 571 S.W.2d 82 (1978), the Supreme Court stated: "[t]o be final the decree must also put the court's directive into execution, ending the litigation or a separable branch of it." The Court dismissed the appeal, noting that the court had merely entered interlocutory orders deciding questions of law which were pertinent to the upcoming trial. We followed the reasoning in *Festinger* in *Gina Marie Farms* v. *Jones*, 28 Ark. App. 90, 770 S.W.2d 680 (1989), holding that, in workers' compensation cases, absent a final order, the case should be dismissed. We noted that:

> Therefore, while our jurisdiction to hear appeals from the Workers' Compensation Commission is not based on the same foundation as that of the Arkansas Supreme Court, *see Davis* v. *C & M Tractor Company*, 2 Ark. App. 150,

> 617 S.W.2d 382 (1981), our jurisdiction is, nevertheless, appellate jurisdiction . . . .

Again, the final order rationale is as logically applicable to appeals from the Public Service Commission as to appeals from the Workers' Compensation Commission.

Order No. 12 merely determined whether the PSC staff was a proper party. No rights of the intervenors have been concluded; no one has been dismissed from the matter or discharged from the action. Once a final order is entered, an appeal can be taken, and the issue raised here, having once been put in issue, is not lost by the intervenors proceeding through this matter. *See Heber Springs Lawn and Garden, Inc.* v. *FMC Corporation, supra.*

Dismissed.

CORBIN, C.J., not participating.

ROGERS, J., concurs.

JUDITH ROGERS, Judge, concurring. I reluctantly concur. I am painfully aware that no direct precedent applies to this situation and that the nearest guidance we can utilize are workers' compensation cases, such as *Gina Marie Farms* v. *Jones*, 28 Ark. App. 90, 770 S.W.2d 680 (1989). I am also mindful that the Supreme Court has looked askance at the issue of the PSC staff's status in *General Telephone Company of the Southwest* v. *Arkansas Public Service Commission*, 295 Ark. 595, 751 S.W.2d 1 (1988), and am sure that the issue of impropriety will arise in the future, if not in this case, in a later appeal.

I realize that this Court's *per curiam* does not foreclose appellants' right to raise the issue in a later appeal and hence does not now appear to prejudice their rights, but I believe there is a continuum of litigant's rights in Public Service Commission cases of which this Court must remain acutely aware. Consequently, the issue of PSC staff participation as a party or intervenor before the Commission itself should not, in my view, be totally dependent upon whether Order No. 12 is characterized as one which is not final and appealable according to traditional definitions. *See Corning Bank* v. *Delta Rice Mills, Inc.*, 281 Ark. 342, 663 S.W.2d 737 (1984); *Gina Marie Farms, supra*; Ark. R. App. P. 2.

I offer these cautionary observations because, due to the peculiar, complicated nature of PSC cases, a seemingly interlocutory, procedural matter such as staff's status could result in a waste of a vast expenditure of time and resources by all parties before the Commission. I have difficulty with the concept that the majority lays down a "bright line" rule at this juncture without solid precedential guidance. I caution against adoption of the notion that *any* order of the Public Service Commission, which appears interlocutory in nature, may not be appealable under our *per curiam*'s guidance.

Nevertheless, I reluctantly join my colleagues because, at this juncture, we may somewhat arbitrarily determine that our opinion does not materially affect appellants' rights here.

Danny Paul RODGERS *v.* STATE of Arkansas

CA CR 89-203 790 S.W.2d 911

Court of Appeals of Arkansas
Division II
Opinion delivered June 13, 1990

Mashburn & Taylor, by: *Scott E. Smith*, for appellant.

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

GEORGE K. CRACRAFT, Judge. Danny Paul Rogers appeals from his conviction at a non-jury trial of driving while intoxicated, fourth offense. He does not contend that the evidence was insufficient to sustain a conviction of the underlying charge of driving while intoxicated, but only that the trial court erred in admitting evidence of two prior convictions of the same crime, which, together with a third prior conviction, were used to enhance his sentence as provided in Ark. Code Ann. § 5-65-111(b)(3) (1987). We affirm.

The State introduced into evidence duly certified copies of documents purporting to evidence three prior convictions for the offense of driving while intoxicated. Appellant conceded that one of them was admissible but objected to admission of the other two. Each of the two documents in issue contained the entry "Trial Docket." Immediately under those words appeared the words "Jeff Duty, Atty." The documents were properly identified by the clerk of the court in which the convictions were obtained as being true copies of records kept in her office. She testified as to the manner in which such docket entries are made and that these entries meant that Jeff Duty had been appellant's attorney.

At the conclusion of the clerk's testimony, appellant made the following objection:

> [O]n both of these documents it says "Trial Docket, Jeff Duty, Attorney." Well, there's no way to tell if Jeff Duty was the city attorney or Jeff Duty was the county prosecutor . . . . It's simply too ambiguous to send this man to the Arkansas Department of Correction over. And I come back to if you're going to do it you might as well do it right. And they're just not doing it right out there, Judge.

The trial court admitted both documents, ruling on appellant's objection as follows:

> I don't think there is any ambiguity. Number one, it reflects an attorney, Jeff Duty. [The clerk] testified that Jeff Duty was the defense attorney. I think probably, furthermore, I can take judicial notice that Mr. Duty is not the prosecuting attorney. I know who the prosecuting attorney is. It is Mr. Harper or Mr. Blocker. So I think on the balance these do meet the test, especially with the testimony of [the clerk].

Appellant argues to us, as he did in the trial court, that the admitted documents were too ambiguous on the issue of whether appellant had been counseled or validly waived his right to counsel in his prior cases, and contends that our decision in *Tims* v. *State*, 26 Ark. App. 102, 760 S.W.2d 78 (1988), *supp. op. on reh'g granted*, 26 Ark. App. 106-A, 770 S.W.2d 211 (1989), requires that this case be reversed. We do not agree.

It is clear that uncounseled misdemeanor convictions cannot be used to enhance punishment for a subsequent offense. *Baldasar* v. *Illinois*, 446 U.S. 222 (1980); *State* v. *Brown*, 283 Ark. 304, 675 S.W.2d 822 (1984). It is also clear that representation by counsel or a waiver of the right to counsel cannot be presumed from a record that is silent on that subject. *Burgett* v. *Texas*, 389 U.S. 109 (1967). Our supreme court applied the *Burgett* rule to records that were silent as to representation in *Lovell* v. *State*, 283 Ark. 425, 678 S.W.2d 318 (1984); *Klimas* v. *State*, 259 Ark. 301, 534 S.W.2d 202 (1976); and *McConahay* v. *State*, 257 Ark. 328, 516 S.W.2d 887 (1974).

Tims v. *State*, *supra*, relied upon by appellant, is the latest in a series of cases on this subject. There, the document evidencing a

prior conviction contained a column for the name of the arresting officer in which appeared the words "Atty. O'Brien." We found merit in the argument that that entry could mean either that O'Brien was defense counsel or the prosecuting attorney. We held that although the record was not a silent one, in the absence of further evidence, the record entry was too ambiguous to be relied upon to establish representation by counsel.

Appellant's reliance upon *Tims*, however, is misplaced. The basis for our decision in that case was that there was no evidence to explain or clarify the entry. *Cf. Klimas* v. *State*, *supra*, (a "silent record" case, but the court indicated that the inadequacy of a silent record could be overcome by other evidence tending to show that the defendant in fact was represented by counsel or waived that right). Here, as in *Tims*, the records are not silent. However, unlike in *Tims*, there was other evidence offered explaining the docket entries. The clerk of the court in which the prior judgments were entered testified that such docket entries were her method of showing whether an accused had been represented by counsel and, if so, who that counsel was. She testified that the entries in question here meant that appellant was represented by Mr. Duty and that, had he not been represented by an attorney, the word "none" would have appeared on the docket where Mr. Duty's name was shown. From our review of the record, we cannot conclude that the trial court's stated conclusions on this point are erroneous.

In his brief, appellant also argues that the admitted documents were constitutionally infirm for use as evidence for other reasons. However, we do not address these arguments. Our review of the record discloses that the only ground for exclusion both argued on appeal and presented to and ruled on by the trial court was that the evidence was too ambiguous to be relied on, in that one could not tell whether Mr. Duty had represented appellant or the State. Only those specific objections made in the trial court are available on appeal; all others are deemed waived. *Parette* v. *State*, 301 Ark. 607, 786 S.W.2d 817 (1990); *Whaley* v. *State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984).

Affirmed.

COOPER and JENNINGS, JJ., agree.

Nudie Mae WELDER *v.* James R. WIGGS, Odissia Wiggs, Edwin Hubach, Lou Hubach, Larry V. Taylor, and Betty S. Taylor

CA 89-389 790 S.W.2d 913

Court of Appeals of Arkansas
Division II
Opinion delivered June 13, 1990
[Rehearing denied August 22, 1990.]

Jones & Tiller Law Firm, by: *Marquis E. Jones*, for appellant.

Lightle, Beebe, Raney and Bell, by: *Donald P. Raney*, for appellees.

GEORGE K. CRACRAFT, Judge. Nudie Mae Welder appeals from an order of the White County Chancery Court quieting title to parcels of land in favor of appellees James and Odissia Wiggs, Edwin and Lou Hubach, and Larry and Betty Taylor. We find no error and affirm.

The forty-acre tract in issue, which is located in White County, was owned by Elijah Moore at the time of his death in 1919. Moore left no will and was survived by five children, one of whom was appellant's mother. Upon the death of her mother in 1929, appellant acquired her one-fifth interest in the property. Appellant purchased the one-fifth interest of another child of Elijah Moore in 1945.

In 1952, four persons, claiming to be the sole surviving heirs of Moore, executed a warranty deed purporting to convey fee title to the forty acres to Arthur Bone. In 1953, Bone conveyed the forty-acre tract to Arthur and Annette Bartell. In 1970, the Bartells conveyed a portion of the tract to appellees Wiggs, and in 1971 and 1976 conveyed portions to appellees Taylor. In 1973, the Bartells conveyed the balance of the tract to Harold Huntsman. In that same year, Huntsman conveyed the property to the appellees Edwin and Lou Hubach. All of the deeds in appellees' chain of title from Bone purported to convey title in fee and contained full covenants of warranty.

In May of 1988, appellant brought this action in partition, alleging that she is the owner of a two-fifths undivided interest in the lands occupied by appellees. Appellees answered and counterclaimed, asserting that they had acquired title to the lands by adverse possession and that appellant was estopped from asserting her claim and prayed that their titles to the respective properties be quieted in them. The chancellor found that appellees had sustained their burden of proving title by adverse possession, dismissed appellant's complaint, and quieted title in appellees.

In order to establish title by adverse possession,

appellees had the burden of proving that they had been in possession of the property continuously for more than seven years and that their possession was visible, notorious, distinct, exclusive, hostile, and with intent to hold as against the true owner. 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. Whether possession is adverse to the true owner is a question of fact. *Walker* v. *Hubbard*, 31 Ark. App. 43, 787 S.W.2d 251 (1990).

The record indicates that appellees Taylor built a residence and actually resided on their property. Mr. Taylor testified that they maintained the yard and a garden and made other improvements on the remainder of their property. Appellees Hubach cleared their property and built a barn and fences for their cattle that runs on the land. The appellees had paid all taxes due on their respective properties and each had executed mortgages, oil and gas leases and rights-of-way affecting the property.

Appellant does not contend that appellees were not in open, exclusive, notorious, and continuous possession of the land for the statutory period, but only that appellees' possession was not hostile or adverse to her. She argues that as Bone's predecessors owned only undivided interests in the forty-acre tract, Bone and his subsequent grantees became her cotenants. Therefore, appellant argues that one cotenant cannot hold adversely to another merely by occupying the land, because possession by one cotenant is presumed to be the possession of all until such time as notice is brought home to the other cotenant that one is holding adversely to him. *See Hirsch* v. *Patterson*, 269 Ark. 532, 601 S.W.2d 879 (1980).

The rule of general application is that one entering into possession of land under a deed of conveyance is presumed to occupy and to claim only the interest named in the conveyance. Where one enters under a deed purporting to convey only an undivided interest, it is presumed that he claims only that undivided interest and that his occupancy is not adverse to his

cotenants. *Patterson* v. *Miller*, 154 Ark. 124, 241 S.W. 875 (1922).

Here, however, the cotenants conveyed the lands to a stranger by a deed purporting to convey the entire fee, and that stranger entered into possession of the land. The chancellor correctly ruled that under these circumstances the stranger is presumed to have occupied the land with the intent to claim interest in the whole tract, as described in his deed. The rule is stated in *Watkins* v. *Johnson*, 237 Ark. 184, 187, 372 S.W.2d 243, 245 (1963), as follows:

> In a long line of cases we have held when a co-tenant executes a deed to a stranger to the title, describing the entire land, and such grantee enters into exclusive possession under such deed, then such deed constitutes color of title, and such entry commences the running of limitation in favor of the grantee and against all the other co-tenants of the grantor. *Parsons* v. *Sharpe*, 102 Ark. 611, 145 S.W. 537; *Jackson* v. *Cole*, 146 Ark. 565, 226 S.W. 513; *Landman* v. *Fincher*, 196 Ark. 609, 119 S.W.2d 521; *Ulrich* v. *Coleman*, 218 Ark. 236, 235 S.W.2d 868.

In *Jackson* v. *Cole*, 146 Ark. 565, 571, 226 S.W. 513, 515 (1920), the court stated:

> A conveyance to a stranger to the title, by one cotenant, by an instrument purporting to pass the entire title in severalty, and not merely such cotenant's individual interest, followed by an entry into actual, open and exclusive possession by such a stranger, under claim of ownership in severalty, amounts to a disseisin of the other cotenants, which, if continued for the statutory period, will ripen into good title by adverse possession. * * * In considering this question the familiar principle is recalled that when one enters upon land, he is presumed to enter under the title which his deed purports upon its face to convey, both as respects the extent of the land and the nature of his interest.

Appellant contends that, in any event, she had no notice of appellees' adverse claim and the statute of limitations could not run against her. We disagree. A landowner has a duty to

keep herself informed as to adverse occupancy of her property. *Reeves* v. *Metropolitan Trust Company*, 254 Ark. 1002, 498 S.W.2d 2 (1973). Actual notice of adverse possession is not essential. One claiming lands adversely under color of title need not give affirmative notice to another residing in a distant place that he is claiming ownership of the land where he has no knowledge of the existence, whereabouts, or claim of interest of another in the land. *Miller* v. *Chicago Mill & Lumber Co.*, 140 Ark. 639, 215 S.W.2d 900 (1919); *Scott* v. *Hill*, 1 Ark. App. 281, 614 S.W.2d 690 (1981). While a true owner must have knowledge or notice that possession of another is hostile, this may consist of either actual knowledge or constructive notice, arising from the openness and notoriety of the possession. Constructive notice is that which would reasonably indicate to the owner, if he visits the premises and is a man of ordinary prudence, that a claim of ownership adverse to his own is being asserted.

Here, appellant testified that she lived in Little Rock, Pulaski County, and had never been in possession of the property or paid any taxes on it. She stated that she had not seen the property until sometime in 1986 or 1987. There was no evidence that appellees were aware of her whereabouts or that she claimed an interest in the land prior to 1986. A neighbor of appellees testified that she could see the Taylors' residence, and the activities conducted by the other appellees on their properties, from her home. She stated that there was a well-travelled highway that ran in front of the property and anyone travelling the road could readily see the activity being conducted on the property. Appellant was therefore on constructive notice of those activities that she would have observed had she visited the property.

Although we review chancery cases *de novo* on the record, we do not reverse a chancellor's findings unless they are clearly against the preponderance of the evidence, giving due deference to his superior position to observe the witnesses and

weigh their credibility. *Miniat* v. *McGinnis*, 26 Ark. App. 157, 762 S.W.2d 390 (1988); Ark. R. Civ. P. 52(2). From our review of the record, we cannot conclude that the chancellor's finding that appellees met the requirements necessary to give them title to the disputed tract by adverse possession is clearly erroneous.

Affirmed.

MAYFIELD and COOPER, JJ., agree.

MERCANTILE FIRST NATIONAL BANK of Doniphan
v. Larry K. LEE and Sonia Lee

CA 89-326 790 S.W.2d 916

Court of Appeals of Arkansas
Division I
Opinion delivered June 13, 1990

Riffel, King & Smith, by: *Tim King*, for appellant.

Scott Manatt, for appellee.

MELVIN MAYFIELD, Judge. This is the second appeal of this case. Larry Lee and his wife were the appellants in the first appeal, *Lee* v. *Mercantile First National Bank*, 27 Ark. App. 11, 765 S.W.2d 17 (1989), where we reversed and remanded for further proceedings not inconsistent with our opinion. It is from the trial court's order on remand that the appellee in the first appeal brings the present appeal.

In our previous opinion we outlined the factual circumstances involved; therefore, without detailing those circumstances again, we simply state that the Lees had executed a note to a savings and loan association and had secured the note by a mortgage upon some commercial property. Later they executed another note to the association and secured it with a mortgage upon their homestead. Still later, a corporation owned by the Lees executed two notes, both on the same day, to the Mercantile First National Bank of Doniphan (Missouri), and both notes were secured by a deed of trust on the same commercial property which secured the first note the Lees had executed to the savings and loan association.

The association subsequently assigned its notes and mortgages to the bank, and the bank subsequently filed suit against the Lees and their corporation. Judgment in rem was granted the bank against both the commercial and homestead properties, and foreclosure was ordered. No personal judgment was granted against the Lees because their personal liability had been

discharged in bankruptcy. They also claimed their homestead property as exempt and the trial court's decree provided that should there be any overplus from the sale of the homestead property, above the amount due on the note secured by the homestead property, that overplus should be "applied to the use and benefit" of the Lees.

In the first appeal, we held that because of the law concerning the homestead exemption "one whose homestead is mortgaged along with other property is entitled to demand that the mortgagee proceed first against the other property." So, we reversed because the decree appealed from had ordered *both* the commercial and homestead properties sold instead of requiring the commercial property to be sold first. We also said that if the sale of the commercial property did not produce enough to pay the amount due on both the savings and loan notes, the homestead property would then have to be sold and the proceeds applied to the amount due on those notes. However, we said the decree was not clear as to what would happen if the homestead was sold for more than enough to satisfy the amount due on the mortgages to the savings and loan association and held in that event, under the circumstances in this case, the balance would go to the Lees as proceeds of the sale of the exempt homestead property.

A mandate was issued by the clerk of this court and it was filed, with a copy of our opinion, in the trial court, and the mandate and copy of our opinion are both in the record on this second appeal. With the exception of these documents, the only thing in this new record that was not in the record on the first appeal is (1) what the appellant refers to in its abstract as "an order proposed, with reservations, by Appellant, and rejected by the Chancellor," (2) the order actually entered by the chancellor, (3) the notice of appeal and designation of record, and (4) the formal certificates. There is a short "Transcript of Testimony" of matters discussed at the conclusion of the testimony taken at the original trial, but this is not new "testimony." It is what occurred at the trial on November 13, 1987. No additional testimony was taken after the reversal and remand of this case by our opinion of February 22, 1989.

On this appeal, the appellant seeks to reargue some of the issues decided in the first appeal. Before addressing those argu-

ments, we address a contention which we think has merit. This contention is made under the second point argued and states in broad terms that the trial court "failed to correctly apply funds from the sale of the commercial and residential property." We think appellant is correct in its conclusion, although we do not agree—perhaps do not understand—how it reaches that conclusion.

On remand, the trial court entered an order giving the Lees judgment in the amount of $43,000.00, together with interest at the rate of 10% from January 15, 1988, "for the proceeds of their exempt homestead." This was the amount the homestead sold for at the foreclosure sale. The sale actually occurred while the first appeal was pending. Both the commercial and homestead properties were sold on January 8, 1988, were purchased by the appellant bank, the sale was approved, and a Commissioner's Deed was executed on January 15, 1988. There is nothing in the record, or in the briefs, to indicate why judgment was entered for $43,000.00. We think our first opinion must have been misunderstood. It specifically stated that if the sale of the commercial property did not produce enough to pay the amount due on the savings and loan association "mortgages" the homestead property would have to be sold. And, it said, if the sale produces more than enough to pay the indebtedness due on the association mortgages "the balance would go to [the Lees] as proceeds of the sale of exempt homestead property."

We point out that this means that the appellant bank, who holds notes on which more than $350,000.00 is owed, and which are secured by the Lees' commercial property, does not have any right to subject the proceeds of the sale of the homestead property to the payment of these notes. That is because homestead property is exempt from sale under execution or other process, *see* Ark. Const. Art. 9 § 3; however, the Lee homestead property is subject to sale to pay the savings and loan association notes because the Lees executed a mortgage to the association which waived their homestead exemption as to the debt secured by that mortgage. *See Free* v. *Harris*, 181 Ark. 644, 27 S.W.2d 510 (1930); *Ragsdell* v. *Gazaway Lumber Co., Inc.*, 11 Ark. App. 188, 668 S.W.2d 60 (1984). Moreover, that mortgage stated that the Lees waived the homestead exemption as to any other indebtedness "which may now or is hereafter due and owing by

the mortgagors [the Lees], or either of them, to the mortgagee [the savings and loan association] up to the time this mortgage is foreclosed or released." Therefore, our first opinion stated that if the sale of the commercial property does not produce enough to pay the amount due on the association "mortgages" then the homestead property would have to be sold; and if that sale produces more than enough to pay the indebtedness due on the association mortgages, "the balance would go to [the Lees] as proceeds of the sale of exempt homestead property."

