J. W. DAVIS *v.* Purushottam O. PATEL

CA 90-66 794 S.W.2d 158

Court of Appeals of Arkansas
Division I
Opinion delivered September 5, 1990

Southern, Allen, & James, for appellant.

Hale, Fogleman & Rogers, for appellee.

GEORGE K. CRACRAFT, Judge. J.W. Davis appeals from an order granting appellee's motion for summary judgment. He does not argue that there were material facts to be determined by the court, but that the court erred in misapplying the law to the undisputed facts.

It was undisputed that in March 1982 the parties entered into a written contract in which appellant agreed to sell a motel and its furnishings to appellee for $150,000.00, of which amount appellee agreed to pay $25,000.00 in cash at the time of closing. The remaining $125,000.00 was to be evidenced by a promissory note bearing interest at the rate of ten percent per annum, payable in monthly installments of principal and interest of $1,363.27. The contract provided that closing was to take place no later than May 31, 1982. At the time, both parties were aware of outstanding liens on the property and it was agreed in the written contract that the cash down payment and monthly installments of principal were to be applied to the satisfaction of those liens before the seller retained any of the purchase price for his own benefit.

It was admitted that the contract was subsequently modified by oral agreement to extend the time of closing. It was also orally modified to provide that of the $150.000.00 purchase price, $25,000.00 would be paid in cash at closing and the balance of $125,000.00 would be evidenced by two notes, one in the amount of $5,000.00 due and payable in December 1982, and the other in the amount of $120,000.00 payable in monthly installments of principal and interest.

The contract was further modified by oral agreement to require the appellant to make extensive repairs to the rooms within the building, to correct a leak in the underground water

pipes, and to provide hot water piping for each room in the motel at his own expense.

For reasons that are not made clear in the record, the transaction was never closed. The lienholder brought a foreclosure action and the property was sold at public sale for $85,000.00. Appellant brought this action in October 1985 to recover the difference between the contract price and that obtained in foreclosure. Appellee answered, asserting several defenses, including both the statute of frauds and the statute of limitations. Appellee filed a motion for summary judgment based on depositions filed in the case, responses to requests for admission, and other supporting documents establishing the facts as we have recited them. The trial court granted the motion and entered an order in which it found that the undisputed facts established that the written contract had been so altered by oral modification as to constitute a new oral contract subject to the three-year statute of limitations provided in Ark. Code Ann. § 16-56-105 (1987). The action was therefore barred. We find no error.

We agree with the trial court that the three-year statute of limitations was applicable and effectively barred the action. Our courts recognize that, while parol testimony cannot be received to vary the terms of a written contract, parol evidence is admissible to show that the written contract has been rescinded and a new one made in parol. *Ferguson* v. *C.H. Triplett Co.*, 199 Ark. 546, 134 S.W.2d 538 (1939); *Johnson* v. *Mosley*, 179 F.2d 573 (8th Cir. 1950). While these cases involved the application of the statute of frauds, they did address the effect of oral modification of written contracts. If they can become oral for the purpose of the statute of frauds, we find no reason why they should not stand in the same position with regard to the statute of limitations.

Additionally, we note that the statute of frauds was also pled as a defense in this action. Here, the original contract was for the transfer of an interest in real estate and was therefore required to be in writing under the statute of frauds. Ark. Code Ann. § 4-59-101(a)(4) (Supp. 1989). The general rule accepted by our court is that such a contract cannot be modified in essential parts by parol agreement and be held valid against a plea that it is invalid under that statute. *Reynolds* v. *Havens*, 252 Ark. 408, 479

S.W.2d 528 (1972); *Valley Planing Mill Co.* v. *Lena Lumber Co.*, 168 Ark. 1133, 272 S.W. 860 (1925); *Arkmo Lumber Co.* v. *Cantrell*, 159 Ark. 445, 252 S.W. 901 (1923).