The term "exempt" did not mean "exempt" from the association's claims, but "exempt" from the appellant bank's claims. That is because the bank has no mortgage from the Lees making the homestead property security for the payment of the notes from the Lees to the bank. The bank does have an assignment of the notes made payable to savings and loan association, which are secured by the homestead property, but that assignment does not give the bank any greater right than the association had, and we held in our first opinion that the bank could not apply the doctrine of marshaling assets to subject proceeds from the sale of the homestead property to the payment of the notes the bank got from the corporation owned by the Lees, secured only by the Lees' commercial property. This is one of the bank's contentions that it has attempted to reargue in this second appeal. However, without discussing the merits of the argument (which we do not agree with), we think it enough to say that the issue is foreclosed under the law-of-the-case rule, which the Arkansas Supreme Court has explained as follows:

> On second appeal, as in this case, the decision on the first appeal becomes the law of the case, and is conclusive of every question of law or fact decided in the former appeal, and also of those which might have been, but were not, presented.

Morris v. *Garmon*, 291 Ark. 67, 68, 722 S.W.2d 571 (1987); *see also Ferguson* v. *Green*, 266 Ark. 556, 567, 587 S.W.2d 18 (1979); *Mellinger* v. *Mellinger*, 26 Ark. App. 233, 236, 764 S.W.2d 52 (1989).

But as indicated above, we think the trial court erred in granting the Lees judgment against the bank in the amount of $43,000.00. The amount found due the bank on the notes

assigned to it by the savings and loan association totaled $76,461.55. The sale of both properties brought $113,000.00 ($70,000.00 for the commercial; $43,000.00 for the homestead). Subtracting the total of $76,461.55 owed from the $113,000.00 produced by the sale of both properties leaves a balance of $36,538.45. That is the amount due to the Lees as proceeds of the sale of the homestead property. So, we reduce the $43,000.00 allowed by the chancellor to $36,538.45.

The bank, however, argues that it should be allowed an additional amount representing interest on its indebtedness from date of the entry of the original decree on December 15, 1987, to the date of the sale of the Lee property on January 8, 1988. Also, it argues it is entitled to some court costs advanced. Our problem with these items is that we find nothing in the record to show they were presented to the chancellor. Although there is an undated and unsigned "Order" in the transcript, and appellant's abstract states the order was proposed but rejected by the chancellor, the record does not show that it was presented to the chancellor and, except for the fact that it is not signed, the record does not show it was rejected by the chancellor, or why it was rejected. The rule is well established that issues raised for the first time on appeal will not be considered. *Arnold* v. *Lee*, 296 Ark. 339, 343, 756 S.W.2d 904 (1988); *Farmers & Merchant's Bank* v. *Deason*, 25 Ark. App. 152, 155, 752 S.W.2d 777 (1988).

The judgment appealed from is modified to reduce the Lees' judgment against the bank from $43,000.00 to $36,538.45, plus interest at 10% per annum from January 15, 1988, plus the sum of $710.00, allowed by this court as costs in the first appeal, with interest at 10% from the date of the issuance of the mandate in that appeal on March 22, 1989. However, judgment for the Lees shall be offset by the costs of the present appeal in the amount to be fixed by the clerk of this court.

Affirmed as modified.

CRACRAFT and JENNINGS, JJ., agree.

Jerry L. WORTHAM *v.* DIRECTOR OF LABOR

E 90-2 790 S.W.2d 909

Court of Appeals of Arkansas
En Banc
Opinion delivered June 13, 1990

Appellant, pro se.

No response.

PER CURIAM. On May 25, 1990, the appellant filed a petition which we view as a writ of certiorari to bring the record to this Court. No response has been filed by the Director of Labor. We grant the petition.

Under Ark. Code Ann. Section 11-10-529(b)(1) (1987), the Director of Labor is required to file a certified copy of the record of the case, including all documents, papers, and a transcript of the testimony, but the statute specifies no time period within which the record shall be filed. We think, however, it is intended that the record be filed within a reasonable period of time. In *Commercial Standard Insurance Co.* v. *Hill*, 203 Ark. 768, 158 S.W.2d 676 (1942), the Court considered Section 25 of Act 319 of 1939, which provided for an appeal to circuit court from a final award of the Workers' Compensation Commission. Although that Act specified no time period in which the record should be filed, the Arkansas Supreme Court held that, after the notice of appeal was filed, "the Commission should, *within a reasonable*

time, return to the [circuit] court all documents and papers on file in the matter together with the transcript of the evidence, the findings and award, in order that the same should become the record of the cause." 202 Ark. 771 (emphasis added).

In *Davis* v. *C & M Tractor Co.*, 2 Ark. App. 150, 617 S.W.2d 382 (1981), we held the law required that the record on appeal from a Workers' Compensation Commission decision be filed in this Court within 90 days from the filing of the notice of appeal "as is required in other civil actions." 2 Ark. App. 154. Because Rule 5(a) of the Rules of Appellate Procedure requires that the record on appeal from circuit and chancery courts be docketed in the appellate court within 90 days of the filing of the first notice of appeal and because we have held that that time limit should apply to appeals from the Workers' Compensation Commission, it would seem by analogy, that 90 days is a reasonable period of time in which the record on appeal should be filed in appeals to this Court from the Arkansas Board of Review.

In *Whitlow* v. *American Greetings Co.*, 268 Ark. 1122, 599 S.W.2d 410 (Ark. App. 1980), we noted that it should be remembered in interpreting and applying the Employment Security Law that "the basic design of the Act is to protect the employee from the economic consequences of unemployment through no fault of the employer; and, to that end, the Act should be liberally construed." 268 Ark. 1125. The Arkansas Supreme Court said in *Davis* v. *Stiles*, 287 Ark. 261, 698 S.W.2d 287 (1985), that "[t]his statute was written for the purpose of settling employment claims and furnishing compensation in an expeditious way to those who are entitled." 287 Ark. 263. We hold that a period of 90 days, after the filing of the notice of appeal, is a reasonable time in which to file the record on appeal from an unemployment compensation case.

In the case at bar, the Board of Review decision is dated December 19, 1989. Notice of appeal was filed January 2, 1990, and the director of the Department of Labor filed a response on January 3, 1990, stating that the record would be filed as soon as possible. As of today, no record has been filed. Since over five months has passed since the filing of the notice of appeal without filing the record, we grant the petition for a writ of certiorari and order that the record be transmitted to this Court within thirty

days in keeping with Rule 26 of the Rules of the Arkansas Supreme Court and Court of Appeals.

Petition for Writ of Certiorari granted.

Goldie RITCHIE *v.* STATE of Arkansas

CA CR 89-293 790 S.W.2d 919

Court of Appeals of Arkansas
Division I
Opinion delivered June 20, 1990
[Rehearing denied August 22, 1990.]

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

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

JAMES R. COOPER, Judge. The appellant was charged with the offense of being an accomplice to murder in the first degree, in violation of Ark. Code Ann. §§ 5-2-403 and 5-10-102 (1987). At the close of all the evidence, the jury was instructed on accomplice liability, murder in the first degree, and murder in the second degree. Over the objection of the appellant the jury was also instructed on hindering apprehension or prosecution. The jury found the appellant guilty only of hindering apprehension or prosecution and sentenced her to three years in the Arkansas Department of Correction. On appeal, she argues that the trial court erred in instructing the jury on hindering apprehension or prosecution because, first, she was not charged with that offense and second, it is not a lesser included offense to the crimes with which she was charged. We reverse.

The only argument made by the State is that we should not consider the appellant's argument because she has not abstracted her objection to the instruction. However, the State concedes that the appellant did object to the instruction and the objection was obviously overruled because the jury was instructed on the hindering apprehension issue. If we consider affirming for non-compliance with Ark. R. Sup. Ct. 9(e) to be unduly harsh, we may request the appellant to reprint his brief. However, because the State has conceded that the appellant objected, we find rebriefing to be unnecessary and that it would involve an unreasonable delay. Ark. R. Sup. Ct. 9(e)(2).

According to Ark. Code Ann. § 5-1-110 (b)(1987) an offense is a lesser included offense if:

> (1) It is established by proof of the same or less than all the elements required to establish the commission of the offense charged; or
>
> (2) It consists of an attempt to commit the offense charged or to commit an offense otherwise included within

it; or

(3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish its commission.

However, an offense is not a lesser included offense solely because a greater offense includes all the elements of the lesser offense. The lesser included offense doctrine additionally requires that the two offenses be of the same generic class and that the difference between the offenses be based upon the degree of risk or risk of injury to person or property or else upon grades of intent or degrees of culpability. *Thompson* v. *State*, 284 Ark. 403, 682 S.W.2d 742 (1985); *Shamlin* v. *State*, 23 Ark. App. 39, 743 S.W.2d 1 (1988).

In overruling the appellant's objection, the trial court observed that hindering apprehension was a form of the old accessory after the fact charge. While the trial court's observation is correct, *see Taylor* v. *State*, 265 Ark. 822, 581 S.W.2d 328 (1979), it is not a lesser included offense to accomplice liability under the murder statutes. The present criminal code treats the concept of accessories differently from the common law and is consistent with the weight of authority. Under present law an accessory before the fact is an accomplice, Ark. Code Ann. § 5-2-403(1987), and one who was formerly an accessory after the fact is now guilty of a separate crime, i.e., hindering apprehension and prosecution. *Taylor*, *supra*. Furthermore, while an accomplice is one who can be convicted of the same charge as the principal, hindering apprehension or prosecution can only arise where a crime has already been committed, and the culpability for that offense is less than the underlying offense. Thus, hindering apprehension or prosecution is a totally separate offense and is not a lesser included offense.

Because the appellant was not charged with hindering apprehension or prosecution and because it is not a lesser included offense, we find it was error for the trial court to instruct the jury on hindering apprehension and prosecution. Accordingly, we reverse.

Reversed.

MAYFIELD, and CRACRAFT, JJ., agree.

Peoria MITCHELL *v.* Edward P. HAMMONS, M.D.

CA 89-466 792 S.W.2d 333

Court of Appeals of Arkansas
Division II
Opinion delivered June 20, 1990

Marc I. Baretz, for appellant.

Sloan, Rubens, Peeples & Coleman, by: *Gerald A. Coleman* and *Therese H. Green*, for appellee.

JOHN E. JENNINGS, Judge. This is an adverse possession case. Peoria Mitchell brought this action against Edward Hammons, alleging that she was the owner of an undivided one-half interest in a forty-acre tract in St. Francis County, Arkansas. She sought partition of the property and a decree quieting title. In response to the petition, Hammons asserted that he had acquired title by adverse possession and that Mitchell's claim was barred by laches. After hearing the testimony, the chancellor issued a thoughtful and extensive memorandum opinion containing separate findings of fact and conclusions of law. The chancellor held that Mitchell's claim was barred by adverse possession, laches, and estoppel. While the chancellor's findings of fact are clearly supported by the evidence, we agree with appellant's contention that his conclusions of law were in error and therefore reverse.

Although the record is somewhat sparse, the facts are virtually undisputed. Peoria Mitchell was the only child of Gordon and Mattie Young. She was born in 1923 in St. Francis

County, Arkansas, where her father, Gordon Young, and his brother, Buford Young, farmed a forty-acre tract. As a child, she lived on the farm with her parents. In the mid-1930's Mitchell's parents separated and she and her mother left the farm, although they continued to live in St. Francis County. In 1940 Gordon Young and Buford Young bought the forty-acre tract, taking title as tenants in common, and continued to farm the land. There was no evidence that Mitchell was aware of this purchase. Mitchell married one Jessie Gunn in 1942 and moved to Egypt, still in St. Francis County. In 1949, Mitchell and Gunn separated and Mitchell moved to Memphis, Tennessee.

In 1960 Mitchell went to St. Louis to visit her father, who was on his deathbed. Some time in the early 1960's, after the death of Gordon Young, Buford Young died. The chancellor found that Buford's widow, Roxie Young, apparently took control of the forty-acre tract after Buford's death and apparently paid the real estate taxes on it. In 1968 Roxie and their only son, Alfred, executed a deed conveying the forty-acre farm to themselves. The deed stated:

> THAT we, Roxie Young, surviving widow of Buford Young, and Alfred F. Young, sole heir at law of Buford Young, deceased, and Gordon Young, deceased, . . . hereby grant, bargain, sell, and convey unto Roxie Young [sic] as joint tenants with right of survivorship unto their heirs and assigns forever, the following lands. . .
>
> TO HAVE AND TO HOLD THE same unto the said Roxie Young and Alfred F. Young, as joint tenants with right of survivorship,. . .

Of course, the recital in the deed that Alfred Young was the sole heir at law of Gordon Young was untrue and the conclusion is inescapable that Roxie and Alfred knew it was untrue. The deed was duly recorded and fairly soon afterwards Alfred Young drowned.

In 1975 Mattie Young, Peoria Mitchell's mother, died. In 1979 Roxie Young, who now appeared to be the sole owner of the property based on the recital contained in the 1968 deed, leased the property to Millard Cummings. On September 8, 1981, she conveyed the property to Cummings by warranty deed. Cum-

mings made certain improvements on the property — he cleared fourteen acres of timber, leveled some of the land, and put in an irrigation well.

In 1982, Millard Cummings mortgaged his interest in the property to the Federal Land Bank. He subsequently defaulted on the loan, and after foreclosure the property was sold at public sale on January 27, 1988, to Edward Hammons, the appellee here. After the foreclosure sale, Peoria Mitchell learned that she might have an interest in the land and brought the present action on April 19, 1988. Hammons has been in possession of the property since January of 1988 and at the time of the hearing was renting the property to a tenant.

In examining the issue of adverse possession we begin with the familiar rule that the possession of one tenant in common is the possession of all. *Graham* v. *Inlow*, 302 Ark. 414, 790 S.W.2d 428, (1990); *Ueltzen* v. *Roe*, 242 Ark. 17, 411 S.W.2d 894 (1967); *Franklin* v. *Hempstead County Hunting Club*, 216 Ark. 927, 228 S.W.2d 65 (1950). A tenant in common is presumed to hold in recognition of the rights of his cotenants. *Baxter* v. *Young*, 229 Ark. 1035, 320 S.W.2d 640 (1959); *Gibbs* v. *Pace*, 207 Ark. 199, 179 S.W.2d 690 (1944). It has been said that the presumption continues until an actual ouster is shown. *Baxter*, *supra*. Since possession by a cotenant is not ordinarily adverse to other cotenants, each having an equal right to possession, a cotenant must give actual notice to other cotenants that his possession is adverse to their interests or commit sufficient acts of hostility so that their knowledge of his adverse claim may be presumed. *Hirsch* v. *Patterson*, 269 Ark. 532, 601 S.W.2d 879 (1980). In order for the possession of one tenant in common be adverse to that of his cotenants, knowledge of his adverse claim must be brought home to him directly or by such notorious acts of an unequivocal character that notice may be presumed. *Graham*, *supra*; *Barr* v. *Eason*, 292 Ark. 106, 728 S.W.2d 183 (1987) (citing *Zackery* v. *Warmack*, 213 Ark. 808, 212 S.W.2d 706 (1948)); *Harris* v. *Harris*, 225 Ark. 789, 285 S.W.2d 513 (1956). The statutory period of time for an adverse possession claim does not begin to run until such knowledge has been brought home to the other cotenants. *Hirsch*, *supra*; *Gibbs*, *supra*. There is no "hard and fast" rule by which the sufficiency of an adverse claim may be determined; courts generally look to the totality of the

circumstances and consider such factors as the relationship of the parties, their reasonable access to the property, kinship, and enumerable other factors to determine if non-possessory cotenants have been given sufficient warning that the status of a cotenant in possession has shifted from mutuality to hostility. *See Hirsch*, *supra*; *Ueltzen*, *supra*; *Linebarger* v. *Late*, 214 Ark. 278, 216 S.W.2d 56 (1948). When a tenant in common seeks to oust or dispossess the other tenants and turn his occupancy into an adverse possession and thus acquire the entire estate by lapse of time under the statute of limitations, he must show when knowledge of such adverse claim or of his intention to so hold was brought home to them, for it is only from that time that his holding will be adverse. *Gibbs* v. *Pace*, 207 Ark. 199, 179 S.W.2d 690 (1944); *Singer* v. *Naron*, 99 Ark. 446, 138 S.W. 958 (1911), *cited in Ueltzen* v. *Roe*, 242 Ark. 17, 29, 411 S.W.2d 894, 900 (1967) (Fogleman, J., dissenting). When, as here, there is a family relation between cotenants, stronger evidence of adverse possession is required. *Ueltzen* v. *Roe*, 242 Ark. 17, 411 S.W.2d 894 (1967); *McGuire* v. *Wallis*, 231 Ark. 506, 330 S.W.2d 714 (1960); *Morgan* v. *Morgan*, 15 Ark. App. 35, 688 S.W.2d 953 (1985).

At the death of her father, Peoria Mitchell became the owner of an undivided one-half interest in the property. Her cotenants were, in order, Buford Young, then Alfred Young at Buford's death, then Alfred and Roxie Young by virtue of the 1968 deed, and finally Roxie Young after the death of Alfred. There is no evidence that any of her relatives gave actual notice of their intent to hold adversely to her or that she had actual knowledge of any hostile claim on their part. The question then becomes whether Buford, Roxie, or Alfred committed "sufficient acts of hostility" so that her knowledge of their adverse claims may be presumed. *See Hirsch*, *supra*; *Johnson* v. *Johnson*, 250 Ark. 457, 465 S.W.2d 309 (1971). As far as Buford Young and his immediate family are concerned, it appears that from the date of Gordon Young's death until the conveyance by Roxie Young to Millard Cummings they were in actual possession of the property, and it also appears, as the chancellor found, that they paid the taxes thereon. There is also the deed containing the false recital or heirship from Roxie and Alfred to themselves. Finally, there is the fact that Roxie Young leased the property from 1979 until

1981 to Millard Cummings. When these facts are considered together, we think that they are not "so notorious that notice may be presumed." *Harris* v. *Harris*, 225 Ark. 789, 285 S.W.2d 513 (1956); *Smith* v. *Kappler*, 220 Ark. 10, 245 S.W.2d 809 (1952). A cotenant is not expected to check the records constantly to determine whether instruments affecting title have been executed. *See Tennison* v. *Carroll*, 219 Ark. 658, 243 S.W.2d 944 (1951).

We conclude that at least until the conveyance from Roxie Young to Millard Cummings on September 8, 1981, the seven year statute of limitations had not yet begun to run. At that time, however, the statute did begin to run against Peoria Mitchell's claim. When a cotenant executes a deed to a stranger to the title, purporting to convey the entire property, and the grantee enters into exclusive possession under such deed, then the deed constitutes color of title, and the grantee's entry commences the running of the statute of limitation in favor of the grantee and against all the other cotenants of the grantor. *Watkins* v. *Johnson*, 237 Ark. 184, 372 S.W.2d 243 (1963); *Ulrich* v. *Coleman*, 218 Ark. 236, 235 S.W.2d 868 (1951); *Jackson* v. *Cole*, 146 Ark. 565, 226 S.W. 513 (1920). It follows that acts of ownership on the part of such a grantee must necessarily be adverse to any other part owner, even though the latter had no actual notice of the adverse character of the possession. *Jackson* v. *Cole*, *supra*. In the case at bar, because the deed to Cummings was executed in September of 1981 and suit was filed by the appellant in April of 1988, the seven year statute of limitations had not run. *See* Ark. Code Ann. § 18-61-101 (1987).

In reaching the contrary conclusion, the chancellor relied primarily on our opinion in *Morgan* v. *Morgan*, 15 Ark. App. 35, 688 S.W.2d 953 (1985), in which we quoted from *Ueltzen*:

> Our courts have ordinarily held that to constitute estoppel, adverse possession or laches with reference to a cotenant, that no one or two specific acts, and sometime even more, necessarily, of themselves amount to a disseisin, but the following each are items to be considered in determining whether the possession is adverse, or the individual is estopped or guilty of laches and they include such acts as (a) possession of the property; (2) payment of

> taxes; (3) enjoyment of rents and profits; (4) making of improvements (particularly of a substantial nature); (5) payments of insurance made payable to himself; (6) holding possession of lands for a long period of time, such as 30 years; (7) treating property as one's own; (8) selling timber; (9) executing leases; (10) assessment of property in one's own name; (11) selling crops; (12) the execution, delivery, and recording of a deed by one cotenant which purports to convey the entire property; and (13) generally treating property as his own.

The chancellor correctly recognized that the stated factors were not all inclusive. Indeed, as the court said in *Ueltzen*:

> What in one case would be sufficient as a warning might not be enough in another. Relationship of the parties, their reasonable access to the property and opportunity or necessity for dealing with it, their right to rely upon conduct and assurances of the tenant in possession, kinship, business transactions directly or incidentally touching the primary subject matter, silence when one should have spoken, natural inferences arising from indifference—these and other means of conveying or concealing intent may be important in a particular case, but not controlling in another; . . . There can, therefore, be no "open and shut" rule by which purpose can be measured.

Ueltzen v. *Roe*, 242 Ark. at 21 (quoting *Linebarger* v. *Late*, 214 Ark. at 282). Rather than focusing upon the time from which the statute began to run, the chancellor considered the duration of possession by the Buford Young family together with the improvements made by Millard Cummings. It is with this method of analysis that we must disagree. Furthermore, both *Morgan* and *Ueltzen* are distinguishable on their facts from the case at bar. In *Ueltzen*, the court found it significant that the cotenants out of possession visited the property and had actual knowledge that improvements were being made. Similarly in *Morgan*, we found it particularly significant that the out of possession cotenants had actual knowledge of certain acts of ownership. *Morgan*, 15 Ark. App. at 40. To summarize, we conclude that the actions of Buford Young and his family were not such as to begin the running of the seven year statute of limitations, that the statute commenced to

run as of the date of the conveyance from Roxie Young to Millard Cummings, and that suit was filed by the appellant within seven years of the date of that conveyance.

Nor can we agree with the conclusion that the appellant's claim was barred by the doctrine of laches or the principle of estoppel.[1] On this issue the chancellor again relied on *Ueltzen*:

> Laches or estoppel, is not brought into being merely by delay, but by delay that works a disadvantage to another. So long as the parties are in the same condition, it matters little whether one presses a right promptly or slowly within limits allowed by law. But where, knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith become so changed that he cannot be restored to his former state, if the right be enforced, delay becomes inequitable, and operates as estoppel against the asserted right. This disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes, the making of substantial improvements to the land, and other causes, for where the court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.

The court also relied on *Sanders* v. *Flenniken*, 180 Ark. 303, 21 S.W.2d 847 (1929):

> [W]hen the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known to him were such as to put the duty of inquiry upon a man of ordinary intelligence.

The chancellor noted that appellant made no attempt to find out what property, if any, her father owned at his death. He

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[1] Because estoppel was not pled and because we believe the chancellor used the word only in the sense that the doctrine of laches is said to be "a species of estoppel," *see, e.g., Beshear* v. *Ahrens*, 289 Ark. 57, 709 S.W.2d 60 (1986), and *Franklin* v. *Hempstead County Hunting Club*, 216 Ark. 927, 228 S.W.2d 65 (1950), we do not separately address the issue. The chancellor was probably also influenced by language in our decision in *Morgan* and that of the supreme court in *Ueltzen*, which lump the two concepts together with adverse possession.

held that she was chargeable with knowledge of her father's interest in the land because "ordinary inquiry would have given her actual knowledge." Under the exact circumstances presented we cannot agree that Mitchell's claim was barred by laches. In determining whether the doctrine is applicable, all the facts and circumstances of the case must be considered. *See Inman, supra*; *Ueltzen, supra*. She was between nine and thirteen years of age when she moved with her mother from the farm, and at that time her father owned no interest in the property. The chancellor found that she did not know where the property was, and this finding is supported by the evidence. She has lived in Memphis since 1949. We can understand her apparent failure to inquire of her father about the extent of his property when she visited him in St. Louis in 1960. The apparently collusive deed executed by Roxie and Alfred Young is another factor weighing against the application of the doctrine of laches. *See Inman* v. *Quirey*, 128 Ark. 605, 194 S.W. 858 (1917). We are persuaded that the doctrine should not be applied in the case at bar.

Ueltzen and *Sanders* involved factors not present here. In *Ueltzen*, the court noted that the out-of-possession cotenants had visited the property and had known that valuable improvements were being made for some thirty years and yet "sat idly by and made no claim." In *Sanders*, it appears that all of the out-of-possession cotenants resided near the subject property. Some of them lived on the property at the time it was sold at foreclosure sale in 1907. In 1922, they discussed their possible interest in the land with a lawyer, but delayed bringing suit until 1925. In the case at bar, it is undisputed that appellant brought suit promptly upon learning that she might have an interest in the St. Francis County property.

Our conclusion is that appellant's claim is not barred by adverse possession, laches, or estoppel and we reverse and remand.

Reversed and remanded.

COOPER, J., agrees.

CORBIN, C.J., concurs.

Inez EFIRD *v.* Hallie EFIRD, Et Al.

CA 89-253 791 S.W.2d 713

Court of Appeals of Arkansas
Division II
Opinion delivered June 20, 1990

Fenton Stanley, for appellant.

Chris E. Williams, for appellees.

MELVIN MAYFIELD, Judge. On November 10, 1987, Inez

Efird filed suit against her husband, Hallie Efird, and his children by a previous marriage, Melvin Efird and Sandra Jean Mills. In her complaint Inez alleged that in December of 1973 her husband had conveyed certain real property in Malvern, Arkansas, to his two children without her knowledge in a fraudulent attempt to deny her rights to the property. She asked that the deeds be set aside and canceled.

After answers were filed by Hallie, his children and their spouses, who were also made parties, the case came on for trial in November of 1988. The chancellor held that Inez had failed to prove the allegations of her complaint, and it was dismissed. Inez has now appealed to this court.

It is undisputed that on December 27, 1973, Hallie Efird, accompanied by the appellant, obtained a marriage license. Later that day, Hallie executed a warranty deed for no money consideration conveying four lots in Malvern to the appellees Melvin Efird and Sandra Mills, reserving a life estate to himself. On December 28, 1973, Hallie Efird executed a quitclaim deed to the same property to his children, in consideration of the sum of $1.00, for the purpose of correcting the December 27 deed, again reserving a life estate to himself. Then on December 29, 1973, appellant and Mr. Efird were married in the home he had built on the property conveyed to his children.

Appellant and Hallie lived in the home together until 1986 when he went to a nursing home and appellant remained in the home alone. Hallie Efird died on March 8, 1989, before the record on appeal was filed, and the trial court ordered that the case not abate but proceed by the surviving parties in accordance with Ark. R. Civ. P. 25(a)(4).

The appellant, Inez Efird, testified at trial that before she and Hallie were married he told her he was going to build them a house. It was built on his property and finished before they got married. Appellant testified that she helped pick out the paneling, curtains, and plan the kitchen. She testified that Hallie got a loan from a bank in Malvern on which he made payments of $81.00 per month, and the payments continued after their marriage. She said she knew nothing about the deeds to Hallie's children when the marriage took place.

In September 1986, Hallie was seriously burned. Appellant testified that when he began to recover, she asked him if she would have a place to live if something happened to him, and he said, "No, you'll have to get on welfare, or your son'll have to take care of you." She said he did not tell her why, but later, when he went to the nursing home and she was trying to get him on Medicaid, she went to the courthouse and found out what he had done. Her name was not on anything, and she realized for the first time that he made the deeds to the house the same day they applied for their marriage license. She testified that she just wants a place to live; she has lived in the house for fifteen years; and she feels like it is her home.

Appellee Melvin Efird testified he knew about the deeds his father made; that he was aware his father was going to transfer the property before he married Inez; that his father told him that because of his other marriage, it was his intention to leave his property to Melvin and his sister; and Melvin felt that before his father got married he took care of things just exactly the way he wanted. He said his father said he did not want anyone other than his children to have his property, but as far as he knew, it was after his father was burned that his father told Inez about the December 1973 deed.

Appellant argues that the trial court erred in ruling she was not entitled to have the deeds to the homeplace set aside, canceled, reformed or modified, or to have the grantees hold the property in trust to protect her rights. She argues that the deeds, if left standing, would deprive her of that which an intended wife is reasonably and lawfully expected to receive by reason of marriage.

In *West* v. *West*, 120 Ark. 500, 179 S.W. 1017 (1915), the Arkansas Supreme Court set out the following general rule:

> The general rule is that if a man or woman convey away his or her property for the purpose of depriving the intended husband or wife of the legal rights and benefits arising from such marriage, equity will avoid such conveyance or compel the person taking it to hold the property in trust for or subject to the rights of the defrauded husband or wife.

120 Ark. at 504. In that case, however, the court reversed the trial

court's setting aside of a deed from J.L. West to his children by a prior marriage because, unlike the instant case, there was no evidence from which it could be inferred that Mr. West contemplated marriage to the appellee at the time he deeded his property away.

In *Roberts* v. *Roberts*, 131 Ark. 90, 198 S.W. 697 (1917), the widow of Thomas Roberts filed suit to set aside a deed her husband had executed on the day before their marriage. The deed conveyed property without consideration, or without adequate consideration, to a young man that Thomas had reared but had not legally adopted. The chancellor found against the appellant. Our supreme court stated there was no intimation of undue or improper influence over Mr. Roberts to induce execution of the deed, but it was a deliberate act prompted by affection for the boy he had reared. After quoting the language we set out above from *West* v. *West*, the court said:

> Applying the doctrine of that case to the facts of this, we have concluded that the chancellor's finding is contrary to the preponderance of the evidence, and that the deed in question was executed for a grossly inadequate consideration and for the purpose of defeating the dower right which otherwise appellant would have had.

131 Ark. at 96.

The *West* rule was again followed in *Harrison* v. *Harrison*, 198 Ark. 64, 127 S.W.2d 270 (1939). There the appellee and William Harrison were married in March 1927. William had been married twice before. On March 26, 1927, a few hours prior to his marriage to the appellee, he conveyed by deed certain of his property to his children by his first wife. The appellee and William then occupied the place as a home for nearly ten years; she and William were occupying the place as a home at the time of his death; during the time they occupied the home, he had exclusive control of the land and managed it as the owner; and there was no evidence the appellee knew anything about the deed until after William's death. The chancellor held the appellants, who were the children of William and his first wife, took no title to the land "that would exclude the widow of her dower and homestead," and the Arkansas Supreme Court affirmed citing

West v. *West* and *Roberts* v. *Roberts*. The court in *Harrison* said:

> The law is well settled in this state that if, shortly before marriage, the future husband conveys away his real estate, without the knowledge of his betrothed, the courts will set aside such conveyance.

198 Ark. at 67.

Likewise, in *Wilhite* v. *Wilhite*, 242 Ark. 705, 415 S.W.2d 44 (1967), the line of cases resulting from *West* was again followed. There Fred Wilhite executed a deed on April 24, 1944, to the appellees, his children by a former marriage. On May 4, 1944, Mr. Wilhite married the appellant and they lived on the land until his death, after which appellant remained until the house burned down. The appellees asked for a declaratory judgment holding that appellant had no interest in the property, and the trial court granted that request. On appeal, our supreme court reversed holding appellant was defrauded of her marital right by her husband. The court, citing *West* and *Harrison*, stated:

> There can be no doubt that the rule announced should apply in this case. Not only did Mr. Wilhite fail to tell appellant he had deeded away the property ten days before they were married, but he apparently misled her into thinking otherwise before and after the marriage.

242 Ark. at 707.

The appellees say that the burden of proof is on the party alleging a fraudulent conveyance, and that fraud must be proved by clear and convincing evidence. It is true that our cases have said this. *See Clay* v. *Brand*, 236 Ark. 236, 365 S.W.2d 256 (1963). In that case the court also stated that two rules of law with respect to proof of fraud had been developed with reference to written instruments. One, the ordinary rule which requires proof of fraud by a preponderance of the evidence and, two, the stricter rule which requires proof of fraud by a preponderance of the evidence which is clear and convincing. The court said the "clear and convincing" language stemmed from the line of cases which require clear and convincing proof to cancel or reform a solemn writing because of fraud, accident, or mutual mistake. However,

regardless of the standard of proof required, we think the chancellor's failure to set aside the deeds from Hallie Efird to his children by a former marriage is clearly erroneous.

It is undisputed that Hallie Efird deeded the property away on the very day he and appellant applied for a marriage license; two days later they married and lived together on the property until he entered a nursing home thirteen years later; the first time appellant knew of the December 1973 deed was when Mr. Efird was seriously burned in 1986. No one disputes the statement in Hallie's deed of December 27, 1973, that: "There was no money consideration herein." Moreover, Melvin Efird testified his father told him it was his intention to leave his property to Melvin and his sister; and that his father did not want anyone other than his children to have his property. These facts bring this case squarely within the rule of *West* and the cases which have followed that decision. Apparently, *West* and its progeny were based upon constructive fraud. In *Lane* v. *Rachel*, 239 Ark. 400, 389 S.W.2d 621 (1965), the Arkansas Supreme Court found constructive fraud and reversed the trial court's decision. Constructive fraud was said to be "a breach of legal or equitable duty" and that "neither actual dishonesty of purpose nor intent to deceive" was an essential element of such fraud. *See also Davis* v. *Davis*, 291 Ark. 473, 725 S.W.2d 845 (1987), where the court said, "[w]e have many times held that there may be a constructive fraud even in the complete absence of any moral wrong or evil intention." 291 Ark. at 476.

The record reflects that at the conclusion of the appellant's case in chief, the appellees' moved to conform the pleadings to the appellant's testimony that "I do not seek nothing more than a life estate, what Hallie Efird had in the said property." The motion was granted by the court and appellant does not argue on appeal that this should not be the limit of her recovery.

On appeal, chancery cases are tried de novo and the usual practice is to end the controversy by final judgment in the appellate court or reverse with directions for the chancellor to enter a final decree. *Wilborn* v. *Elston*, 209 Ark. 670, 191 S.W.2d 961 (1946); *Fish* v. *Bush*, 253 Ark. 27, 484 S.W.2d 525 (1972).

Based on the law discussed above and the undisputed facts in evidence, we reverse and remand for entry of judgment, consis-

tent with this opinion, granting the recovery as limited by the trial court's action noted above.

JENNINGS and ROGERS, JJ., agree.

Craig KENNEDY *v.* STATE of Arkansas

CA CR 89-258 789 S.W.2d 746

Court of Appeals of Arkansas
En Banc
Opinion delivered June 20, 1990

Larry Horton, for appellant.

No response.

PER CURIAM. Appellant's brief was due to be filed in this Court on November 14, 1989. On November 21, 1989, we granted appellant a 30-day extension to file his brief. As of this date, June 20, 1990, appellant has not filed a brief with this Court.

On January 11, 1990, the Clerk of this Court wrote a letter to appellant's counsel of record, Mr. Larry Horton, Route One, Bismarck, Arkansas, 71929, inquiring as to the status of this case and requesting a response within seven days. No response by Mr. Horton was received. On April 20, 1990, the Clerk of this Court again wrote Mr. Horton to inquire of the status of the case and to advise him of possible sanctions if he did not respond within seven days. This Court has not received a response to this inquiry.

According to our records, appellant's counsel, Larry Horton, was apparently retained by appellant rather than appointed by the Court. Mr. Horton has neither responded to any of this Court's written inquiries, nor has he filed a brief on behalf of the appellant. No further motions for extensions of time for the filing of a belated brief have been filed.

Although Ark. Sup. Ct. Rule 10 provides for dismissal of civil cases where no brief is filed, there is no corresponding rule in criminal cases. Therefore, we allow appellant until July 5, 1990, to file a brief. Appellant may retain new counsel if he wishes, or, if appellant now believes himself to be indigent and therefore unable to afford retained counsel, he may apply for appointment of counsel by filing the appropriate documents with the Clerk of this Court. If no brief is filed within the period allowed by this *per curiam*, either by present counsel, new counsel, or by the appellant *pro se*, this appeal will be dismissed.

The Clerk of this Court is directed to serve a copy of this *per curiam* on appellant; appellee; the sureties on the appellant's bond, Sidney and Minola Kennedy, 410 S. New Orleans Street, Brinkley, Arkansas, 72021; and the Arkansas Supreme Court Committee on Professional Conduct.

Motion denied.

Ellis WILLIAMS *v.* LUFT CONSTRUCTION COMPANY

CA 90-202 790 S.W.2d 921

Court of Appeals of Arkansas
En Banc
Opinion delivered June 20, 1990

E.W. Brockman, Jr., for appellant.

Ralph Wilson and *William H. Edwards, Jr.*, for appellee.

PER CURIAM. The appellant in this workers' compensation case has filed a motion for rule on the clerk. His appeal is from an opinion of the Workers' Compensation Commission entered February 6, 1990. The record was tendered on May 7, 1990, but the Clerk of the Supreme Court and the Court of Appeals refused to docket the case because the record was submitted too late for filing.

Rule 5 of the Arkansas Rules of Appellate Procedure requires that the record be filed and docketed within 90 days of the filing of the first notice of appeal, unless an extension is granted by the trial court. No extension was granted in the case at bar, and the appellant's first notice of appeal was not received by the Commission until March 28, 1990, more than 30 days after the Commission's order of February 6, 1990. *See* Ark. R. App. P. 4 (a). The appellant does not contend that March 28, 1990, was within the time allowed for filing a notice of appeal, but asserts

that the notice of appeal was mailed to the Commission on February 15, 1990, in a timely manner, but was apparently lost in the mail and not received by the Commission. The appellant mailed copies of the notice of appeal to the attorneys for the appellees on February 15, 1990, as well, and has submitted affidavits executed by those attorneys showing that they received their copies of the notice of appeal in due course of the mail; one affidavit shows that a copy was received on February 16, 1990, the day after it was mailed. The appellant has also submitted an affidavit to show that the Commission accepted a duplicate copy of his notice of appeal, received March 28, 1990, as timely filed. He argues that the notice of appeal should be held to have been timely filed because its loss in the mail constituted an unavoidable casualty.

It is clear that the appellant's notice of appeal was mailed to the Commission in a timely manner and that, but for some unforeseeable circumstance, it would have been received by the Commission well within the period allowed for timely filing. Although we are not unsympathetic to the appellant's dilemma, we nevertheless find no error on the part of our clerk because the timely filing of a notice of appeal is essential to our jurisdiction. *Blevins* v. *UIS*, 29 Ark. App. 102, 780 S.W.2d 584 (1989). This is not a procedural rule but is instead a jurisdictional one, and although a person can consent to jurisdiction over his person, jurisdiction cannot otherwise be conferred by consent. *Id.* This rule applies to appeals from the Workers' Compensation Commission, *Lloyd* v. *Potlatch Corp.*, 19 Ark. App. 335, 721 S.W.2d 670 (1986), and the rule of unavoidable casualty does not apply to failure to file a timely notice of appeal. *Burris* v. *Burris*, 278 Ark. 106, 643 S.W.2d 570 (1982); *see LaRue* v. *LaRue*, 268 Ark. 86, 593 S.W.2d 185 (1980); *City of Hot Springs* v. *McGeorge Contracting Co.*, 260 Ark. 636, 543 S.W.2d 475 (1976). Therefore, because the appellant's notice of appeal was not timely filed within thirty days of the Commission's opinion, we do not have jurisdiction to hear the appeal.

Motion denied.

Rita Rose HODGES *v.* BAPTIST MEDICAL SYSTEMS, Et Al.

CA 89-496 790 S.W.2d 922

Court of Appeals of Arkansas
Division II
Opinion delivered June 27, 1990

Philip M. Wilson, for appellant.

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

GEORGE K. CRACRAFT, Judge. Rita Rose Hodges appeals from an order of the Arkansas Workers' Compensation Commission denying her temporary total disability benefits resulting from an injury sustained while in the employ of appellee Baptist Medical Systems. She contends that the Commission improperly applied the law to the facts in denying her those benefits. We agree and reverse the decision of the Commission.

On January 9, 1987, appellant sustained an accidental injury to her back while working at the appellee medical facility. She was off work for a period of six days. After she returned to work, she continued having problems with her back until September 14, 1987, when her doctor advised that she be taken off work due to her initial back injury. She did not return to work until October 5, 1987. The Commission awarded her medical expenses and temporary total disability benefits for the period that she was unable to work in September and October, but denied her any disability benefits for the six-day period following the injury in

January. No one contends that the second period of disability did not result from a mere recurrence of the injury suffered in January of 1987, or that it resulted from an aggravation or a new injury. The sole issue presented by this appeal is whether the Commission erred in holding that appellant was not entitled to temporary total disability benefits for the initial six-day period under Ark. Code Ann. § 11-9-501(a) (1987), which provides as follows:

> 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 weeks, compensation shall be allowed beginning the first day of disability, excluding the day of injury.

In *Pinkston* v. *General Tire & Rubber Co.*, 30 Ark. App. 46, 782 S.W.2d 375 (1990), this court had occasion to address the construction to be given this section. There, we noted that the purpose of the waiting period is to prevent malingering. According to 11 W. Schneider, *Workmen's Compensation Law* § 2320 (1957), the generally accepted purpose underlying the waiting period in workers' compensation legislation is "to prevent workmen, who are so inclined, from taking advantage of a slight or imaginary strain, as an excuse for obtaining a few days vacation on half or two-thirds pay."

In *Pinkston*, the worker likewise sustained two episodes of disability as the result of a single injury. The first period of disability was in excess of the two-week waiting period provided by our statute, but the second was not. In *Pinkston*, we rejected the contention that this section imposed on the worker a second waiting period for another episode of disability resulting from the same injury. We said:

> 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 disabil-

> ity; 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.

30 Ark. App. at 52, 782 S.W.2d 378-79.

We find no reason why a different result should be reached where, as here, the statutory two-week waiting period is satisfied by a second episode of wage-loss disability rather than by the first. All of appellant's disability was the natural and probable consequence of a single injury. Our statute provides that compensation not be allowed for the first seven days of disability resulting from an injury; however, if a disability extends for a period of two weeks, compensation should be allowed beginning the first day of disability, excluding the day of injury. On the facts of this case, we conclude that when the recurrence resulted in disability that extended beyond the required two-week period, appellant met her waiting period requirement and was entitled to compensation for all wage-loss disability suffered, "beginning the first day of disability, excluding the day of injury." To adopt the interpretation applied by the Commission would not be in furtherance of the purposes for which that section was enacted, and would be contrary to our rule that this remedial legislation be construed liberally in favor of the claimant. *See Northwest Tire Service* v. *Evans*, 295 Ark. 246, 748 S.W.2d 134 (1988); *Pinkston* v. *General Tire & Rubber Co.*, *supra.*

This cause is reversed and remanded to the Commission for further proceedings not inconsistent with this opinion.