Appellant agrees that the governing principle is as stated but argues that it is inapplicable here under the rule set forth in *Valley Planing Mill Co.* v. *Lena Lumber Co., supra.* There, the parties entered into a written land contract which required that two notes be endorsed by a bank in Boston. It was later discovered that the bank had no authority to make such an endorsement and the parties orally agreed to substitute the endorsement of another party. The court rejected the plea that the oral modification violated the statute of frauds in the following language:

> The general rule is that a material modification of a contract within the statute of frauds must be in writing in order to be valid and binding. Such a contract cannot be modified in essential parts by parol agreement so as to be valid against a plea of invalidity under the statute of frauds. *Arkmo Lumber Co.* v. *Cantrell,* 159 Ark. 445. There is a marked difference, however, between a modification of a written contract in the essentials required to meet the statute of frauds and an agreement for a substituted method of performance not within the statute. The former is required to be in writing in order to be enforceable as against a plea of the statute of frauds, whereas the latter is valid if in parol.

168 Ark. at 1140, 272 S.W. at 863. *See also Reynolds* v. *Havens, supra.*

Appellant also argues that the oral modifications in this case were no more than a substituted method of performance. We do not agree.

Here, the oral modifications went beyond a mere substituted method of performance. Although the contract made time of performance of the essence, it was verbally modified to extend that time indefinitely. The oral modifications required the appellee to obligate himself to pay $5,000.00 of the unpaid purchase price by December 15, 1982, rather than in annual installments over an extended period. They also obligated the

seller to make extensive repairs, to correct leaking water systems buried in concrete, and to provide hot water lines to all the motel units. None of these obligations were contained in the written contract. These changes can only be regarded as essential elements of the agreement which are not evidenced by the required memorandum and, as such, cannot be held valid against a plea of invalidity under the statute of frauds. To satisfy the statute, a memorandum must state all of the essential elements of the agreement. *See Reynolds* v. *Havens, supra.*

Affirmed.

COOPER and MAYFIELD, JJ., agree.

Charlotte BUCKNER *v.* SPARKS REGIONAL MEDICAL CENTER and Second Injury Fund

CA 89-459 794 S.W.2d 623

Court of Appeals of Arkansas
Division I
Opinion delivered September 5, 1990

Hewett, Shock and VanWinkle, by: *Mark Hewett*, for appellant.

Jones, Gilbreath, Jackson & Moll, by: *Robert L. Jones III* and *Charles R. Garner, Jr.*, for appellee Sparks Regional Medical Center.

E. Diane Graham, for appellee Second Injury Fund.

MELVIN MAYFIELD, Judge. Appellant, Charlotte Buckner, has appealed a decision of the Workers' Compensation Commission holding that the appellee, Sparks Regional Medical Center, is only liable for the attorney's fee on benefits equal to claimant's anatomical rating and that the appellee, Second Injury Fund, did not controvert appellant's entitlement to compensation and is not

responsible for an attorney's fee in any amount.

Appellant was injured on September 13, 1983, while working for Sparks Regional Medical Center. As a result of that injury she underwent surgery and was assessed a permanent partial impairment rating of 20%, of which 10% preexisted. She was awarded temporary total disability benefits for the period from November 8, 1983, through May 1, 1984, at which time she returned to Sparks and worked through September 23, 1984, when she was terminated due to economic conditions. On November 22, 1984, appellant began working at Booneville City Hospital where she worked until she became totally disabled on August 6, 1985. On September 13, 1985, appellant filed a workers' compensation claim against Sparks and Sparks controverted compensability contending the statute of limitations had run and that appellant had sustained a new injury while working for Booneville City Hospital. On October 1, 1985, the Second Injury Fund was made a party.

The administrative law judge held that the claim was compensable, that it was not barred by the statute of limitations, and that appellant had not sustained any new injury while employed by Booneville City Hospital. The full Commission affirmed and adopted the opinion of the law judge. Sparks appealed that decision to the Arkansas Court of Appeals which affirmed the Commission's decision on March 2, 1988. On March 8, 1988, the appellant wrote the Commission claiming the case was ripe for a determination of permanent total disability. On March 15, 1988, the Second Injury Fund accepted liability for permanent total disability benefits and initiated payments to the appellant.