COOPER and MAYFIELD, JJ., agree.

Donald MONTGOMERY *v.* DELTA AIRLINES

CA 89-292 791 S.W.2d 716

Court of Appeals of Arkansas
Division II
Opinion delivered June 27, 1990

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

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

MELVIN MAYFIELD, Judge. The issue in this appeal from a decision of the Workers' Compensation Commission is the amount of the weekly benefits the employee is entitled to as a result of his permanent total disability. The resolution of this issue involves the distinction between the terms "time of injury" and "time of accident."

Appellant Donald Montgomery suffered a compensable back injury on May 8, 1979. He received medical treatment, returned to his regular job and continued to work until he became totally disabled on March 1, 1983. In an opinion issued on April 8, 1987, the appellant was found by the administrative law judge to have become permanently totally disabled on March 1, 1983, and

to be entitled to weekly benefits at a rate of $112.00. Appellant then requested a modification to $154.00 per week based on the maximum allowable at the time he became unable to work. On August 16, 1988, the administrative law judge issued an order which stated:

> It is clear, based upon the evidence in this record, that the claimant in the present claim suffered a disability on March 1, 1983, as a result of his accidental injury of May 8, 1979. On March 1, 1983, the maximum weekly benefits payable to the claimant was $154.00. The language of the provisions of the Arkansas Workers' Compensation Act addressing the questions of the average weekly wage, disability, and injury is not ambiguous.
>
> The Opinion and Award previously filed in this claim on April 8, 1987, is herein modified pursuant to Section 26 of the Arkansas Workers' Compensation Act to reflect that the correct and proper weekly compensation benefits payable to the claimant is $154.00, in accordance with Section 10(a)(B) of the Workers' Compensation Act.

On appeal, the Commission reversed (with one Commissioner dissenting), stating that although "an unambiguous statute is to be enforced literally, we find that the statutory scheme as a whole is ambiguous." After discussing the proposition of making distinctions between the date of an "accident" and the date of an "injury," the Commission stated:

> We are persuaded that the general rule of prospective application requires us to compute the benefits as of the date of the accident. If we accepted the argument that the disability date governs because the payments are intended to replace lost wages, there would be problems not only with premium calculations but also with claimants who leave their employment between the two dates. If a worker obtains a better paying job and then becomes disabled as a result of the compensable injury, he might contend that the first employer is required to pay benefits based upon the second company's higher wage rate. On the other hand, respondents might argue that a claimant who becomes

> unemployed and is not earning wages at the time of his physical incapacitation is not entitled to any benefits at all since there are not wages to replace. Surely, the legislature did not intend any of these untoward results.

The present Workers' Compensation Law comes from Initiated Act No. 4, adopted at the General Election in November of 1948, and from the amendments to that Act. Section 12 of that Act was compiled as Ark. Stat. Ann. § 81-1312 (Repl. 1976) [now Ark. Code Ann. § 11-9-518 (1987)], and provides in pertinent part:

> 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 work week in the employment.

Section 10 of Initiated Act No. 4, compiled as Ark. Stat. Ann. § 81-1310(a) (Supp. 1985) [now Ark. Code Ann. § 11-9-501 (1987)], provides (as amended by Act 290 of 1981) in pertinent part:

> (a) Disability. 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 (9th) 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.
>
> Compensation payable to an injured employee for disability shall not exceed sixty-six and two-thirds percent (66 ⅔%) of the employee's average weekly wage, with a Fifteen Dollar ($15) per week minimum, subject to the following maximum:
>
> (A) . . . .
>
> (B) For a disability occurring on or after March 1, 1982, the maximum weekly benefits payable shall be One Hundred Fifty-Four Dollars ($154).

We note that Subsection (B) of Ark. Stat. Ann. § 81-1310(a) has undergone numerous amendments. Apparently, the weekly benefits of $112.00, as first allowed by the law judge, were based on a rate fixed by a 1979 amendment. *See* Ark. Stat. Ann. § 81-1310(a)(B)(Supp. 1979).

Our case law has made a distinction between the date of "accident" and the date of "injury." *See Donaldson* v. *Calvert-McBride Printing Company*, 217 Ark. 625, 232 S.W.2d 651 (1950), in which the court was considering a question of when the statute of limitations began to run. It reasoned as follows:

> [A]ppellees, in effect, argue that "time of the injury" as provided in the act is synonymous with "time of accident." We think there is a clear distinction between an accident and an injury. The injury is the result of the accident. An accident often, at the time of its happening, produces a compensable injury, but this is not always true.

217 Ark. at 629-30. Furthermore, there is a statutory distinction between an injury and a disability. Ark. Stat. Ann. § 81-1302 (Repl. 1976) [now codified as Ark. Code Ann. § 11-9-102 (1987)] provides the following definitions:

> (d) "Injury" means only accidental injury arising out of and in the course of employment, including occupational diseases . . . .
>
> (e) "Disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury.
>
> (f) . . . .
>
> (g) . . . .
>
> (h) "Wages" means the money rate at which the service rendered is recompensed under the contract of hire in force at the time of the accident, ...

And, in *Cornish Welding Shop* v. *Galbraith*, 278 Ark. 185, 187, 644 S.W.2d 926 (1983), the Arkansas Supreme Court said, "Arkansas is an 'injury state' because we have long interpreted the applicable statutes as meaning that the date of accident and the date of injury are not necessarily the same."

The case of *Donaldson* v. *Calvert-McBride Printing Company*, *supra*, held that time of injury means a compensable injury, and that an injury does not become compensable until the employee suffers a loss in earnings. This court, followed the rule of *Donaldson* in *Shepherd* v. *Easterling Construction Company*, 7 Ark. App. 192, 646 S.W.2d 37 (1983), in *Arkansas Louisiana Gas Company* v. *Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983), and in *Calion Lumber Co.* v. *Goff*, 14 Ark. App. 18, 684 S.W.2d 272 (1985) (where we also relied upon *Cornish Welding Shop* v. *Galbraith*, *supra*). In *Grooms* we said that "the Statute of Limitations provided in [Ark. Stat. Ann] § 81-1318(a) [now Ark. Code Ann. § 11-9-702] does not begin to run until the true extent of the injury manifests *and* causes an incapacity to earn the wages which the employee was receiving at the time of the accident, which wage loss continued long enough to entitle him to benefits under § 81-1310." 10 Ark. App. at 98-99.

Referring back to Ark. Stat. Ann. § 81-1310(a)(B) (Supp. 1985), we see that it provides, "For a disability occurring on or after March 1, 1982, the maximum weekly benefits payable shall be One Hundred Fifty-Four Dollars ($154)." Therefore, the claimant here is entitled to the maximum weekly benefit rate in effect at the time the disability occurred. This rate, however, is based on the wages being earned on the date of the accident. The record shows that on May 8, 1979, the date of the accident, appellant was earning $500.00 per week. Under Ark. Stat. Ann. § 81-1310(a), the compensation shall not exceed 66⅔% of the employee's average weekly wage, subject to the applicable maximum. Taking the $500.00 average weekly wage, we find that 66⅔% of that average would exceed the $154.00 maximum allowed, so appellant is only entitled to the $154.00 maximum.

When the maximum allowed at the time of the injury (meaning when disability occurs, *see* Ark. Stat. Ann. § 81-1310) is applied to the wages being paid at the time the accident occurs (*see* Ark. Stat. Ann. § 81-1312), the problems noted as persuasive in the Commission's opinion disappear. This is best demonstrated by the following quotation from the dissenting Commissioner's opinion:

> The majority has misconstrued claimant's position in this case. Claimant is not arguing that benefits are to be

computed on the basis of the circumstances in existence on the date of the injury. The average weekly wage and the weekly benefit rate are computed and become fixed at the time of the accident. Ark. Code Ann. §§ 11-9-102(8); 11-9-518; 11-9-519(a); 11-9-520. Claimant argues only that he is entitled to the cost of living increase in the maximum weekly benefit rate which was in effect on the date the accident resulted in a compensable injury (disability).

Since the average weekly wage and the weekly benefit rate remained unchanged and unaffected by developments between the date of the accident and the date of the injury, and since insurance premium computations are generally based on the wages paid a claimant for covered employment, *Hart's Exxon Service Station* v. *Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ark. App. 1980), the anticipated problems discussed in the majority opinion simply would not occur.

Nor do we have a problem with retroactive application of the statute. Claimant does not claim to be entitled to the increases in the maximum weekly benefit rate enacted since he became disabled. He merely wants the maximum weekly benefit rate in effect on the date he became disabled.

The decision of the Commission is reversed and the case is remanded for an order to be entered in keeping with this opinion.

Reversed and remanded.

JENNINGS and ROGERS, JJ., agree.

Judy Lynn (Hollowell) BENNETT *v.* Michael Lynn HOLLOWELL

CA 89-485 792 S.W.2d 338

Court of Appeals of Arkansas
Division I
Opinion delivered June 27, 1990

Herrod, McGough & Herrod, for appellant.

Richard L. Proctor, for appellee.

JUDITH ROGERS, Judge. The appellant, Judy Lynn Bennett, appeals from the chancellor's decision denying her motion for a change of custody. The parties were divorced by decree of October 10, 1984, wherein appellant was awarded custody of their son and daughter, Tommy, age three years, and Jody, then six months. By an order dated September 22, 1987, custody of the children was removed from appellant and placed with appellee, Michael Lynn Hollowell, and his wife, Mildred. The record reflects that this action was based on evidence that appellant was living with a man, Terry Dildine, to whom she was not married, and that the couple had shown sexually explicit photographs to the young children. In his findings, the chancellor also noted that there was evidence that Mr. Dildine had a drinking problem. Appellant was granted rights of visitation with the condition that she have no male overnight guests during visitation.

Appellant's first attempt to regain custody was denied by the chancellor in March of 1988. Upon appellee's petition for contempt, the chancellor entered an order on June 22, 1988, restricting appellant's visitation to her parents' home on a finding that appellant had violated the previous order by having Mr. Dildine spend the evening at her home during periods of visitation.

In November of 1988, appellant filed the present action seeking a change in custody. As changed circumstances, appellant alleged that she had married Mr. Dildine, that no further instances of showing graphic photographs to the children had

occurred, and that the children had been endangered when appellee's wife, Mildred, had driven with the children while intoxicated. After a hearing held on May 31, 1989, the chancellor denied appellant's motion. It is from this decision that appellant brings this appeal.

Appellant raises the following two issues for reversal:

I

THE TRIAL COURT ERRED BY FAILING TO CONSIDER THAT THE APPELLANT PROVED A CHANGE IN CIRCUMSTANCES IN THAT SHE HAD REMARRIED AND HAD A SATISFACTORY HOME ENVIRONMENT, ALL FOR THE BEST INTERESTS AND SAFETY OF THE TWO MINOR CHILDREN.

II

THE TRIAL COURT ABUSED ITS DISCRETION, BASED ON THE CONFESSED ALCOHOLIC STEP-MOTHER'S STATEMENTS AND HER CONVICTION FOR D.W.I. WITH THE CHILDREN IN THE AUTOMOBILE, BY SAYING THAT HE WAS SATISFIED IT WOULD NOT BE REPEATED.

At the hearing on this matter, the appellant testified that she had married Mr. Dildine in June of 1988, and that he had a good relationship with the children. She said that her husband still drinks a little, but that he does not consume alcohol in the presence of the children. Appellant related that she was present in court when Mildred pled guilty to driving while intoxicated. She said that she was upset with appellee for allowing Mildred to drive in that condition with the children, and that she was fearful for the children's safety. She further testified that she loved her children, that she takes them to church, and that she takes good care of them. She also said that her husband was not in need of treatment for his previously identified alcohol problem.

Terry Dildine, appellant's husband, testified that he was quitting drinking and had not had a drink in two weeks. He referred to himself as a "minor self drinker," and that he was weaning himself off alcohol. He said that the children were bright

and well-behaved, and that he wanted them in their custody as he felt they would be more secure. He also testified that he had not viewed a pornographic movie in a year.

Bobby Smith, a deputy sheriff in Woodruff County, testified that on October 31, 1988, he responded to a call and found Mildred with the children in her car that was backed off the road and stuck in mud. He said that Mildred smelled strongly of alcohol and that she stumbled and almost fell when getting out of the car. He related that Mildred failed the sobriety tests given, and that, in his opinion, she was intoxicated.

Mildred Hollowell also testified. She said that Tommy and Jody had lived with her and appellee for two and a half years. She related that when first placed in their custody they were shy and withdrawn, and that it had taken them a year to adapt to the new arrangement. She said that they were now well-adjusted and happy, and that Tommy was on the honor roll at school. In this regard she said that she felt that another change of custody would be detrimental to the children. Mildred admitted that she was an alcoholic, but that prior to the incident on October 31st, she had been sober for seven years. She testified as to problems she had been having with her own two daughters as precipitating the recent drinking episode. She testified that she was regularly attending meetings of Alcoholics Anonymous, while appellee attended Alanon, and that she had experienced no further problems with drinking. She also said that appellee was unaware of how much she had had to drink on the night in question. Speaking of appellee, she said he was an attentive father whose children came first, and that the children worshipped him.

In his testimony, appellee also noted the difficulty the children initially experienced when placed in his custody, and said he shared the concerns of Mildred regarding another change of custody. He said that he was embarrassed and humiliated about Mildred's D.W.I., and realized the gravity of her problem. He admitted that he had been wrong to allow her to drive that night, but that he was not fully aware of her condition. He said that he had offered to help Mildred with her problem, and that he was going to Alanon meetings. He also stated that following the incident he had a long talk with Mildred, and had told her that she could not continue to drink. He further testified that Mildred

knew she had made a mistake and that he was confident it would not happen again.

The chancellor issued a memorandum opinion on June 14, 1989. In the opinion, he noted, among other things, that he considered the relationship between parent and child, as revealed by the parents' past conduct and by the strength and sincerity of the parents' desire to have custody. He said that he also deemed important the children's need for stability and continuity in their relationships with their parents. While he could not excuse Mildred's conduct, the chancellor determined that the October 31, 1989, incident was not a sufficient reason to change custody, as he was satisfied that it would not be repeated. Ultimately, he decided that a change of custody was not in the children's best interest.

As her first point, appellant argues that the chancellor erred by not considering the changed circumstances of her marriage to Mr. Dildine and evidence indicating that no more explicit photographs had been shown to the children. Essentially, she contends that the chancellor ignored this evidence and the steps she had taken to address these problems, which had contributed to her loss of custody. Secondly, she argues that the chancellor's finding that he was satisfied that the incident involving Mildred and the children would not be repeated represents an abuse of discretion.

Although we review chancery cases *de novo*, we do not disturb the chancellor's findings unless they are clearly against the preponderance of the evidence. *Riddle* v. *Riddle*, 28 Ark. App. 344, 775 S.W.2d 513 (1989). Since the question of the preponderance of the evidence turns largely on the credibility of witnesses, the appellate court defers to the superior position of the chancellor, especially so in those cases involving custody. *Hoing* v. *Hoing*, 28 Ark. App. 340, 775 S.W.2d 81 (1989). Custody awards are not made or changed to gratify the desires of either parent, or to reward or punish either of them. *Watts* v. *Watts*, 17 Ark. App. 253, 707 S.W.2d 777 (1986). As in all custody cases, the primary consideration is the welfare and best interest of the children involved; all other considerations are secondary. *Hoing* v. *Hoing*, *supra*. While the chancery court retains continuing power over the matter of child custody, it does not follow that a change in that

status should be made without proof of a subsequent material change in circumstances affecting the welfare of the children involved. *Thigpen* v. *Carpenter*, 21 Ark. App. 194, 730 S.W.2d 510 (1987).

When the chancellor first removed the children from appellant's custody, the decision was based on facts including the showing of sexually explicit photographs to the children, and overnight visitors with drinking involved. Appellant presented evidence attempting to give the appearance that the problems provoking her loss of custody had been rectified. However, it is evident from the chancellor's order that he did not consider the circumstances alluded to by appellant as being sufficiently material to warrant a change in custody. Conditions of life rarely remain constant. Thus, proof of changed circumstances alone does not ordinarily justify a change in custody. In order for custody to be changed, there must not only be proof of a *material* change in circumstances, but that proof must also be accompanied by evidence that the change would be in the child's best interest. Moreover, a material change of circumstances is a question of fact made by the chancellor who is often familiar with the parties, and how the change in circumstances presented affects the best interests of the children, which is the fundamental issue in custody cases.

Here, the testimony showed that appellant's marriage to Mr. Dildine occurred just five days after the order was entered restricting her visitation due to her having an overnight male guest in violation of the previous order. We believe the chancellor was justified in considering this violation and other past conduct, the timing of the marriage and the sincerity of the parties in making his decision. With the exception of the isolated instance of Mildred's D.W.I., there was no other evidence presented showing that custody with appellee had been detrimental to the children. We then cannot say that the lack of materiality found by the chancellor regarding the evidence of changed circumstances is clearly against the preponderance of the evidence.

We also cannot say that the chancellor's confidence that the unfortunate event involving Mildred would not be repeated was misplaced. The chancellor heard testimony as to both appellee and Mildred's recognition of her drinking problem, the firmness

of appellee in dealing with it, and the efforts both were making to combat it. Mildred testified that she had been sober for seven years prior to the incident, and had in the intervening months since then adhered to the treatment she was receiving. As this question involves primarily an assessment of credibility, we defer to the chancellor's superior position in making this determination. Based on our *de novo* review of the record, we cannot conclude that the chancellor's refusal to change custody is clearly erroneous.

Affirmed.

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

Tommy STAFFORD *v.* DIAMOND CONSTRUCTION CO., Et Al.

CA 90-153 793 S.W.2d 109

Court of Appeals of Arkansas
Opinion delivered June 27, 1990

Steve Festinger, for appellant.

Robert L. Henry III and *Walter A. Murray*, for appellees.

PER CURIAM. The appellant in this workers' compensation case petitioned the Workers' Compensation Commission for a change of physician. The petition was granted and a new physician was appointed by the administrative law judge (ALJ). Apparently dissatisfied with the ALJ's choice of physician, the appellant appealed to the full Commission contending that he never agreed to the procedure by which the new physician was selected by the ALJ. The Commission found that the appellant's counsel had agreed to the procedure and that the new physician had been properly selected, and the Commission affirmed the ALJ's decision. From that decision, the appellant brought this appeal. However, the appellees have filed a motion to dismiss the appeal, asserting that the order appealed from is not a final, appealable order. We agree, and we dismiss.

An order of the Workers' Compensation Commission is ordinarily reviewable only at the point where it awards or denies compensation; interlocutory decisions and decisions on incidental matters are not reviewable for lack of finality. *Mid-State Construction* v. *Sealy*, 26 Ark. App. 186, 761 S.W.2d 951 (1988). Here, the appellant obtained the relief he sought before the Commission, i.e., a change of physician, and we consider the dispute concerning the method by which the new physician was selected to be interlocutory and incidental in nature. Without expressing an opinion on the finality or appealability of an order denying a change of physician, we hold that, on these facts, the order granting a change of physician is not appealable by the petitioning party at this time. Therefore, we grant the appellees' motion and dismiss this appeal. The appellant's motion to supplement the record is mooted by this dismissal.

Dismissed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I dissent from today's per curiam opinion holding that a decision of the Workers' Compensation Commission granting a change of physicians is not an appealable order.

First, I point out that both the claimant and one of the employer's insurance carriers think that "this court should hold that an Order granting a change of physicians is an appealable

Order." In addition, the full Commission found that the appeal from the Administrative Law Judge's order changing claimant's physician was an appealable order.

In order to get the issue determined in this court, one of the employer's insurance carriers has filed a motion to dismiss the appeal but states in its motion as follows:

> Respondent No. 2 submits the better rule of law and the better interpretation of the law is to permit the appeal of an Order granting a change of physicians. To do otherwise would allow a claimant in a compensation case to obtain an Order from an Administrative Law Judge granting a change of physicians over the objection of respondents, embark upon and receive an extensive course of medical care, and respondents would never be able to obtain any review of the Order until a final appealable Order was subsequently entered into in the case long after the medical care had been rendered to claimant. This sequence of events would occur even though the entry of the Order granting change of physicians may have been clearly erroneous.

On the other hand, from the claimant's standpoint it is not hard to imagine a situation where the claimant needs the treatment of an expert physician to save the claimant's life. Assume that for some reason the Commission in good faith but with bad judgment decides that the claimant should not be permitted to change to the expert physician and that is not an appealable order. Assume further that the matter comes to this court on appeal after the general practitioner has allowed the claimant a 10% permanent partial disability and we, two years after the Commission refused to allow a change of physicians, decide the Commission was wrong. Assume also that we are right, the Commission was wrong, and the expert says it is too bad but you should have seen me two years ago.

Surely the liberal construction that everyone agrees the Compensation Act should receive in order to accomplish its humanitarian objectives should not be defeated by a narrow and technical devotion to the cant that an order of the Commission "is ordinarily reviewable only at the point where it awards or denies

compensation." In fact, this very court has announced that "a better definition of a final, appealable order in workers' compensation cases" is that "to be final the decree must also put the court's directive into execution, ending the litigation or a separable branch of it." *See Gina Marie Farms* v. *Jones*, 28 Ark. App. 90, 770 S.W.2d 680 (1989).

Thus, in the present case, the Commission has granted a change of physicians. That order has been put into execution and the claimant has now been given a new doctor. He wants to appeal that decision. Under the definition of an appealable order in *Gina Marie Farms* the claimant is entitled to appeal the Commissioner's order at this time and I would allow him to do so.

The per curiam of the majority worries about the merits of the appeal the claimant wishes to pursue; it thinks he asked for a change of physician which was granted; now he should not get to appeal that change just because he is dissatisfied with the new doctor. I, however, would decide the merits of the matter after the appeal is before us — not before it gets here.

ARKANSAS ELECTRIC ENERGY CONSUMERS *v.* ARKANSAS PUBLIC SERVICE COMMISSION

CA 90-276 791 S.W.2d 719

Court of Appeals of Arkansas
En Banc
Opinion delivered July 3, 1990

Kirkland & Ellis, by: *Stephen A. Herman*; and *Rose Law Firm, A Professional Association*, by: *Herbert C. Rule III* and *Stephen N. Joiner*, for appellant.

Friday, Eldredge & Clark, by: *Michael G. Thompson*; and *Mitchell, Williams, Selig & Tucker*, by: *Kent Foster* and *E.B. Dillion, Jr.*, for appellee Arkansas Power and Light Company.

Staff of the Arkansas Public Service Commission, by: *Gilbert L. Glover*, Staff Chief Counsel, for appellee Arkansas Public Service Commission.

PER CURIAM. On June 28, 1990, appellant, Arkansas Electric Energy Consumers (AEEC), a voluntary unincorporated association of large customers of appellee Arkansas Power and Light Company (AP & L), filed a Notice of Appeal with this Court, seeking review of certain actions of appellee Arkansas Public Service Commission (APSC). Appellant concurrently requested a stay of portions of the order appealed pending eventual resolution on the merits. Appellee AP & L, the moving party below, and appellee APSC, here to defend its order, filed their responses to appellant's stay request on July 2, 1990. The only other party below, the Arkansas Attorney General, also an appellee, has elected not to file with this Court any response to the appellant's stay request. While oral argument was requested, we

note that expeditious resolution of APSC appeals is required by Ark. Code Ann. Section 23-2-423(d) (1987) and observe that the parties filed excellent and comprehensive briefs. Therefore, we have elected to forego oral argument as all issues have been thoroughly treated to our satisfaction by the parties.

First, appellant requests that this Court stay that part of the APSC's order allowing AP & L to transfer management responsibility for its Arkansas Nuclear One (ANO) nuclear plants at Russellville to a sister management corporation, a move which was accomplished as of June 6, 1990. Second, appellant requests a stay of that part of the APSC's order allowing it to transfer its ownership interests in the Independence Steam Electric Station 2 (ISES 2) and the Ritchie 2 generating facilities, a transfer approved by all regulatory agencies except the Securities and Exchange Commission of (SEC), whose approval is expected momentarily. AP & L asserts, and appellants do not dispute the assertion, that it will close the sale immediately upon SEC approval.

Appellant contends that its members and consumers of AP & L will be irreparably harmed if the APSC's order is not stayed as requested. It claims that AP & L could lose control of ANO and that the APSC could lose jurisdiction over its operations and contends that the sale of ISES 2 and Ritchie 2 would be detrimental to it and other AP & L customers. Appellant claims it is likely to succeed on the merits and that any harm AP & L may suffer if the order is stayed would be minimal.

AP & L, on the other hand, claims that it will be harmed to the extent of nearly $2 million per month for each month the sale is delayed and claims it would lose a substantial amount of interest expense if it is unable to close the sale and pay off 14% bonds used to finance ISES 2. AP & L is joined in its position by the APSC, and both argue appellant's likelihood of success on the merits is slim.

All parties agree that the analysis to be applied in determining whether a stay should be granted is that set forth in *Corning Savings and Loan Association* v. *Federal Home Loan Bank Board,* 562 F. Supp. 279 (1983), which relied upon *Dataphase, Inc.* v. *C.L. Systems, Inc.*, 640 F.2d 109 (1981). Quoting *Dataphase*, the *Corning* opinion noted the factors to be

considered in determining the propriety of a stay:

> "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Systems, Inc.* v. *C.L. Systems, Inc.,* 640 F.2d 109, 113 (1981).

Corning at 281. *See Arkansas Public Service Commission* v. *Arkansas-Missouri Power Company,* 220 Ark. 39, 246 S.W.2d 117 (1952). In *Dataphase,* the Court observed: "[a]t base, the question is whether the balance of the equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." 640 F.2d at 113.

We observe that AEEC sought a stay before the APSC on virtually identical grounds and note that the APSC, which had heard all of the evidence below and is directed by the General Assembly to apply its particular expertise to these unique cases, denied a stay of its order. We are not at this juncture persuaded that decision was erroneous. We hold that appellant has not met its heavy burden of proof of its entitlement to a stay and accordingly deny the motion to stay the APSC's order.

■ Without belaboring all aspects of the voluminous pleadings and briefs filed herein, we observe that any harm AEEC may suffer if the APSC's order is not stayed is not quantifiable and is subject to some degree of conjecture. On the other hand, it is virtually undisputed that AP & L is incurring unreimbursed additional expenses of nearly $2 million per month because of the expiration of a contract to sell power from ISES 2, and that these expenses are highly likely to continue if the sale is not completed. The likelihood of success on the merits is difficult to assess in a case as complicated and voluminous as this. We note, however, that this Court's scope of review is narrowly defined and limited by Ark. Code Ann. Section 23-2-423(c)(3), (4), and (5) (1987), which leaves an appellant with a heavy burden on appeal. Finally, we are not at this juncture persuaded that the public interest would best be served if the order is stayed. Indeed, the order appealed from takes into account the public interest and has found it to be served by the sale of the plants and transfer of ANO management.

Because we cannot say at this time that appellant has met its burden, the motion for a stay is accordingly denied.

Denied.

MAYFIELD, J., concurs.

ESTATE OF Janice Parker HOUSTON *v.* Gary Clint HOUSTON

CA 90-108 792 S.W.2d 342

Court of Appeals of Arkansas
Division II
Opinion delivered July 5, 1990
[Rehearing denied August 22, 1990.]

Robert A. Newcomb, for appellant.

Howell, Price, Trice, Basham and Hope, by: *Dale Price*, for appellee.

JOHN E. JENNINGS, Judge. In this divorce case, after the wife's death, the chancellor set aside the decree and the parties' property settlement agreement, and redivided the parties' property. The wife's estate appeals, conceding that the court had the power to set aside the decree, but contending that the chancellor erred in his division of the parties' property. We agree, and modify the trial court's order.

Gary and Janice Houston were married in 1974 and separated in May of 1987. They had no children. Gary Houston filed

an action for divorce on June 9, 1987. About a month earlier, Alfred's Place Limited (apparently a limited partnership which owned a restaurant in the Turks and Caicos Islands), executed a promissory note, payable on demand to Janice Houston, in the amount of $20,000.00. On April 1, 1988, the appellee filed requests for production of documents and interrogatories seeking information about any agreements with or business interests in Alfred's Place on the part of his wife. The requests and interrogatories were never answered and no motion to compel was filed. On October 13, 1988, the parties entered into a written property settlement agreement which recited their intention to finally and fully settle all their property rights. Two days later, Janice Houston suffered a massive stroke and went into a coma; she never regained consciousness. On October 20, 1988, the court entered a decree of divorce which expressly incorporated the parties' property settlement agreement. The first paragraph of that agreement provided:

> Husband has since the time of the separation of the parties caused to be transferred to the wife in June,[1] 1987, $25,000.00 of marital funds. These funds shall be considered the separate property of the wife.

On October 29, 1988, Janice Houston died. On November 10, 1988, the appellee filed a motion to set the decree aside for fraud. The court conducted a hearing and on January 17, 1989, entered an order setting aside the divorce decree on the basis of fraud. In that order the court held "that the defendant is deceased and in no further need of marital property and that the retaining by defendant's estate her one-half interest in the tenancy by entirety real property is more than sufficient to meet the needs of the estate with the exception the plaintiff should have possession of the marital home until his death."

On February 23, 1989, the chancellor entered an order setting aside in turn his order of January 17. The February order recited that the court had no intention of setting aside the portion of the original decree which granted the divorce and had intended

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[1] This date is clearly wrong. The $25,000.00 was received by the wife at least as early as May 18, 1987.

only to set aside the property division portion of the decree. The February order also recited that the court had not yet made a decision on the property division and would take the matter under advisement.

On March 7, 1989, the chancellor entered a fourth order. In that order the bulk of the marital property[2] was awarded to appellee. The order recited that the property should be divided disproportionately based on the nine criteria set forth in Act 705 of 1979, as amended, codified at Ark. Code Ann. § 9-12-315 (Supp. 1989). That section provides in part:

> (a) At the time a divorce decree is entered: (1)(A) All marital property shall be distributed one-half (½) to each party unless the court finds such a division to be inequitable. In that event the court shall make some other division that the court deems equitable taking into consideration:
> (i) The length of the marriage;
> (ii) Age, health, and station in life of the parties;
> (iii) Occupation of the parties;
> (iv) Amount and sources of income;
> (v) Vocational skills;
> (vi) Employability;
> (vii) Estate, liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income;
> (viii) Contribution of each party in acquisition, preservation, or appreciation of marital property, including services as a homemaker; and
> (ix) The federal income tax consequences of the court's division of property.
> (B) When property is divided pursuant to the foregoing considerations the court must state its basis and reasons for not dividing the marital property equally between the parties, and the basis and reasons should be recited in the order entered in the matter.

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[2] Appellant estimates the disparity in the value of the property finally awarded at six to one in favor of the appellee, and as best we can tell from this record the estimate may be correct. The difference in dollar value of appellee's share, before and after the redivision, appears to be somewhere near $200,000.00.

The order also set forth as additional reasons for the disproportionate division the doctrine of unclean hands and the wife's lack of need of additional funds, due to her death.

It is apparent from the evidence admitted in the post-decree hearing that Janice Houston had, in May of 1987, made an interest free loan to Alfred Holzfeind. In return she received a demand note for $20,000.00, bearing no interest, together with a written option to buy 50% of the shares of Alfred's Place Limited. The option could only be exercised while she was employed at the restaurant, and therefore became valueless at her death. Mrs. Houston's will was also introduced. In it she left all shares she owned in, and notes due from, Alfred's Place Limited to Holzfeind.

Jack Lassiter, an attorney who had represented Janice Houston in the divorce, testified that during the discussions between the parties and their attorneys, Mrs. Houston stated that she had spent the $25,000.00 which her husband had given her to live on. Mr. Houston testified that he was aware that his wife's purpose in going to the Turks and Caicos Islands was to open a restaurant with Holzfeind. He testified that his wife agreed that he would receive credit for the $25,000.00 in any divorce settlement. An unsigned agreement to that effect was admitted into evidence. Appellee also testified that he "constantly" asked her during the settlement negotiations what had happened to the money and that his wife told him she had spent all but $5,000.00 to live on. He testified that he did not feel that he was given credit for the $25,000.00 in the original divorce decree.

We agree that Janice Houston's false statement during the course of negotiation should not have been considered by the trial court as a significant factor in the redivision of the parties' property and that the doctrine of unclean hands should not have been applied, on the facts of this case. Both parties discuss *Stover* v. *Stover*, 287 Ark. 116, 696 S.W.2d 750 (1985). There the supreme court held the chancellor was entitled to consider the fact that the wife had murdered the husband in making an equitable division of the parties' property. The court expressly limited its holding to the facts of the case. Mrs. Houston's misconduct in the case at bar is not comparable to that which occurred in *Stover*. The doctrine of unclean hands has

traditionally not been used to punish the complainant nor to favor the defendant, but has been applied in the interest of the public and to protect the court and defendant by not allowing the complainant to use the court's powers to bring about an inequitable result. Note, *Equity — Clean Hands Doctrine*, 6 UALR L.J. 559 (1983). In determining whether the clean hands doctrine should be applied, the equities must be weighed. *Bramlett* v. *Selman*, 268 Ark. 457, 597 S.W.2d 80 (1980); *McCune* v. *Brown*, 8 Ark. App. 51, 648 S.W.2d 811 (1983). Mr. Houston is not entirely without responsibility for the problem which arose. Although the chancellor's finding that he was misled is supported by the evidence, appellee had somewhat detailed knowledge of the basic fact but failed to follow through with discovery. "Public policy requires that pressure be brought upon litigants to use great care in preparing cases for trial in ascertaining all the facts. A rule which would permit the reopening of cases previously decided because of error or ignorance during the progress of the trial would in a large measure vitiate the effects of the rule of res judicata." *Kulchar* v. *Kulchar*, 82 Cal. Rptr. 489, 462 P.2d 17 (1969). Furthermore we have difficulty in understanding appellee's contention that he did not receive credit for the $25,000.00, in view of the first paragraph of the parties' property settlement agreement. In any event we hold that the doctrine of unclean hands should not have been applied.

We also think that the chancellor should not have considered the fact that Janice Houston's needs had diminished because of her death as a significant factor in redistributing the parties' property. Again this is not comparable to the exception the supreme court made in *Stover*. Courts are reluctant to upset property awards based on separation agreements after the death of one of the spouses. *See* H. Clark, *Law of Domestic Relations*, § 16.15 at 569 (1968). There are significant practical problems involved in a complete redistribution of the parties' property after the death of a spouse, not the least of which is that the trial court will tend to get only one side of the story.

Appellant concedes that the appellee is entitled to relief and we cannot disagree. When the case is fully developed and we can see where the equities lie we may, on *de novo* review, enter the judgment that should have been entered in the trial court. *See Osborne* v. *City of Camden*, 301 Ark. 420, 784 S.W.2d

596 (1990). In granting relief from a judgment, equitable considerations may require that only limited relief be granted. *See* Restatement (Second) of Judgments § 74 (1982). Factors which may properly be considered are the consequences of the original judgment, the relative clarity with which it appears that the judgment was unjust, the relative fault of the parties, the requirement of diligence on the part of the person seeking relief, the equities in the interest of reliance, and the balance to be struck between finality and correctness of judgments. *See* Restatement (Second) of Judgments § 74 comment g (1982). Ordinarily, the relief given by a court of equity ought to bear a reasonable relationship to the magnitude of the wrong. Here, the appellee testified that the reason for bringing the suit was his belief that he had not received credit, in whole or in part, for the $20,000.00 promissory note which had been concealed from him. We think it appropriate to award him judgment for $10,000.00. We otherwise leave the original decree intact. The same relief was granted in *Milekovich* v. *Quinn*, 40 Cal. App. 537,181 P. 256 (Cal. 1919), on similar facts.

We affirm the order of the chancellor, as modified, and remand the case for the entry of an order consistent with this opinion.

Affirmed as modified and remanded.

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

HOLIDAY INN-WEST and Crum & Forster Commercial Insurance *v.* Darryl COLEMAN

CA 89-377 792 S.W.2d 345

Court of Appeals of Arkansas
En Banc
Opinion delivered July 5, 1990

Barber, McCaskill, Amsler, Jones & Hale, P.A., by: *Micheal L. Alexander* and *R. Kenny McCulloch*, for appellants.

Philip M. Wilson; and *Holiman, Fox and Coleman*, by: *Richard E. Holiman*, for appellee.

Walter A. Murray Law Firm, for amicus curiae Arkansas Self-Insured Association.

Mitchell & Roachell, by: *Michael W. Mitchell*; and *Friday, Eldredge & Clark*, by: *Diane S. Mackey*, for amicus curiae Arkansas Hospital Association, Arkansas Medical Society, Arkansas Chiropractic Association, Arkansas Chapter of American Physical Therapy Association, Arkansas Podiatric Medical Association, and Arkansas State Dental Association.

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

JOHN E. JENNINGS, Judge. On April 20, 1987, Darryl Coleman was injured while working for appellant Holiday Inn-West. The administrative law judge found the injury to be compensable and awarded benefits. The ALJ also entered the following orders relating to the claimant's attorney fees:

> IT IS THEREFORE ORDERED that attorney fees are awarded to the claimant's attorney at the maximum level.
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> IT IS FURTHER ORDERED that pursuant to Ark. Code Ann. § 11-9-715, one-half (½) of said attorney fees shall be paid by respondents based upon the total compensation awarded, to include medical and indemnity benefits.
>
> IT IS FURTHER ORDERED that pursuant to Ark. Code Ann. § 11-9-715, one-half (½) of said attorney fees shall be paid by the claimant based upon the compensation payable to him, indemnity benefits.
>
> IT IS FURTHER ORDERED that the respondents shall pay its portion of the attorney fees to the claimant's attorney directly and shall deduct the claimant's portion of the attorney fees out of compensation payable to claimant, indemnity benefits, and likewise submit same to claimant's attorney directly.

The claimant appealed, challenging the method of calculating attorney's fees, and the full Commission reversed and held that under the applicable statute the proper procedure is for the carrier to pay one-half the claimant's attorney's fee on its own behalf and pay the remaining one-half attorney's fee by deducting proportionate amounts from bills payable to medical providers and indemnity payments due to the claimant.

On appeal to this court the employer and carrier argue that the method of payment of attorney's fees devised by the Commission is not in accordance with the statute and that the Commission's decision violates the due process rights of the medical provider. Because we reverse the Commission's decision on the first point argued we do not reach the second.

The applicable statute is Ark. Code Ann. § 11-9-

715(a)(2)(B) (1987) which provides in part:

> In all other cases whenever the commission finds that a claim has been controverted, in whole or in part, the commission shall direct that fees for legal services be paid to the attorney for the claimant as follows: One-half (½) by the employer or carrier in addition to compensation awarded; and one-half (½) by the injured employee or dependents of a deceased employee *out of compensation payable to them.* (Emphasis added.)

The Commission decided that the word "compensation" in the phrase "out of compensation payable to them" included medical benefits. In doing so the Commission overlooked the first rule of statutory construction: if the language of the statute is plain and unambiguous it must be applied as it reads. *Tolhurst* v. *Reynolds*, 21 Ark. App. 94, 729 S.W.2d 25 (1987).

In arriving at its conclusion the Commission considered a number of factors:

(1) That the definition of "compensation" found in Ark. Code Ann. § 11-9-102(9) includes medical benefits.

(2) That Arkansas courts have held that "compensation" includes medical benefits for purposes of determining the full amount of the claimant's attorney's fee, citing *Hulvey* v. *Kellwood Co.*, 262 Ark. 564, 559 S.W.2d 153 (1977), and for purposes of determining whether the statute of limitations has run, citing *Northwest Tire Service* v. *Evans*, 295 Ark. 246, 748 S.W.2d 134 (1988).

(3) That the 1986 revisions to the Workers' Compensation Act did not reduce the total fee to be awarded to claimant's attorney.

(4) That the 1986 amendments did exclude some forms of compensation for purposes of calculating attorney's fees, citing Ark. Code Ann. § 11-9-715(c) (1987).

(5) That the statutorily provided attorney's fees in workers' compensation cases are "woefully small" in comparison to fees in other areas of the practice of law and that attorneys might decline to accept workers' compensation cases were fees to be further

reduced.

(6) That in a case involving substantial medical bills, a contrary interpretation could leave the claimant with no net indemnity benefits.

(7) That medical providers benefit from the efforts of the claimant's attorney and therefore it is "fair and proper" to require that they bear a proportionate burden of those fees.

(8) That the situation is analogous to the apportionment of attorneys fees in certain tort cases, citing *Burt* v. *Hartford Accident & Indemnity Co.*, 252 Ark. 1236, 483 S.W.2d 218 (1972).

Both the Commission and this court are required to construe the provisions of the Workers' Compensation Act liberally, in accordance with its remedial purposes. Ark. Code Ann. § 11-9-704(c)(3). However, liberal construction does not mean enlargement or restriction of any plain provision of the law. If a statutory provision is plain and unambiguous, it is the duty of the court to enforce it as it is written. *Hart's Exxon Service Station* v. *Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ark. App. 1980). The rule of liberal construction does not mean that the plain provisions of the Act can be ignored. *Jobe* v. *Capitol Products Corp.*, 230 Ark. 1, 320 S.W.2d 634 (1959).

The Commission erred in focusing on the word "compensation" rather than the phrase used in the statute, "out of compensation payable to them." The word "them" obviously refers to the claimant or his dependents; it cannot be read to include medical providers. When the language of a statute is clear, our duty is to follow it, not to interpret it. We conclude that the statute does not authorize the Commission to direct the carrier to withhold proportionate amounts due to medical providers for payment of the claimant's portion of the attorney's fee.

The appellee questions appellants' standing[1] to com-

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[1] Standing in the federal courts is an aspect of the justiciability doctrine. Justiciability, in turn, is a term of art used to give expression to the limitations placed on federal courts by the "case or controversy" provisions of article III of the United States Constitution. *See* L. Tribe, *American Constitutional Law* § 3-7 (1978). In state court jurisprudence, standing is judge-made or common law doctrine. 59 Am. Jur. 2nd *Parties* §

plain. The question is one of "issue standing" not "access standing" — the appellants are obviously proper parties to the litigation. *See generally* Nichol, *Rethinking Standing*, 72 Calif. L. Rev. 68 (1984). The question is whether these appellants are entitled to argue that the Commission's interpretation of the statute was wrong. Clearly appellants have been directed by order of the Commission to do something they contend the statute does not provide for. Appellants also argue that a requirement that they calculate a fractional amount to be withheld from all medical providers will impose a significant administrative burden. While we may not agree with appellants on the extent of this burden, we think they have a sufficient interest to entitle them to raise the issue.