Appellant then filed a petition for an attorney's fee contending that Sparks had paid all attorney's fees applicable to temporary total disability benefits, medical expenses, and fees awarded on appeal to the full Commission and that on March 17, 1988, Sparks accepted liability for the 10% anatomical disability rating and made the appropriate payment to the appellant but that Sparks refused to pay the applicable attorney's fee on any part of the permanent partial disability benefits except the 10% anatomical disability. Furthermore, the petition contended, the Second Injury Fund had also refused to pay any attorney's fee

applicable to the permanent total disability benefits.

The administrative law judge held that under the rule announced by the Arkansas Court of Appeals in *Prier Brass* v. *Weller,* 23 Ark. App. 193, 745 S.W.2d 647 (1988), the employer, Sparks, was not liable for an attorney's fee on any permanent disability benefits in excess of that attributable to the anatomical impairment resulting from the injury sustained by claimant while in the employ of Sparks. The law judge also held that the Second Injury Fund had "tacitly" concurred in Sparks' controversion of the claim and was, therefore, liable for an attorney's fee. However, he held that because the Fund had conceded liability for permanent total disability in excess of the anatomical impairment of 10% once compensability was determined, and thus reduced the length and complexity of the services required from the claimant's attorney, an appropriate attorney's fee for the Fund would be "one-half of the maximum statutory attorney's fee on all permanent disability benefits payable by the Fund which had accrued prior to the Second Injury Fund's acceptance of liability for such benefits." Both the claimant and the Fund appealed the decision to the full Commission which reversed the law judge's finding that the Second Injury Fund had controverted the compensability of the claim and, therefore, held that the Fund was not liable for any attorney's fee. The claimant appealed that decision to this court.

Appellant first argues that the full Commission erred in finding that the Second Injury Fund had not controverted appellant's entitlement to permanent total disability benefits. She contends that by choosing to wait until the determination of compensability was decided (a period of 2½ years) before accepting liability, by filing interrogatories, and by participating in the taking of the claimant's deposition, the Fund actually controverted the claim. We cannot agree.

The question of whether or not a claim is controverted is one of fact to be determined from the circumstances of each particular case. *Walter* v. *Southwestern Bell Telephone Co.*, 17 Ark. App. 43, 702 S.W.2d 822 (1986); *Climer* v. *Drake's Backhoe*, 7 Ark. App. 148, 644 S.W.2d 637 (1983). When reviewing a decision of the Worker's Compensation Commission, we must view the evidence and all reasonable inferences deducti-

ble therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Clark* v. *Peabody Testing Service,* 265 Ark. 489, 579 S.W.2d 360 (1979); *Tyson Foods, Inc.* v. *Disheroon,* 26 Ark. App. 145, 761 S.W.2d 617 (1988).

The Second Injury Fund does not become liable for benefits until it has been established that (1) the claimant has sustained a compensable injury which has resulted in a permanent disability, (2) the claimant has a preexisting disability or impairment, and (3) a combination of the two has resulted in a greater disability than would have been caused by the last injury considered alone. *Mid-State Construction Company* v. *Second Injury Fund,* 295 Ark. 1, 746 S.W.2d 539 (1988); Ark. Code Ann. § 11-9-525 (1987). Filing interrogatories and participating in the taking of depositions are methods of gathering information for the investigation the Fund must make in any case in which it has been made a party. Otherwise, it has no knowledge about the matter. This investigation does not mean that the claim is controverted by the Fund. Indeed, once the issues in the present case were narrowed to the compensability of the claim and the continuation of temporary total disability, the Second Injury Fund was excused from participating in the case until those issues were decided. It was not until the Court of Appeals issued its decision on March 2, 1988, establishing that there was a compensable injury, that the Fund had any liability. Immediately thereafter, on March 15, 1988, the Fund accepted its liability. In *Aluminum Company of America* v. *Henning,* 260 Ark. 699, 543 S.W.2d 480 (1976), the court stated that the purpose of determining whether or not a claim has been controverted, and by whom, "is to place the burden of litigation expense upon the party which made it necessary." 260 Ark. at 706-07, 543 S.W.2d at 485. In the instant case it was not the Second Injury Fund which made the litigation necessary; it was the employer, Sparks Regional Medical Center. The Fund never denied liability and when the issue of permanent disability became ripe, the Fund acknowledged its liability. The Commission's finding that the Fund is not liable for an attorney's fee is clearly supported by the law and the evidence.

Appellant also argues that she should be allowed an attorney's fee on all permanent disability benefits payable to her

and contends it should be paid by either Sparks or the Second Injury Fund. She contends that if the Fund is not liable, the case of *Prier Brass* v. *Weller,* 23 Ark. App. 193, 745 S.W.2d 647 (1988), holding that the liability of the employer in second injury cases "is limited to that which results from injuries sustained while in the employment," should be reconsidered and modified. She suggests that the limitation on attorney's fees imposed by that case could impair an injured worker's ability to obtain proper legal representation. Sparks points out that it did not have this effect in the present case, and there is no reason to speculate it could in some other case, especially since the Second Injury Fund has a potential liability for an attorney's fee. We think the *Prier Brass* decision is sound and should not be modified.

Affirmed.

COOPER and JENNINGS, JJ., agree.

Francisco Rosas GONZALEZ *v.* STATE of Arkansas

CA CR 89-320 794 S.W.2d 620

Court of Appeals of Arkansas
Division I
Opinion delivered September 5, 1990

Richard A. Garrett, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant was convicted by a jury of possession of a controlled substance (marijuana) with intent to deliver and sentenced to serve 20 years in the Arkansas Department of Correction and a fine of $15,000.00. Appellant does not challenge the sufficiency of the evidence, but argues the

trial court erred in refusing to quash the jury panel and in refusing to find the vehicular stop and subsequent search illegal.

On the day of trial, the court announced the charges against appellant and stated: "We're here today for the trial of that matter. We've also got a number of other things to take up and I am going to go ahead and proceed with them at this time. You ladies and gentlemen who are here as jurors, if you'll just be patient it won't take but a few minutes and maybe we'll get some of the courtroom cleared out and then we'll proceed with the trial." The court then proceeded, in the presence of the jury panel, with the arraignment of approximately 30 individuals on drug charges. At the conclusion of the arraignments, and immediately before the clerk drew the names of prospective jurors for the present case, the appellant moved to quash the entire panel because of the alleged prejudicial effect of the plea and arraignment session. The court denied appellant's motion and proceeded with the draw.

During juror voir dire the appellant's attorney asked the first 12 veniremen whether the fact that they sat there and saw the arraignment gave them bad feelings about people charged with crimes involving drug use, delivery, or sale. No juror responded in the affirmative. However, five jurors were excused on peremptory challenges by the appellant and one by the state. No juror was challenged or excused for cause. Six new veniremen were then called and counsel asked whether any of them was bothered by the fact that there were 31 or 32 arraignments on drug charges that morning. One, Ms. Shaffer, responded it bothered her, and she was subsequently excused by the state through the exercise of a peremptory challenge. None of the additional six were challenged or excused for cause.

Appellant first argues on appeal that the court erred in refusing to quash the jury panel. Appellant states he is guaranteed the right to a trial by an impartial jury, U.S. Const. amend. VI; Ark. Const. art. 2, § 10; that a jury cannot be predisposed to find guilt, *United States* v. *McIver,* 688 F.2d 726 (11th Cir. 1982); and that it is proper for the entire panel to be quashed if they cannot render an impartial decision, *United States* v. *Stratton,* 649 F.2d 1066 (5th Cir. 1981). Appellant also contends that the arraignment could do nothing other than prejudice the

panel against someone charged with violation of drug laws and that the statements the jurors made coupled with the fact they brought back the maximum sentence leaves one no choice but to conclude the jury had presumptive bias. The case of *Pickens* v. *State*, 260 Ark. 633, 542 S.W.2d 764 (1976), is cited in support of this conclusion. However, in that case the court, citing *Holland* v. *State*, 260 Ark. 617, 542 S.W.2d 761 (1976), found no error in not dismissing jurors merely because they had sat on previous cases involving the sale of controlled substances. The *Pickens* opinion also stated that the appellant's attorney had extensively voir dired the jurors and "no prejudice or bias was revealed because of having served on the previous trial." The trial court was reversed, however, for not excusing a particular juror for cause where that juror gave equivocal answers to questions concerning his ability to impartially judge the witnesses' credibility and whether he had formed an opinion as to his verdict.