Because of our holding on appellants' first point we need not address the argument that the Commission's order violates the due process rights of medical providers, nor the appellee's counter-argument that the appellants lack standing to raise this issue. We reverse and remand the case to the Commission for the entry of an order that is consistent with this opinion.

Reversed and remanded.

CRACRAFT and MAYFIELD, JJ., dissent.

GEORGE K. CRACRAFT, Judge, dissenting. I dissent. As I understand appellants' first point, they primarily argue that the Commission erred in ordering them to make direct remittance of any portion of the claimant's share of the attorney's fee, as Ark. Code Ann. § 11-9-715 (1987) provides that one-half of the total fee be paid "by the claimant." Appellants also argue under their first point that, in any event, the Commission erred in requiring that sums be deducted from amounts otherwise due to the medical providers and applied to the claimant's share of the attorney's fee, since the statute provides that the claimant's share of the fee is to be paid "out of compensation payable to [him]." As I understand the prevailing opinion, it fails to address the first of these arguments, but does address the second one.

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30 (1987). For this reason pronouncements of federal courts on standing are not wholly transplantable into state law settings.

Although I have no problem with the majority's interpretation of the statute as it relates to the responsibility of medical providers, I do not think that these appellants have standing to raise that issue on appeal. The employer and the carrier cannot be aggrieved by the Commission's holding that a portion of the claimant's attorney's fee be paid by third persons. For perfectly valid and sensible reasons, our appellate courts refuse to issue declaratory judgments and address only those issues presented by an "aggrieved party". While I prefer to avoid dissents, I feel more comfortable in adhering to the time-honored wisdom of not deciding issues that are not properly before us, even though they are advanced by the parties and amici or are of particular interest to some segments of the public.

MELVIN MAYFIELD, Judge, dissenting. I dissent for two reasons. First, for the reasons stated in Judge Cracraft's dissent, I do not think the appellants have a standing to raise the issue they argue on appeal. Second, I do not agree with the majority opinion. Actually, I cannot understand what the opinion holds. Obviously, it asks more questions than it answers. Surely the statute is not as plain and unambiguous as the opinion suggests. Hopefully, the General Assembly will remedy the problems the statute presents.

TYSON FOODS, INC. *v.* Lucille WATKINS

CA 89-494 792 S.W.2d 348

Court of Appeals of Arkansas
Division I
Opinion delivered July 5, 1990

Bassett Law Firm, by: *Gary V. Weeks*, for appellant.

Gerald D. Lee, for appellee.

JOHN E. JENNINGS, Judge. This is a workers' compensation case. Lucille Watkins, the appellee, was first employed by Tyson Foods, Inc., the appellant, in 1981. Originally she "candled eggs." In 1986 she began working on an assembly line, laying pieces of frozen chicken on plates as they passed by. There was evidence that these duties required the continuous use of her arms in a rapid, repetitious manner. In 1987 appellee began experiencing pain in her right elbow and on July 27, 1987, she was diagnosed by Dr. Bryan Abernathy as having bilateral epicondylitis, or "tennis elbow." Dr. James Moore also saw the appellee and expressed his opinion that the epicondylitis was caused by her employment.

The administrative law judge awarded compensation and found that the claimant's condition was an occupational disease. The employer appealed to the full Commission on the basis that the ALJ's decision was "contrary to the law" and "contrary to the evidence." The Commission affirmed the decision of the administrative law judge, but found that the claimant's bilateral epicondylitis was an occupational injury rather than an occupational disease.

On appeal to this court appellant argues: (1) that the Commission erred in raising and deciding the issue of whether the claimant's condition was an occupational disease or an injury, since that issue was not raised on appeal; (2) that the Commission's characterization of the condition as an occupational injury was wrong as a matter of law; and (3) that the Commission's characterization was not supported by substantial evidence. We disagree and affirm.

The reason that the characterization makes a difference is that the burden of proof is affected. If the claimant's condition is an "injury," she has the burden of proving that it arose out of and in the course of her employment by a preponderance of the evidence. *See* Ark. Code Ann. § 11-9-704(c)(2). On the other hand, if her condition is an "occupational disease," a causal connection between the employment and the disease must be established by clear and convincing evidence. Ark. Code Ann. § 11-9-601(e)(1).

The sole authority offered by appellant in support of the argument that the Commission was without authority to decide

the issue is Ark. Code Ann. § 11-9-711(a)(1) and (2). The first subsection provides that the ALJ's order becomes final unless appealed from within thirty days; the second provides for cross-appeal. We do not agree that the cited code provisions limit the Commission's authority to raise issues on its own. As we said in *McCoy* v. *Preston Logging*, 21 Ark. App. 68, 728 S.W.2d 520 (1987):

> Commission Rule 25(b), which relates to the scope of review on appeal to the Commission, provides as follows:
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> > All 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.
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> In *American Transportation Co.* v. *Payne*, 10 Ark. App. 56, 661 S.W.2d 418 (1983), this court noted that 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. 10 Ark. App. at 61. The Commission reviews cases appealed from the administrative law judge level *de novo*, and the duty of the Commission is not to determine whether there was substantial evidence to support the Administrative Law Judge's decision; rather, it must make its own findings in accordance with a preponderance of the evidence. Hence, while the Commission has the statutory authority to require that parties specify in their notice of appeal to the Commission all issues to be presented, this does not negate the Commission's authority to hear argument on other issues.

When the case at bar was appealed to the full Commission, it had the duty to decide the facts *de novo*. It is obviously essential to the performance of that function that the Commission know what the applicable burden of proof in the case is. Here, the burden of proof turns on whether the appellee's condition is characterized as an occupational disease or an injury and it was incumbent on the Commission to make that determination. We see no reason to hold that it was bound by the characterization adopted by the administrative law judge.

Appellant's second and third arguments are so related that we treat them together. "Occupational disease" is now defined as "any disease that results in disability or death and arises out of and in the course of the occupation or employment of the employee, or naturally follows or unavoidably results from an injury as. . . ." Ark. Code Ann. § 11-9-601(e)(1). Silicosis and asbestosis are dealt with separately. Ark. Code Ann. § 11-9-602. Prior to 1976, the legislature listed a schedule of occupational diseases. *See* Ark. Stat. Ann. § 81-1314 (Repl. 1960). Included in the schedule were "synovitis, tenosynovitis, or bursitis due to an occupation involving continual or repeated pressure on the parts affected." Ark. Stat. Ann. § 81-1314(a)(5)(4) (Repl. 1960). Appellant's argument is that, while epicondylitis was not listed under the old schedule, it is so similar to synovitis, tenosynovitis, and bursitis that it should be considered an occupational disease. In support of the argument appellant cites R.B. Leflar, *Compensation for Work Related Illness in Arkansas*, 41 Ark. L. Rev. 89 (1988):

> One can . . . conclude without undue difficulty that diseases listed on the pre-1976 schedule should continue, for the present, to be analyzed under section 14 [occupational disease] standards. When the legislature repealed the schedule, presumably it intended that conditions previously covered by section 14 should remain in the same status, at least in the absence of evidence supporting a change of treatment. In keeping with this reasoning, the Court of Appeals has recognized that cases of tenosynovitis (inflammation of a tendon sheath), a condition listed on the old schedule, should be decided under section 14. Leflar, *supra* at 99.

The case cited by Professor Leflar is *Sanyo Mfg. Corp.* v. *Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984). In *Sanyo*, the parties conceded that tenosynovitis was properly characterized as an occupational disease, and thus that issue was not before us.

We agree with several of the guidelines suggested by Professor Leflar for use in determining whether a condition is an injury or occupational disease. (1) Where the ambiguity of the statutory language permits alternative interpretations, the Commission and courts should generally resolve the ambiguity in

favor of claimants. This, as Leflar points out, is mandated by Ark. Code Ann. § 11-9-704(c)(3) (1987). (2) The Commission's categorization efforts should be based not simply on how the medical profession may characterize a given condition, but rather primarily on factors germane to the purposes of workers' compensation law. These factors should include the general remedial goals of the act, efficiency of future claim handling, the extent to which the classification being considered would encourage safer employment practices, and avoidance of unacceptably high costs to the system. (3) The initial presumption should be that conditions on the pre-1976 schedule of compensable occupational diseases are still to be handled under section 14, although the Commission is not required to do so since the schedule has been repealed. Leflar, *supra* at 118-120.

In view of the fact that bilateral epicondylitis was not listed in the pre-1976 schedule, and giving consideration to those factors listed in Leflar's suggested guidelines, we find no error in the Commission's characterization of appellee's condition as an occupational injury.

Affirmed.

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

Terry BAXLEY and Nancy Davis *v.* COLONIAL INSURANCE CO.

CA 89-72 792 S.W.2d 355

Court of Appeals of Arkansas
Division II
Opinion delivered July 5, 1990

[redacted]

[redacted]

[redacted]

[redacted]

Compton, Prewett, Thomas & Hickey, P.A., by: *Floyd M. Thomas, Jr.*, for appellant Terry Baxley.

James B. Bennett, for appellant Nancy Davis.

Dowd, Harrelson & Moore, by: *Marshall H. Moore*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a summary judgment granted the appellee insurance company in its suit for a declaratory judgment against the appellants. The pleadings, exhibits, affidavits, deposition, and statements of counsel reveal the facts and circumstances out of which the crucial issue arises.

In May of 1986, Terry Baxley was a passenger in an automobile which was owned and being driven by Joel Hall. They were traveling south on State Highway 57 near Stephens, Arkansas, when the vehicle crossed the center line of the highway and collided with an oncoming vehicle being driven by Nancy Davis. Joel Hall had no liability insurance but Terry Baxley had a liability policy issued by the appellee on another car.

Ms. Davis sued Hall and Baxley in the Circuit Court of Columbia County, Arkansas, seeking damages alleged to have been sustained in the collision, and by amended complaint alleged both defendants were negligent. She specifically alleged that at the time of the accident, Baxley "joined in the operation and control of the vehicle" in that he "grabbed the person of Defendant Hall and/or the steering wheel of the vehicle just prior to and/or during the occurrence of said accident and thereby contributed to the accident."

After the complaint and amended complaint were filed by Ms. Davis, the insurance company filed a petition for declaratory judgment against Davis, Hall, and Baxley alleging that the policy Baxley had in force at the time of the collision did not obligate it to defend the suit brought by Ms. Davis or to satisfy any judgment rendered against Hall or Baxley in that suit; the petition stated

the insurance company was presently affording a defense to the suit under a "reservation of rights" arrangement; and it prayed for a declaratory judgment setting out the rights and obligations of the parties under the policy in force at the time of the collision.

Davis and Baxley answered the petition for declaratory judgment and alleged the company was obligated to both defend the Davis lawsuit and satisfy any judgment for damages entered as a result of the suit. No answer was filed by Hall. The insurance company subsequently filed its motion for summary judgment, and after responses and other matters were filed, and other proceedings were had, the circuit court granted the motion for summary judgment and entered a declaratory judgment holding the company had no obligation to defend the suit filed by Ms. Davis or to pay any judgment resulting therefrom. Davis and Baxley have appealed.

The liability coverage provided by the policy issued by the appellee to appellant Baxley provided:

> We will pay damages which any insured person is legally liable because of bodily injury and property damage arising out of the ownership, maintenance or use of your insured car.
>
> We will defend any suit or settle any claim for those damages as we think appropriate, but we shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of liability has been paid.

The definitions applicable to the liability coverage involved in this case, defined an insured car as follows:

> (d) any car or utility trailer you use, that is not owned by you or any resident of your household, if such use is with the permission of the owner.

In the judgment granting appellee's petition for declaratory judgment, the trial court reasoned as follows:

> [T]he term "use" as contained in the subject insurance policy should and must be interpreted in a common sense

> and practical way as expressed in *Hardware Mutual Casualty Company* vs. *Crafton*, 350 SW 2d 506. Further, the Court finds that the term implies use with "care, custody or control," and "with permission." From the facts of the case at bar, none of the foregoing requirements has been met.

We pause here to point out that the "Declaratory Judgment" entered by the trial court was entered as a result of the court's granting the appellee's motion for summary judgment. Summary judgment is authorized by Ark. R. Civ. P. 56(c) when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact." In *Township Builders, Inc.* v. *Kraus Construction Co.*, 286 Ark. 487, 696 S.W.2d 308 (1985), the court said:

> "It is well-settled that 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." *Cummings, Inc.* v. *Check Inn*, 271 Ark. 596, 609 S.W.2d 66 (1980); Ark. R. Civ. P. 56. Summary judgment is an extreme remedy and any proof submitted must be viewed most favorably to the party resisting the motion and any doubts and inferences must be resolved against the moving party. *Leigh Winham, Inc.* v. *Reynolds Ins. Agency*, 279 Ark. 317, 651 S.W.2d 74 (1983). In order to be entitled to a summary judgment, the moving party has to show there is no issue of fact. *Hurst* v. *Feild*, 281 Ark. 106, 661 S.W.2d 393 (1983).

286 Ark. at 490. *Wolner* v. *Bogaev*, 290 Ark. 299, 718 S.W.2d 942 (1986), the court said:

> It is an extreme remedy. *Dodrill* v. *Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979). The object of a summary judgment is not to try the issue but to determine if there are issues to be tried. *Ashley* v. *Eisele*, 247 Ark. 281, 445 S.W.2d 76 (1969). If there is any doubt whatever, it should be denied. *Southland Insurance* v. *Northwestern National Insurance Co.*, 255 Ark. 802, 502 S.W.2d 474

(1973).

290 Ark. at 302. And in *Walker* v. *Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981), the court said: "Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable men might differ." 3 Ark. App. at 210.

Before discussing the applicable law, we should also note that the record clearly shows that there is one disputed question of fact in this case. It is alleged in an amendment to the complaint of Ms. Davis, in her suit for damages, that Terry Baxley joined in the operation of the vehicle in which he was a passenger by grabbing "the person" of the driver, Joel Hall "and/or the steering wheel of the vehicle just prior to and/or during the occurrence of said accident." Although Mr. Baxley testified in a deposition that he took no action to try to help Hall get the car back on the road, the appellants, in response to the motion for summary judgment, filed an affidavit by Ms. Davis' brother who said that Baxley told him that he (Baxley) "grabbed the wheel, but it was too late." This certainly shows that there is a disputed question of fact in this case.

Moreover, we think this affidavit can be considered on the motion for summary judgment. In 10A Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2738 at 483-84 (1983), the authors quote from a case that reversed a grant of summary judgment. *Corley* v. *Life and Casualty Ins. Co.*, 296 F.2d 449 (D.C. Cir. 1961). The court relied upon a hearsay statement in an affidavit, presented by the nonmoving party, which could constitute a declaration against interest. The opinion stated that it was possible that the alleged admission would be admissible and this was sufficient to defeat the motion for summary judgment. This view is approved by the treatise on the basis that "because the burden of proving that there is no genuine issue of material fact rests on the moving party, the opposing party is entitled to all of the favorable inferences that reasonably may be drawn from the papers before the court." So, while we are not able at this point to know whether this evidence will be admissible at trial, we think the affidavit must be considered in ruling upon the motion for summary judgment.

Under the procedure governing motions for summary judgment, one moving for summary judgment has the burden of establishing that there is no genuine issue of fact to be decided. The appellee points to the policy language that provides coverage for "any car . . . you use . . . if such use is with the permission of the owner," and cites *Maryland Casualty Co.* v. *Turner*, 235 Ark. 718, 361 S.W.2d 646 (1962), where it is stated that "the word '*used*' is, to some extent, employed by insurance companies as a substitute for the phrase 'care, custody, and control,' in exemption clauses in liability policies." However, the issue in *Turner* was whether the appellee, who had a contract to furnish rock for certain revetment work on the Arkansas River, was "using" a truck which fell into the river. The appellee had made subcontracts with truck owners to haul the rock, and this particular truck was being lowered over the river bank to enable the dropping of its load at the designated point when the appellee's bulldozer, to which the truck was connected by a cable, slipped and let the truck fall. The appellee's liability coverage did not apply to damage to "tools or equipment being used by the insured in performing his operations," but the supreme court affirmed the trial court's holding that the insurance company had to defend the appellee in the truck owner's suit for damages. Immediately after making the statement about the word "used," the court in *Turner* quoted from *Hardware Mutual Casualty Co.* v. *Crafton*, 233 Ark. 1020, 350 S.W.2d 506 (1961), as follows:

> The care, custody and control clause in liability policies, so far as our research has extended, appears to be almost universally used but its construction is, to a large extent, dependent upon circumstances of each case and we conclude that the phrase should be applied with common sense and practicality.

The court in *Turner* then said: "Therefore, approaching the construction of the phrase with common sense and practicality, we make use of the following quotation from *Great American Indemnity Co. of N.Y.* v. *Saltzman*, 213 F.2d 743 [8th Cir. 1954]. . . :"

> Of course if the term "use" is construed to embrace all its possible meanings and ramifications, practically every

> activity of mankind would amount to a "use" of something. However, the term must be considered with regard to the setting in which it is employed.

235 Ark. at 720.

Using the approach indicated in the opinion in *Turner*, the court in *Crafton* affirmed the trial court's finding that the appellee's liability policy covered his liability when he moved the car of a customer who had just unloaded his fishing paraphernalia at appellee's boat dock. The appellee moved the car from the driveway to the parking area and had walked approximately 30 or 40 feet from the car when it rolled into the lake. The policy did not apply to "property in the care, custody or control of the insured" or to property to which the insured "for any purpose is exercising physical control," but the supreme court said "under the facts we are unwilling to say" that the coverage exclusion applied.

In the *Saltzman* case cited in *Turner*, the appellee who had just landed his plane at the airport in Flippin, Arkansas, being an airplane enthusiast, entered the cockpit of an unoccupied plane just to look at it and in the course thereof unintentionally started the engines and caused damage to the plane. His liability policy did not cover injury to property being "used" by him or in his "care, custody or control." The trial court held that the policy covered the appellee's liability for the damage to the plane and the appellate court affirmed. In addition to the language as to "use" quoted above, the court said the words "care, custody or control" did not contemplate the action of a trespasser inspecting the aircraft.

The above cases, we think, make it clear that the language "any car . . . you use . . . if such use is with the permission of the owner" in the policy in the instant case must be considered "with regard to the setting in which it is employed," *Saltzman*; and "is, to a large extent, dependent upon circumstances of each case," *Crafton*. Thus, we think summary judgment was inappropriate in the instant case. The complaint filed by Ms. Davis alleges that Terry Baxley joined in the operation of the vehicle by grabbing the steering wheel; Baxley's deposition said: "When I woke up, we were fixing to go off the side of the road." However, he denied that he took any action to help the driver get the car back on the road. But the affidavit of Ms. Davis' brother, attached to her response to

the summary judgment motion, states that at a certain place on a certain date, Baxley told the affiant that:

> As they reached the curve, Mr. Hall went on the shoulder of the right hand side, Mr. Hall snatched the car back, crossing into the wrong side of the traffic. Terry said he "grabbed the wheel, but it was too late."

The factual situations in the cases discussed above are not much help in deciding the instant case. But there are cases with factual situations somewhat akin to the one here, to which we can apply the interpretative guidelines disclosed by the cases discussed above. In *United States Fire Insurance Co.* v. *United Service Automobile Ass'n*, 772 S.W.2d 218 (Tex. Civ. App. 1989), it was alleged that a passenger in an automobile "suddenly and without warning grabbed the steering wheel of the car, causing it to leave the road." The policy contained a provision for liability coverage for "any person using your covered auto." The appellate court held summary judgment improper; the opinion states:

> At the time of the accident, it is undisputed that Anna was riding as a passenger in the Martin automobile. . . . Moreover, we conclude that a passenger who grabs the steering wheel of a moving automobile is "using" the automobile within the meaning of a liability policy.

772 S.W.2d at 221. *See also West Bend Mutual Insurance Co.* v. *Milwaukee Mutual Insurance Co.*, 384 N.W.2d 877 (Minn. 1986)(pointing out that courts have split on whether a passenger's grabbing of the steering wheel is operation of the vehicle).

On the issue of use "with permission of the owner," one court has said that a question of fact as to implied permission to operate the car is presented when one leaves it in a busy street in such a position that a reasonably prudent person should anticipate it must be moved. *Coons* v. *Massachusetts Bonding & Ins. Co.*, 207 N.Y.S.2d 819 (1960). And in *Viking Insurance Co.* v. *Zinkgraf*, 737 P.2d 268 (Wash. App. 1987), the court said "because ambiguities are to be construed in favor of the insured, a passenger who grabs the steering wheel can be said to be 'using the car.' " However, the court held, after considering the depositions, summary judgment was proper because "by unexpectedly

grabbing the steering wheel, Mr. Zinkgraf did not use or drive the car 'with the permission' of Mrs. Harris."

Applying the interpretative guidelines disclosed by the *Turner*, *Crafton* and *Saltzman* cases, and considering the factual situations in the cases just discussed where there was a "grabbing of the steering wheel," and the affidavit in the record in the instant case, we think the court erred in granting the motion for summary judgment.