In the present case, several jurors stated on voir dire that they took the drug laws seriously, were concerned and were shocked to see there is really a problem, and were surprised there were so many people involved in drugs. But, only Ms. Shaffer responded she was concerned by the arraignments, and she was excused by the state. Moreover, appellant's counsel sat without objecting to the jury's presence during the arraignment proceedings and objected only after the entire process was completed. An immediate objection could have avoided the problem as the trial court could have excluded the jury. In addition, the jury was instructed that it was to determine the facts from the evidence produced at trial; that it was to apply the law as contained in the instructions to the facts; and that it should render a verdict upon the evidence and the law. Jurors are presumed to follow the instructions given them by the trial court, *Logan* v. *State*, 300 Ark. 35, 776 S.W.2d 341 (1989), and we cannot say they did not do so in this case.

The constitutional guaranty of an impartial jury is a judicial question addressing itself to the sound discretion of the trial court, which will not be reversed absent a manifest abuse of that discretion. *McFarland* v. *State*, 284 Ark. 533, 548, 684 S.W.2d 233, 242 (1985). Under the circumstances of this case, we find the trial court did not err in denying appellant's motion to quash the jury panel.

Appellant's second argument for reversal is that the trial court erred in denying his motion to suppress evidence because of an allegedly illegal vehicular search. Appellant contends he was stopped for following too closely which has nothing to do with possession of a controlled substance; that there is no rational relationship between the reason the vehicle was stopped and the search; and that the odor of marijuana the officer contends he smelled did not rise to the necessary reasonable belief required for a warrantless search.

At the hearing on appellant's motion to suppress, Officer B.R. Skipper testified appellant's vehicle "ran up on the back" of a vehicle in front of it and traveled behind it so closely that the officer believed it to be unsafe. After the stop, appellant told the officer that the vehicle was rented and when appellant stepped from the vehicle, Officer Skipper noticed what he believed to be a faint odor of marijuana. The officer advised appellant he was going to be issued a citation for following too closely and appellant appeared extremely nervous and unsure. When questioned about the vehicle being rented, appellant appeared confused; wanted to know why the officer was inquiring; and with each question became more nervous. Officer Skipper testified that after issuing the citation, he asked appellant whether he had time to show the officer what was in the trunk; that appellant went to the driver's side of the vehicle and retrieved the keys from the ignition; and that he came back to the rear of the vehicle and began to place the key in the trunk lock. The officer said that about the time appellant started to turn the key he turned it back and pulled it back out; the officer asked appellant if there was a problem and appellant said he didn't have a trunk key. The officer said he told appellant that sometimes the ignition key will work in the trunk and asked if appellant minded his trying it. The officer said appellant handed him the keys and when he opened the trunk an enormous odor of marijuana emanated from it. The officer said he saw a large, or more than one garbage bag; that he placed appellant under arrest, advised him of his rights, and called for another trooper. He then looked into the garbage bag and located what he believed to be marijuana.

The trial court denied appellant's motion to suppress because (1) there was probable cause for the search and (2) there was valid consent to the search. We do not discuss the probable

cause finding as we affirm the finding of valid consent. It is clear that the officer in this case was authorized to stop appellant for the traffic violation of following too closely. Rule 4.1(a)(iii) of the Rules of Criminal Procedure provides that a law enforcement officer may arrest a person for any violation of law committed in the officer's presence, and Ark. Code Ann. § 27-51-305(a) (1987) provides that the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent. When the appellate court reviews a trial court's ruling on a motion to suppress evidence, it makes an independent determination based upon the totality of the circumstances and reverses only if the trial court's ruling was clearly against the preponderance of the evidence. *Campbell* v. *State,* 27 Ark. App. 82, 766 S.W.2d 940 (1989). Although the appellant admitted that he gave the car keys to the officer, he denied that he consented to the search. Therefore, the state had the burden of proving there was a voluntary consent and that it was not the product of duress or coercion. *Alford* v. *State*, 291 Ark. 243, 724 S.W.2d 151 (1987). Based upon the law and the totality of the circumstances, we find that the appellant voluntarily consented to the search of the trunk of the car he was driving and that the trial court was correct in refusing to grant appellant's motion to suppress.