We also agree that it was error to grant summary judgment against Baxley's claim that he is entitled to a defense. His cited case of *Orrill* v. *Garrett*, 241 N.E.2d 1 (Ill. Ct. App. 1968), holds that the word "use" is broader than "operate" or "drive" and that one may use an automobile by being a passenger. Baxley is being sued for conduct engaged in as a passenger and is entitled to a defense. *See also Gronquist* v. *Transit Casualty Co.*, 252 A.2d 232 (N.J. Super. Ct. Law Div. 1969). There may be an obligation to defend even though there is no duty to pay. *Equity Mutual Insurance Co.* v. *Southern Ice Co.*, 232 Ark. 41, 334 S.W.2d 688 (1960). The general rule is that the pleadings against the insured determine the insurer's duty to defend. *Mattson* v. *St. Paul Title Co. of the South*, 277 Ark. 290, 292, 641 S.W.2d 16, 18 (1982); *Fox Hills Country Club, Inc.* v. *American Ins. Co.*, 264 Ark. 239, 241, 570 S.W.2d 275, 277 (1978); *Commercial Union Ins. Co. of America* v. *Henshall*, 262 Ark. 117, 121, 553 S.W.2d 274, 276 (1977); *Proctor Seed & Feed Co.* v. *Hartford Accident & Indem. Co. & Ins. Co. of North America*, 253 Ark. 1105, 1107, 491 S.W.2d 62, 64 (1973). These cases also hold that there can be situations where the duty to defend cannot be determined solely from the pleadings. The Arkansas Supreme Court has stated that it is enough if the *possibility* of damages exists; if injury or damage within the policy coverage could result, the duty to defend arises. *Home Indem. Co.* v. *City of Marianna*, 291 Ark. 610, 618, 727 S.W.2d 375, 379 (1987).

For the reasons discussed above, we reverse the judgment entered by the trial court and remand this case for a trial on its merits.

JENNINGS and ROGERS, JJ., agree.

JANE TRAYLOR, INC. *v.* Frank COOKSEY

CA 89-482 792 S.W.2d 351

Court of Appeals of Arkansas
Division II
Opinion delivered July 5, 1990

Chester C. Lowe, Jr., for appellant.

Jones & Tiller Law Firm, by: *Marquis E. Jones*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Workers' Compensation Commission holding that an injury sustained by appellee arose out of and in the course of his employment. The administrative law judge held the claim compensable because the claimant was driving a vehicle provided by his employer and this constituted an exception to the going and coming rule. The Commission affirmed compensability but said the going and coming rule did not apply because the employee had ceased his trip to work and had begun his assigned job at the time of the injury. We affirm.

The going and coming rule was explained in *Fisher* v. *Proksch*, 20 Ark. App. 80, 723 S.W.2d 852 (1987), as follows:

> The going and coming rule provides that, since all persons are subject to the same street hazards while traveling, injuries sustained by employees going to and coming from work cannot ordinarily be said to arise out of and in the course of the employment within the meaning of the workers' compensation law. *Chicot Memorial Hospital* v. *Veazey*, 9 Ark. App. 18, 652 S.W.2d 631 (1983). However, our courts have recognized a number of exceptions to this rule. *See City of Sherwood* v. *Lowe*, 4 Ark. App. 161, 628 S.W.2d 610 (1982).

20 Ark. App. at 82. In the *City of Sherwood* v. *Lowe* case, this court stated:

> There are numerous exceptions to the "going and coming" rule: (1) where an employee is injured while in close proximity to the employer's premises; (2) where the employer furnishes the transportation to and from work; (3) where the employee is a traveling salesman; (4) where the employee is injured on a special mission or errand; and (5) when the employer compensates the employee for his time from the moment he leaves home until he returns home.

4 Ark. App. at 163-64.

Ms. Jane Traylor testified at the hearing before the law judge and said she owns Jane Traylor, Inc., a corporation which, at the time of the injury involved, did business in one location as "Fabulous Foods by Jane" and at another location as "Traylor's Pavilion in the Park." The appellee, Frank Cooksey, testified that he was the head chef for the restaurant and catering business owned by Jane Traylor, Inc. At the time of the accident, the business had two locations, a restaurant in Little Rock in the Pavilion in the Park and a catering kitchen in North Little Rock located off Landers Road behind McCain Mall. Appellee lived in the Summertree Apartments, off Camp Robinson Road, in North Little Rock.

On Saturday, February 20, 1988, appellee was going to his

employer's restaurant in Pavilion in the Park at approximately 8:00 a.m. Saturday was not a regular workday unless a function was being catered, but Ms. Traylor had closed the restaurant in the Pavilion in the Park, and before leaving town for several days, she left instructions with her employees that certain tasks involved in wrapping up the operation were to be completed by the time of her return. It was appellee's duty to complete the food inventory and transfer any restaurant equipment which had been taken to the catering kitchen back to the restaurant.

As appellee was driving through Levy on his normal route toward the restaurant, he suddenly remembered that there were several pieces of restaurant equipment at the catering kitchen which he needed to pick up and return to the restaurant, so he changed course and headed toward the catering kitchen. As he crossed the railroad track in Levy, his automobile was hit by a train. He received a severe injury to his right knee, a less severe injury to his right arm, and some cuts and abrasions on his face.

Jane Traylor testified that the automobile appellee was driving was owned by her personally. It had been previously titled in her name and that of her husband and she had received it in the divorce. She said she had just purchased a new car and had "let Cooksey take care of the [old] car and drive it, because he was, you know, he was good to have it checked, the tires rotated, and all the things I don't like to do." She further testified that, although food was carried in the car, appellee was not restricted to using the car for business, but was also allowed to use it as his personal vehicle. When asked if it was fair to say that she had more or less loaned the car to appellee, she replied, "Given, maybe would be a better word, yes."

The administrative law judge held that the appellee's case fell within an exception to the going and coming rule because the "claimant was riding in a vehicle provided by the employer at the time of his injury," and that his claim was compensable. The judge explained:

> The second point made by respondents, is that claimant was driving the automobile owned by Ms. Traylor personally, and not owned by Jane Traylor, Inc., d/b/a Jane's Fabulous Foods which was claimant's employer.

> However, clearly Ms. Traylor, and Jane Traylor, Inc., are one and the same, as there is no evidence indicating any other stockholder in Jane Traylor, Inc. The evidence shows that the automobile was loaned to the claimant definitely for the purposes of going to and from work, and was used occasionally in the catering business to run errands, and make deliveries if necessary. Testimony also unrebutted, that Ms. Traylor paid for all the expenses necessary for maintaining the automobile.

On appeal to the full Commission, the law judge's decision on compensability of the claimant's injury was affirmed, but the Commission stated:

> We find it unnecessary to consider the exceptions to the coming and going rule that have been suggested since the coming and going rule does not apply to the facts of this case. When Cooksey deviated from his route toward Little Rock and began to proceed to the North Little Rock location, he had ceased his trip to work and had begun his assigned task of moving equipment. Since he was already at work at the time that he was hit by the train, this case is really no different than it would be if he had gone to the Little Rock location and later left for North Little Rock in order to get the equipment. Both situations are clearly compensable since Cooksey was performing his regular duties when he was injured.

On appeal to this court, we must review the evidence in the light most favorable to the decision of the Commission and affirm if the decision is supported by substantial evidence. *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979). Although the law judges and Commission must weigh the evidence impartially without giving either party the benefit of the doubt, the appellate court must view the evidence in the light most favorable to the findings of the Commission and give the testimony its strongest probative force in favor of the Commission's action. *Fowler* v. *McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987). It is the duty of the Commission to make findings of fact according to a preponderance of the evidence and not whether there is any substantial evidence to support the ruling of

the administrative law judge. *Jones* v. *Tyson Foods, Inc.*, 26 Ark. App. 51, 759 S.W.2d 578 (1988). In fact, the appellate court gives "no weight" at all to the findings of the law judge. *Clark* v. *Peabody Testing Service, supra, Jones* v. *Tyson Foods, supra.*

Therefore, without making any determination with regard to the law judge's decision, we now proceed to consider the Commission's decision. First, we note that the Commission clearly found that at the time of injury the appellee "had ceased his trip to work and had begun his assigned task of moving equipment." Also, after a very few words of discussion, the Commission added the finding that appellee "was performing his regular duties when he was injured." In the second place, we note that the Commission did not assign any rule of law, or cite any case decision, to support its decision that the appellee's injury was compensable. This court in *Mosley* v. *McGehee School District*, 30 Ark. App. 131, 783 S.W.2d 871 (1990), has said:

> 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.

30 Ark. App. at 133. However, in *Clark* v. *Peabody Testing Service, supra*, the Arkansas Supreme Court said:

> We do not deem a full recitation of the evidence to be required, so long as the commission's findings include a statement of those facts the commission finds to be established by the evidence in sufficient detail that the

> truth or falsity of each material allegation may be demonstrated from the findings, the losing party can specify the particulars in which they are not supported by the evidence and 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. at 507.

We are therefore presented with a situation where the Commission has unanimously agreed that the law judge's decision need not be considered because the going and coming rule does not apply to the facts of the case. The Commission has made a determination that the appellee, at the time of his injury, "had ceased his trip to work and had begun his assigned task of moving equipment." The appellant says this finding offends the "going and coming" rule of law. It appears that it is now our task to determine if the Commission's decision is supported by substantial evidence and whether it violates or conflicts with the going and coming rule.

In his treatise on workmen's compensation law, Larson discusses the dual-purpose doctrine as set out by Judge Cardozo in *Marks' Dependents* v. *Gray*, 251 N.Y. 90, 167 N.E. 181 (1929). In 1 Larson, *Workmen's Compensation Law* § 18.12 (3/85), it is stated:

> All of these widely-assorted problems can best be solved by the application of a lucid formula stated by Judge Cardozo in *Marks' Dependents* v. *Gray* a formula which, when *rightly understood and applied*, has never yet been improved upon. [Emphasis in Larson.]

The Arkansas Supreme Court adopted the *Marks'* v. *Gray* rule in *Martin* v. *Lavender Radio & Supply, Inc.*, 228 Ark. 85, 305 S.W.2d 845 (1957), and has approved it in later cases. *See Brooks* v. *Wage* 242 Ark. 486, 414 S.W.2d 100 (1967); *Willis* v. *City of Dumas*, 250 Ark. 496, 466 S.W.2d 268 (1971); and *Wright* v. *Ben M. Hogan Co.*, 250 Ark. 960, 468 S.W.2d 233 (1971). The Arkansas Court of Appeals has applied the rule in *Rankin* v. *Rankin Construction Co.*, 12 Ark. App. 1, 669 S.W.2d

911 (1984), and *Fisher* v. *Proksch*, 20 Ark. App. 80, 723 S.W.2d 852 (1987).

The first case listed above, *Martin* v. *Lavender*, involved an employee, Martin, who had the duty to pick up the mail from the post office by either stopping at the post office on his way to work, or going to his office and sending another employee for the mail. On the day he was injured in an automobile collision, he had not reached the point at which he would have turned off to get the mail and it was held that the injury did not arise during the course of his employment. The court based its decision upon the test in *Marks'* v. *Gray* which it explained as follows:

> The reasoning set forth by Justice Cardozo seems to us to be entirely logical and persuasive, and worthy of adoption. This, then, is the rule that governs this case. *"The decisive test must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to the perils. . . . We do not say that service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause, . . ."* and sufficient within itself to occasion the journey.

228 Ark. at 92 (emphasis in Martin). So, the court in *Martin* said the duty to pick up the mail did not send Martin upon the journey. He would have made the trip and would have been in the exact location where the accident occurred, though he had no duty to pick up the mail. The court in further discussion said it would not be necessary to deviate from the normal route to be acting in the course of employment; if the post office had been on his normal route and Martin had stopped to get the mail he would be acting in the scope of his employment when he stopped—but not before.

Martin and the other cases cited above, in which the "dual-purpose" doctrine of *Marks'* v. *Gray* has been applied, make it clear that the appellee in the instant case was in the course of his employment when he turned from his route to the restaurant in the Pavilion in the Park to go to the catering kitchen behind McCain Mall to pick up the equipment he had been directed to return to the restaurant. It is clear that someone would have had to get this equipment and take it to the restaurant. Once the appellee turned toward the catering kitchen for that purpose,

he was, at least, on a "dual-purpose" journey and therefore in the course of his employment.

It was for the Commission to decide the facts. Its decision in that regard is clear and supported by substantial evidence. While the Commission did not say "dual-purpose" rule, it did make it clear that its decision was not based on an exception to the going and coming rule; and the Commission's opinion plainly states: "When Cooksey deviated from his route toward Little Rock and began to proceed to the North Little Rock location, he had ceased his trip to work and had begun his assigned task of moving equipment." Even if the statement is not completely correct—and he was on a *dual-purpose* trip—the Commission's finding of essential facts is certainly sufficient for us to review and for the parties to identify. The Commission's conclusion of law is clear and precise. We see no reason why it should not be affirmed.

Affirmed.

CRACRAFT and COOPER, JJ., agree.

Sakina BOHRA *v.* Sue MONTGOMERY

CA 89-364 792 S.W.2d 360

Supreme Court of Arkansas
Opinion delivered July 5, 1990

Crockett & Brown, P.A., by: *C. Richard Crockett* and *Richard E. Worsham*, for appellant.

Bruce Leasure, for appellee.

JUDITH ROGERS, Judge. This case involves the confirmation of a sale in foreclosure over the objection of the appellant, Sakina Bohra, who was the highest bidder and purchaser at the sale. Appellant objected to confirmation based on the assertion that he was unaware that he purchased the property subject to a prior mortgage, and based on allegations of irregularities in the foreclosure suit brought by appellee, Sue Montgomery. Appellant also claimed that any surplus from the proceeds of sale should be applied to the first mortgage. After a hearing, the

chancellor ordered that the sale be confirmed, and that the surplus be deposited into the registry of the court for distribution to the mortgagors. For reversal, the appellant argues that the chancellor erred in confirming the sale and in failing to order payment of the first mortgage out of the surplus proceeds of the sale. We find no merit in the points raised, and affirm.

The record discloses that Kenneth and Judith Vandiver executed two promissory notes in the amounts of $16,832 and $1,000 in favor of the appellee. To secure the payment of the indebtedness, the Vandivers gave appellee a mortgage on property located in Pulaski County, Arkansas. Appellee instituted this action in foreclosure on January 14, 1988, against the Vandivers, claiming that they had defaulted on their payments. Appellee also joined as a defendant Seamens Bank for Savings c/o Lumbermen's Investment Corporation (hereinafter "Seamens"), stating in the complaint that it was a possible holder of a lien on the property.

All defendants were duly served with notice of the complaint, but failed to answer. Subsequent to the time for answer, appellee filed a pleading entitled "Motion for Dismissal of One Defendant and Motion for Judgment against the Others." In this motion, appellee asserted that her lien was inferior to that of Seamens, and asked that Seamens be dismissed on that basis. Appellee also requested judgment against the Vandivers and asked that her damages include any monies owed to Seamens, the primary lienholder.

A decree of foreclosure was entered by default on January 3, 1989. The decree was amended on March 16, 1989, to reflect that the principal amount due and owing on the notes as $14,705.72, rather than $12,705.72, as originally stated in the decree. On that same day, the Commissioner of the Court conducted a sale of the property wherein appellant was the purchaser for $19,001. On March 24, 1989, appellant filed a motion objecting to the confirmation of the sale. Upon hearing the matter on May 9, 1989, the chancellor found that the sale should be confirmed, and she subsequently determined that any amounts in excess to that owed appellee, including attorneys fees, costs and expenses, be distributed to the Vandivers as mortgagors of the property.

On appeal, appellant argues that the chancellor erred in

confirming the sale, and erred in failing to apply the surplus proceeds to the payment of the first mortgage held by Seamens. We address appellant's second argument first.

In support of his argument that the surplus remaining from the sale should be applied toward the first mortgage, appellant refers us to the case of *Robb* v. *Hoffman*, 178 Ark. 1172, 14 S.W.2d 222 (1929). In that case, Hoffman initially held two mortgages on the subject property which were executed at the same time. Hoffman assigned a one-half interest in the second mortgage to Linke, who foreclosed on the property. The supreme court held, based on what was stated to be the general rule, that upon foreclosure of either mortgage, the remaining surplus is to be applied to the satisfaction of the other. Thus, appellant argues that the surplus here should be similarly applied to the payment of Seamens' prior mortgage. However, the holding in *Robb* was based on the premise that the two mortgages in question were *simultaneously* executed.

As authority for the general rule, the supreme court in *Robb* quoted 3 L. Jones, *Law of Mortgages of Real Property* § 2171 (8th ed. 1928), which provides in part as follows:

> § 2171 (1689), *Simultaneous* Mortgages. — So if there be *simultaneous* mortgages upon the same land, they are in effect one instrument, and, upon foreclosure of one of them, the surplus remaining after satisfying that is applicable to the payment of the other, although only part of it is due.

(emphasis supplied) It is apparent from the decision in *Robb* and the cited authority that the rule announced applies only to simultaneous mortgages. Such is not the situation in the case at bar, and our research reveals that a different rule applies.

In Mr. Jones' treatise, *supra*, at section 2186, it is stated that upon a sale of a junior mortgage, the surplus belongs to the mortgagor, and is not applied to the satisfaction of the prior mortgage. In 59 C.J.S. *Mortgages* § 793 (1949), it is also stated:

> On foreclosure of a junior mortgage, a senior encumbrancer who was not made a party, and for whom no provision was made in the decree, has no claim on the

> proceeds of a sale of the property under the foreclosure, since, as discussed *supra* § 522, the foreclosure of a junior mortgage has no affect on the rights of a senior lien. The proceeds of the foreclosure sale are not applicable to liens paramount to the mortgage, except in the case of taxes assessments on the land constituting a lien superior to all those created by the parties.

Additionally, 55 Am. Jur.2d *Mortgages* § 571 (1971), provides the following:

> Although there has been some authority to the contrary, the general rule is that persons holding prior mortgages or liens are not necessary parties. . . . Furthermore, a court will not ordinarily decree the payment of a prior lien from the proceeds of the sale, unless the prior lienholder has appeared and consented to the decree. He must be willing to receive payment and to have a sale of the whole title.

Based on these authorities, we hold that the chancellor was correct in holding that the surplus be distributed to the mortgagors.

Appellant also argues on appeal that the chancellor erred by confirming the sale. A portion of his argument is based on the contention that he was unaware that he was purchasing subject to a prior mortgage. However, a court can offer at a judicial sale only such title as is held by the person or estate whose interest is being sold. *Jones* v. *Nix*, 232 Ark. 182, 334 S.W.2d 891 (1960). Consequently, it is firmly settled that the rule of *caveat emptor* applies to such a sale, so that the purchaser takes subject to outstanding liens. *Id. See also Pate* v. *Peace*, 182 Ark. 618, 32 S.W.2d 621 (1930); *Robb* v. *Hoffman, supra.*

Appellant also argues that the chancellor should have refused confirmation of the sale based on certain irregularities. The alleged irregularities include assertions that while appellee requested dismissal of Seamens, the file does not contain an order of dismissal; that the decree fails to grant judgment against the defendants; that the record does not reflect that the amendment to the decree of foreclosure was entered with notice to the defendants; and that the case file does not reflect that the October 3, 1989, motion was served upon the opposing parties.

In judicial sales, the court is the vendor, and, in the exercise of a sound judicial discretion, it may confirm or refuse to confirm a sale made under its order. *Looper* v. *Madison Guaranty Savings & Loan Ass'n*, 292 Ark. 225, 729 S.W.2d 156 (1987); *Mulkey* v. *White*, 219 Ark. 441, 242 S.W.2d 836 (1951); *Summars* v. *Wilson*, 205 Ark. 923, 171 S.W.2d 944 (1943). *Kellett* v. *Pocahontas Savings & Loan Ass'n*, 25 Ark. App. 243, 756 S.W.2d 926 (1988). In the seminal case of *Summars* v. *Wilson, supra*, the supreme court set out the standards governing the exercise of a chancellor's discretion and our standard of review, stating:

> Judicial sales are not to be treated lightly. The courts should not reject a sale and refuse a confirmation for captious reasons, but only in the exercise of sound discretion. The trial court is vested with sound judicial discretion in these matters; and the appellate court, in reviewing the action of a trial court to see if there has been an abuse of discretion, does not substitute its own decision for that of the trial court, but merely reviews the case to see whether the decision was within the latitude of decisions which a judge or court could make in a case like the one being reviewed. Just as the law's standard of conduct is the ordinary, reasonable, prudent man, so in reviewing the exercise of discretion, the test is whether the ordinary, reasonable, prudent judge, under all the facts and circumstances before him, would have reached the conclusion that was reached.

Id. at 927, 171 S.W.2d at 946. *See also Robbins* v. *Guy*, 244 Ark. 590, 426 S.W.2d 393 (1968); *Mulkey* v. *White, supra*; *Campbell* v. *Campbell*, 20 Ark. App. 170, 725 S.W.2d 585 (1987).

In the instant case, while the foreclosure decree was perhaps not a model in form, it clearly provides for the dismissal of Seamens and the granting of judgment against the Vandivers. Paragraph one of the decree states that Seamens is "dismissed for the cause herein," and in paragraph six it is stated that "plaintiff may have execution or garnishment issued as upon a judgment at law for said judgment," and that the property is "to secure payment of this judgment." With regard to the alleged lack of notice in amending the decree, the chancellor had the authority

under Rule 60(b) of the Arkansas Rules of Civil Procedure to correct the judgment previously entered with or without notice. We perceive no irregularity in this instance particularly when it is considered that the Vandivers, the only remaining defendants, were in default and the entry of the decree required no notice. See Ark. R. Civ. P. 55(b).

As to the apparent lack of service of the October 3rd motion, appellant argues that the portion of the motion requesting as damages any sums owed to Seamens as the primary lienholder, was in effect an amendment to the complaint for which service was necessary before taking a default judgment thereon. *See Saxon* v. *Purma*, 256 Ark. 461, 508 S.W.2d 331 (1974). Assuming, without deciding, that appellant's contention has merit, we believe that under the circumstances of this case any error would have been harmless. The chancellor did not order the application of the proceeds in this manner, thus no relief was afforded pursuant to this request, and the decree conformed to that which was requested in the initial complaint. Furthermore, the request for such relief was not well-taken, as shown in the previous discussion that the mortgagor, not the prior lienholder, is entitled to the remaining surplus of the sale.

In short, the appellant bought the property in question subject to the prior mortgage, and the alleged irregularities were of no apparent consequence so as to affect the validity of the decree or sale. We find no abuse of discretion in the chancellor's confirming the sale.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

Dave Sanford KERBY *v.* Linda Webb KERBY

CA 89-507 792 S.W.2d 364

Court of Appeals of Arkansas
Division I
Opinion delivered July 5, 1990

Jon R. Sanford, for appellant.

Charles R. Chadwick, for appellee.

JUDITH ROGERS, Judge. In this custody case, the parties were divorced on September 17, 1980, when their daughter, Crystal, was three years old. The decree provided for custody of the child to be placed with appellee, Linda Kerby, with reasonable rights of visitation being granted to Dave Kerby, the appellant. The appellant is now appealing from the chancellor's order entered on September 1, 1989, denying his motion for a change of custody. For reversal, appellant argues that the chancellor's decision not to change custody is inconsistent with the findings made at the final hearing on this matter. Based on our *de novo* review of the record, we cannot agree with appellant's contention and affirm the order made by the chancellor.

The record of this case reveals a long and bitter history of the parties contesting custody of this child. It also appears from the record that after the divorce custody of the child was exchanged between the parties by informal agreement several times. Beginning in 1984, appellant filed a motion requesting specific visitation or a change of custody, in which he asserted that appellee had refused him summer visitation. Appellee responded with a motion for modification of the decree and for contempt. In her motion, appellee accused the appellant of having sexually abused the child, and requested that his visitation be suspended on that basis. She also asked that appellant be held in contempt for the non-payment of child support.

A hearing was not held on these issues until February of 1986. Based on the testimony, the chancellor ordered that custody was to remain with appellee, and a schedule for supervised visitation of the child with appellant was arranged. The chancellor, however, continued the matter for further hearing, taking all issues under advisement pending a final determination, including the question of delinquent child support.

The final hearing did not take place until April 26, 1989. The

interim period was marked by the filing of motions for contempt by both parties, with appellant consistently citing problems with visitation and appellee asserting the failure of appellant to pay child support. Appellant again moved for a change of custody on May 26, 1987, alleging that appellee had engaged in a course of conduct designed to alienate the child against him. Also during this interval, orders were entered reducing the amount of child support, and increasing appellant's visitation.

At the hearing in April of 1989, appellant testified that he had remarried and was living in Hattiesburg, Mississippi. He related that the child had lived with him for periods both before the divorce during separation, and afterwards, and that he had previously enjoyed an excellent relationship with his daughter. He denied having sexually abused the child, and intimated that because appellee was jealous of his relationship with the child she had fabricated the allegation in an effort to alienate the child against him. He gave testimony concerning the problems he had faced with visitation since the divorce, and said that he had discontinued visitation after September of 1988. He said that the first visit with the child in September had gone well, but that during the second the child had spelled out with dominoes, "I hate Dave." He also said that on that occasion she wrote, "Dave is a satan worshipper." He testified that appellee was responsible for the child's change in attitude and that she had deliberately turned the child against him. He further admitted that he had ceased paying child support at times when he felt he was being denied meaningful visitation. The record reflects that appellant made no child support payments after July in 1986, none in 1987, and only sporadic payments in 1988 and 1989.

The appellee testified that Crystal was twelve years old, in the sixth grade, and had been in her custody for six and a half years. She said that Crystal was popular in school and a good student, making A's and B's, and that she played the piano and took dancing and swimming lessons. She stated that she first suspected that appellant had abused Crystal in the fall of 1983, and that she had taken the child for counseling. She detailed some of the facts surrounding this allegation as had been told to her by the child. She denied having spoken ill of the appellant to the child, or that she had promoted the child's dislike for him. She testified that during a visit the child had run to her crying, saying

the appellant had hit her.

Crystal also testified at the hearing. She said that she loved her mother and wanted to live with her. She said that she did not like the appellant as he had been mean to her when she had lived with him. She related that during the last visit with appellant, he had hit her because she would not say that she loved him into a tape recorder. She further said that she did not love the appellant, and that she did not wish to see him. On redirect, the child said that appellant had abused her.

At the conclusion of the hearing the chancellor made the following findings:

> (1) I think the charge of sexual abuse is completely unfounded and unjustified in the case.
> (2) I am finding that neither of the parties have any intention of cooperating with anything that the court orders as shown by their conduct in the past. I think Mr. Kerby's conduct is less than it should be, and I think Mrs. Kerby has embarked on a deliberate course of alienating the child and interfering with any visitation of any sort.
> (3) The petition for change of custody is denied. I think the parties have messed this child up to the extent that I don't think a change of custody would be justified. But I think that a visitation order that the parties can co-operate with until such time as the child perhaps gets of age and maybe she'll get straightened out. I propose to adjudge both parties in contempt and order them both committed for ten days, with Mr. Kerby being confined until such time as his support is current as shown by the court clerk's records.
>
> Now what can we work out with the visitation? It will need to be at Russellville. It will need to be at some place that Mr. Kerby and his present wife can visit with the child some without somebody looking over their shoulder and it would need to be at a time when both of them can co-operate on acting about like adults.

On appeal, the appellant argues that the chancellor erred in failing to change custody given the findings that were made. Specifically, it is the appellant's contention that once the chancellor found that the allegation of abuse was unfounded and that

appellee had engaged in a course of conduct designed to alienate him from the child, it was incumbent on the chancellor to order a change of custody. In support of this proposition, appellant has cited cases decided in Arkansas and other jurisdictions which he contends establishes a *per se* rule that a change in custody is mandatory when such findings are made. We disagree, as we do not believe that the principles regarding child custody can be applied in such an inflexible manner.

Our standard of review is well-settled. On appeal from a chancery court case, this court considers the evidence *de novo*, and we will not reverse the chancellor unless it is shown that the lower court's decision is clearly contrary to a preponderance of the evidence. *Thigpen* v. *Carpenter*, 21 Ark. App. 194, 730 S.W.2d 510 (1987). As in all custody cases, the primary consideration is the welfare and best interests of the children involved; all other considerations are secondary. *Hoing* v. *Hoing*, 28 Ark. App. 340, 775 S.W.2d 81 (1989). Chancellors in such cases must utilize to the fullest extent, all their powers of perception in evaluating the witnesses, their testimony, and the best interests of the children. We know of no other cases in which the superior position, ability and opportunity of the chancellor to observe the parties carry as much weight as those cases involving minor children. *Riddle* v. *Riddle*, 28 Ark. App. 344, 775 S.W.2d 513 (1989).

We have reviewed the cases cited by appellant and find little support in his argument. In one of the cases referred to us, *Blake* v. *Smith*, 209 Ark. 304, 190 S.W.2d 455 (1945), the supreme court did recognize that an attempt to alienate a child's affections is a factor to consider in making custody determinations. However, the court specifically held that this alone would not be sufficient grounds to warrant a change of custody. In *Riddle* v. *Riddle*, *supra.*, this court acknowledged that the law of child custody cannot be applied in a rigid and mechanical fashion, as to do so conflicts with both statutory and well-settled law that custody awards are to be made in accordance with the welfare and best interests of the child. In keeping with the concept of promoting flexibility in custody cases, in *Johnson* v. *Arledge*, 258 Ark. 608, 527 S.W.2d 917 (1975), the supreme court said:

> . . . the fact that the party seeking to gain or retain

> custody of a child has violated court orders or has been in contempt of court in that respect is a factor to be taken into consideration in the court's exercise of discretion to grant or deny a modification of custody orders but is not so conclusive on the matter as to require the court to act contrary to the best welfare of the child. To hold otherwise, we would have to permit the desire to punish a parent to override the paramount consideration in all child custody cases, i.e., the welfare of the child involved. We have heretofore said that the courts must be keenly alert to the necessity of preventing the shortcomings or merits of the parents from overshadowing that which is best for the child. The chancellor committed no error in this respect.

Id. at 614, 527 S.W.2d at 920 (1975) (citations omitted). In sum, we decline to adopt the position advanced by appellant, and hold that such decisions must be based on the particular facts and circumstances of each case, in relation to the standard of the best interest of the child. Hard and fast rules are particularly inappropriate in custody cases.

Turning to the merits, the chancellor expressly found fault with the conduct of both parties, stating that he was inclined to hold them both in contempt, although he ultimately did not do so. Obviously, the appellee's behavior cannot be condoned, nor can the appellant's refusal to support the child be ignored. In essence, the chancellor found that each party's actions had been harmful to the child. Given the existing situation, the chancellor provided for regular visitation to the end that the appellant's relationship with the child would be mended. Under the circumstances, we cannot say that the chancellor's finding that the welfare of the child would best be served by continuing custody with appellee not clearly against the preponderance of the evidence.

Affirmed.

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

Lucky NOWDEN *v.* STATE of Arkansas

CA CR 89-289 792 S.W.2d 621

Court of Appeals of Arkansas
En Banc
Opinion delivered July 5, 1990
[Rehearing denied August 22, 1990.]

William R. Simpson, Jr., Public Defender, and *Donald K. Campbell III*, Deputy Public Defender, by: *Didi H. Sallings*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Kelly A. Procter*, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. The appellant, Lucky Nowden, appeals his conviction at a bench trial of possession of a controlled substance (marijuana), a violation of Ark. Code Ann. § 5-65-401 (1987). Upon conviction, the appellant was sentenced to four years in prison with three years suspended. For reversal, appellant argues that the evidence was insufficient to support his conviction. We disagree and affirm.

The issue on appeal is whether the verdict is supported by substantial evidence. Substantial evidence, whether direct or circumstantial, must be of sufficient force and character that it will, with reasonable and material certainty, compel a conclusion one way or the other. *Bennett* v. *State*, 297 Ark. 115, 759 S.W.2d 799 (1988). Upon review, it is necessary to ascertain only the evidence favorable to the appellee and only that testimony which actually supports the verdict of guilt. *Id.*

The record reflects that on June 28, 1988, the appellant was driving down Roosevelt Road in Little Rock, Arkansas, in a pick-up truck with a friend, when he was stopped by State Trooper Dale Cook. There was testimony that neither appellant nor his friend was the owner of the truck. At trial, Cook testified that he noticed that the decals on the license plate were peeling off, and a check revealed that the plate had been issued to another vehicle. Cook stated that when he had the vehicle stop, the appellant

exited the truck and came straight to the patrol car "like he did not want me at the truck." He also said that the appellant appeared to be nervous.

Soon afterwards, local police officers stopped to offer assistance. Officer Charles Ray of the Little Rock Police Department testified that when he arrived, Trooper Cook was speaking with the appellant and that the passenger had stepped out of the truck. In checking the truck for weapons, Officer Ray related that he glanced through the window and observed a brown grocery sack sitting on the floorboard on the passenger side of the truck. He said that he could plainly see a large amount of green vegetable matter in the sack. The contents of the sack was later determined to be marijuana. In describing the interior of the truck, Ray stated that it was not cluttered, and that the truck had an automatic transmission with no console or other barrier between the seats. After this discovery Ray alerted Trooper Cook and the appellant and the passenger were arrested. Ray further testified that the grocery sack contained forty-seven individually wrapped plastic baggies of marijuana.

In order to sustain a conviction for possession of a controlled substance, the case law is clear that actual or physical possession of the contraband is not required. *Sweat* v. *State*, 25 Ark. App. 60, 752 S.W.2d 49 (1988). In *Parette* v. *State*, 301 Ark. 607, 786 S.W.2d 817 (1990), the supreme court set out the applicable standards governing proof of possession when there is evidence of joint occupancy, as follows:

> If this conviction is to be affirmed, it must be shown that the appellant possessed the marijuana. Constructive possession is a sufficient showing. Constructive possession may be implied where the contraband is found in a place immediately and exclusively accessible to the defendant and subject to his control. Where, however there is joint occupancy of premises, then some additional factor must be present linking the accused to the contraband. The state must prove that the accused exercised care, control and management over the contraband and that the accused knew that it was in fact contraband.

Id. at 616, 786 S.W.2d at 822 (citation omitted).

In *Plotts* v. *State*, 297 Ark. 66, 759 S.W.2d 793 (1988), the supreme court recognized cases from other jurisdictions that have held that the prosecution can sufficiently link an accused to contraband found in an automobile occupied by more than one person by showing additional facts and circumstances indicating his knowledge and control of the illegal substance. From the cases cited, the court identified certain factors from which constructive possession can be inferred, such as: (1) that the contraband was in plain view; (2) that the contraband was on the defendant's person or with his personal effects; (3) that the contraband was found on the same side of the car seat as the defendant was sitting or in immediate proximity to him; (4) that the accused was the owner of the automobile in question, or that he exercised dominion and control over it; and (5) that the accused acted suspiciously before or during arrest.

In *Plotts*, the driver of the vehicle was arrested for reckless driving and driving without a license. As the officer was putting handcuffs on the driver, a package visibly containing syringes fell onto the ground. The officer then went to the other side of the vehicle to question the appellant, who was the passenger and owner of the car. The officer looked into the backseat of the car and saw a bag of marijuana protruding out of a clothes bag. When the officer asked appellant if he could search the vehicle, appellant replied, "You can search the vehicle, any part of the vehicle you want to. If there are any drugs in there, I want them out." Upon searching the clothes bag, the officer found several bags of marijuana. The court held that the fact that the officer found marijuana lying in plain view, that appellant was the owner of the vehicle, and that appellant made a suspicious statement at the time of the stop were sufficient additional circumstances to link appellant to the contraband.

Applying the factors set out in *Plotts* to the case at bar, the appellant was the driver of a vehicle in which contraband was found. The marijuana was contained in an open sack which was readily visible to the officer who made the discovery. Although the sack was located on the floorboard on the passenger side, from where the appellant was sitting, he had an unobstructed view of the sack which was in an area immediately accessible to him. Additionally, the appellant exhibited suspicious behavior just after the stop and while he was being questioned by the officer. It

was said that he immediately exited the truck acting as if he did not want the officer near it, and that he appeared nervous.

The evidence thus indicates that appellant was exercising dominion and control of a truck where contraband was found in plain view and in his immediate vicinity. These facts, coupled with his outwardly suspicious behavior, sufficiently established evidence linking appellant to the contraband, such that it can be inferred that he had knowledge and control over the illegal substance. Viewing the evidence in the light most favorable to the state, we cannot say that appellant's conviction for possession of a controlled substance is not supported by substantial evidence.

Affirmed.

CRACRAFT, COOPER and JENNINGS, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. Although I do not disagree with the majority's statement of the applicable law, I dissent because I view the evidence as insufficient to support the conviction.

The majority states that the appellant was linked to the contraband because the appellant had an unobstructed view of the contraband, and because the appellant behaved suspiciously by immediately exiting the truck when he was stopped. I do not agree that the evidence is of sufficient force and character to compel either conclusion.

First, I can find no evidence in this record to support a finding that the appellant had an unobstructed view of the contraband. To the contrary, Officer Ray testified that he did not see the brown paper bag when he glanced in the open door on the driver's side of the vehicle; he noticed the bag only after walking around to the passenger's side of the vehicle. He testified that the bag was located on the floorboard directly in front of the passenger's seat, so that it would have been directly between the passenger's legs. Second, I disagree with the majority's conclusion that the appellant acted suspiciously when he exited the truck after being stopped. Trooper Cook testified that, after the vehicle came to a stop, he asked the appellant to step out of his vehicle and come back to the patrol car. Trooper Cook subsequently stated:

> [The appellant] was just very nervous. In all, like I said, he

> exited the vehicle first, came straight back to me like he did not want me up at the truck.

Finally, although other controlled substances were found on the person of the passenger, none were found to be in the actual possession of the appellant, the driver of the vehicle.

In Arkansas, two recent cases have dealt with the joint occupancy issue. In *Williams* v. *State*, 289 Ark. 443, 711 S.W.2d 825 (1986), the Supreme Court held that where there is joint occupancy of the area in which the contraband is found, an additional factor must be present linking the accused to the contraband. The State must prove that the accused exercised care, control, and management over it, and that he knew that the matter possessed was contraband. In *Plotts* v. *State*, 297 Ark. 66, 759 S.W.2d 793 (1988), the court relaxed the rigidity of the *Williams* rule, and recognized cases from other jurisdictions holding that the prosecution can sufficiently link an accused to contraband found in an automobile occupied by more than one person by showing additional facts and circumstances indicating his knowledge and control of it such as 1) that the contraband was in plain view, 2) that the contraband was on the defendant's person or with his personal effects, 3) that the contraband was found on the same side of the car as the defendant was sitting or in immediate proximity to him, 4) that the defendant was the owner of the automobile in question, or that he exercised dominion and control over it, and 5) that the defendant acted suspiciously before or during the arrest.

In *Plotts*, supra, the driver of the vehicle was arrested for reckless driving and driving without a license. As the officer was putting handcuffs on the driver, a package visibly containing syringes fell onto the ground. The officer then went to the other side of the vehicle to question the appellant, who was the passenger and the owner of the car. The officer looked into the backseat of the car and saw a bag of marijuana protruding out of a clothes bag. When the officer asked the appellant if he could search the vehicle, the appellant replied, "You can search the vehicle, any part of the vehicle you want to. If there are any drugs in there, I want them out." During a search of a clothes bag, the officer found several bags of marijuana. The Court held that the fact that the officer found the marijuana lying in plain view, that

the appellant owned the vehicle, and that the appellant made a suspicious statement at the time of the stop were sufficient additional circumstances to link him to the contraband.

An analysis of the facts of the present case applying the factors listed in *Plotts, supra*, leads me to several conclusions regarding the proof presented by the State. First, the evidence is very weak that the bag containing contraband was in plain view from the appellant's perspective. The officer testified that he noticed relatively minor details such as litter on the floorboard of the vehicle when viewed from the driver's side, but he did not discover the bag until he walked around and viewed the interior from the passenger's side. Moreover, the police officer's view of the interior was evidently superior to that of the appellant, whose view of the bag, according to the police officer's testimony, would have been obscured because the bag was situated so as to be between the passenger's legs. The passenger was not in the vehicle when the officer looked in the driver's side, but the officer still did not notice the bag. Second, there is no evidence that the appellant had contraband on his person, and there is substantial evidence that the passenger had contraband on his person. Third, there is no evidence that the contraband was found on the same side of the vehicle as the appellant; instead, the evidence shows that the contraband was in the immediate vicinity of the passenger. Fourth, there is no evidence that the appellant was the owner of the vehicle; although it is clear that the appellant was driving the vehicle, the passenger testified that he requested him to do so. Fifth, there is very weak evidence that the appellant behaved suspiciously. In *Plotts*, the appellant told police that if there were any drugs in the car, he wanted them out. This behavior was certainly suspicious, and could fairly support an inference that Plotts knew that there were drugs in his vehicle. In the case at bar, the appellant promptly exited his vehicle after he was instructed to do so by the officer. The officer testified that the appellant appeared to be nervous, adding that the appellant "exited the vehicle first, came straight back to me like he did not want me up at the truck." The latter statement is speculative, conclusory, and entitled to no weight even in the absence of an objection, given the officer's prior testimony that he instructed the appellant to exit the truck and move to the front of the patrol car. Furthermore, although I concede that the police officer could properly testify

that the appellant seemed to be nervous, this observation, unlike the suspicious statement in *Plotts*, says very little about whether the appellant knew that the vehicle contained contraband.

I do not mean to suggest that I think that all of the factors listed in *Plotts* must be present to support a finding that a defendant had the requisite knowledge and control of the contraband; instead, I believe that those factors are merely circumstances which bear on the ultimate issue of whether knowledge and control were present, and that our review of a finding of knowledge and control must be based on the totality of those circumstances. Therefore, our analysis should not be directed at whether there is substantial evidence, however marginal, to support a finding that a factor listed in *Plotts* was present, but should instead focus on the essential question of whether the factors which *were* present, when taken together, are of sufficient force and character to support a finding that a particular joint occupant had knowledge and control of the contraband. In the case at bar, there was no direct evidence that the contraband was visible to the appellant; to the contrary, the officer's testimony leads me to the opposite conclusion. This leaves us with the following factors: the appellant was driving the vehicle, and he appeared to be nervous when a police officer instructed him to exit the vehicle and move to the front of the patrol car. I submit that the evidence in this case is not substantial so as to induce the mind to go beyond the mere suspicion or conjecture that the appellant had knowledge of and control over the contraband, and is not sufficient to compel a conclusion one way or the other with reasonable certainty.

I would reverse and dismiss.

CRACRAFT and JENNINGS, JJ., join in this dissent.

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