Affirmed.

COOPER and JENNINGS, JJ., agree.

SAFEWAY STORES *v.* Sarah McGOUGH and Death and Permanent Total Disability Trust Fund

CA 90-15 794 S.W.2d 626

Court of Appeals of Arkansas
Division I
Opinion delivered September 12, 1990

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

David L. Pake, for appellee Death & Permanent Total Disability Trust Fund.

MELVIN MAYFIELD, Judge. Safeway Stores, Inc., has appealed a decision of the Workers' Compensation Commission which held that the payments for "current total disability" made to the claimant cannot be credited against the $50,000.00 maximum it must pay in permanent total disability benefits before the liability for those benefits becomes the responsibility of the Death and Permanent Total Disability Trust Fund pursuant to Ark. Code Ann. § 11-9-502(b)(1) and (b)(2)(1987) [formerly Ark. Stat. Ann. § 81-1310(c)(2)(Repl. 1976)]. The version of that section in effect at the time of the claimant's injury provided:

> (2) The first Fifty Thousand Dollars ($50,000) of weekly benefits for death or permanent total disability shall be paid by the employer or his insurance carrier in the manner provided in this Act [§§ 81-1301 — 81-1349]. An employee or dependent of an employee who receives a total of Fifty Thousand Dollars ($50,000) in weekly benefits shall be eligible to continue to draw benefits at the rates prescribed in this Act but all such benefits in excess of Fifty Thousand Dollars ($50,000) shall be payable from the Death and Permanent Total Disability Bank Fund.

Ark. Stat. Ann. § 81-1310(c)(2)(Repl. 1976).

The record shows that an order filed March 3, 1983, stated that the parties had appeared before the administrative law judge and stipulated that the claimant, Sarah McGough, had sustained

a compensable injury on December 2, 1978, while working for Safeway Stores; that she remained currently, totally disabled since her accidental injury; that the law judge found the stipulation to be reasonable; and that the law judge's order of March 3, 1983, directed the employer to pay claimant current, total disability benefits from December 2, 1978, until such time as she was no longer currently, totally disabled.

On April 13, 1987, the Arkansas Supreme Court, in *Arkansas Secretary of State* v. *Guffey*, 291 Ark. 624, 727 S.W.2d 826 (1987), held that the Arkansas Workers' Compensation Act "does not authorize award of current total or limited total disability benefits after the end of the healing period." 291 Ark. at 628, 727 S.W.2d at 828.

On May 4, 1988, a hearing was held by an administrative law judge, and the parties stipulated that the claimant's healing period had ended on October 5, 1981, and that she was permanently and totally disabled as a result of the injury sustained December 2, 1978. The employer contended that all payments made to the claimant after October 5, 1981, which had been previously characterized as "current total disability benefits," should be counted as credit toward the $50,000.00 maximum liability. The Death and Permanent Total Disability Trust Fund contended that the employer (or its carrier) must first pay $50,000.00 in weekly benefits for *permanent total disability* before the Fund would become liable. However, the Fund conceded that the employer could take credit for weekly payments made after April 13, 1987, the date on which the *Guffey* decision was issued by the Arkansas Supreme Court. The law judge found disability in keeping with the stipulation of the parties and held that payments made before April 13, 1987, could not be credited against the $50,000.00 maximum. The full Commission affirmed.

On appeal to this court the appellant employer argues that because the *Guffey* opinion stated that "current total disability" benefits had never been authorized by the Arkansas Workers' Compensation Act, all compensation paid after the healing period ended, although characterized as "current total disability," was actually permanent total disability and should apply toward the statutory maximum.

We rejected a similar argument in *Basford* v. *Weyerhaeuser Co.*, 21 Ark. App. 223, 730 S.W.2d 916 (1987), where we stated:

> At least since 1980, the Arkansas Workers' Compensation Commission and this court have recognized the Commission's authority to make awards for current-total disability to be followed by periods of permanent-partial disability. *See Sunbeam Corp.* v. *Bates*, 271 Ark. 385, 609 S.W.2d 102 (Ark. App. 1980). The Court of Appeals reaffirmed this concept in *Guffey* v. *Arkansas Secretary of State*, 18 Ark. App. 54, 710 S.W.2d 836 (1986). However, on April 13, 1987, the supreme court reversed our decision in *Guffey* and all prior decisions on that issue, declaring that our law does not authorize or recognize current-total disability benefits after the end of the healing period. *Arkansas Secretary of State* v. *Guffey*, 291 Ark. 624, 727 S.W.2d 826 (1987).
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> In 1983, when the Commission ordered current-total disability benefits in this case, both the Commission and this court recognized the validity of such orders. The order was not appealed from and it became final and its terms binding on all parties. In 1985, when that period of current-total disability was terminated, the Commission should have applied the rules then in effect and judicially sanctioned. We conclude that the Commission under its own order was without authority to retroactively remit payments made for current-total disability or direct that they be treated as payments toward a future award of permanent-total disability.

21 Ark. App. at 225-26, 730 S.W.2d at 917.

In its conclusion, the appellant in the instant case argues the concept of current, total disability "never existed" and "is a phantom" that "has now vanished." However, on March 3, 1983, when the payments of "current" total disability were originally ordered in this case, the concept was judicially recognized and accepted. That order was based upon a stipulation that the claimant "remained currently, totally disabled," and we believe the Commission correctly held that the payments of compensation characterized as current total disability by the law judge in March of 1983, and not appealed from by the employer,

cannot now be recharacterized as permanent total disability in order to make the payments apply toward the $50,000.00 maximum at which the Death and Permanent Total Disability Trust Fund assumes liability. The Commission's holding allowing credit for the payments since April 13, 1987, conceded by the Fund, is the very earliest date from which the payments could be counted as permanent total disability under the record in this case.

Affirmed.

COOPER and JENNINGS, JJ., agree.

ERC MORTGAGE GROUP, INC. *v.* Jerry LUPER

CA 89-519 795 S.W.2d 362

Court of Appeals of Arkansas
Division I
Opinion delivered September 12, 1990

Warner and Smith, by: *G. Alan Wooten*, for appellant.

Phillip J. Taylor, for appellee.

JOHN E. JENNINGS, Judge. Appellee, Jerry Luper, brought this action against appellant, ERC Mortgage Group, Inc., alleging, among other things, breach of an employment contract. At the close of appellee's case below, appellant's motion for directed verdict was granted as to all counts except that for breach of contract. At the close of appellant's case the motion for directed verdict was renewed, was again denied, and the jury returned a verdict in favor of appellee for $5,602.24. Appellee was awarded attorney's fees of $1,500.00 plus costs. Appellant's motion for judgment notwithstanding the verdict was denied. On

appeal, appellant argues two points: (1) that the trial court should have granted either appellant's motion for a directed verdict or motion for judgment notwithstanding the verdict because there was no substantial evidence of a breach of contract by appellant; and (2) that the court improperly awarded attorney's fees to the appellee. We find no error, and affirm.

In the fall of 1987 appellee, Jerry Luper, worked in Fort Smith as a closing agent, and had closed some home loans that were handled through appellant, ERC Mortgage Group, Inc. Employees and officers of ERC Mortgage Group began talking to Luper about the possibility of his coming to work for ERC as a home loan originator. The testimony by both Luper and Jane Brightop, who was president of ERC Mortgage at that time, was that there were ongoing negotiations during November and December of 1987 about aspects of the job, including compensation. Luper did not want to work on straight commission, and testified that an agreement was reached where he would be paid $1,000.00 a month plus commissions for one year. Luper was invited to the ERC Mortgage Group Christmas party, where he was handed a document captioned "Employment Plan," essentially a memorandum to Luper dated December 18, 1987, signed by Austin Brightop, the company's state originations supervisor. The document purported to be an employment plan designed for Luper, renegotiable on an annual basis. It described a sliding commission scale, and stated that Luper would be given a $1,000.00 monthly expense allowance. The document stated that Brightop was pleased that Luper was joining the company beginning January 4, 1988. Luper testified that he accepted the terms at the Christmas party, and began work on January 4.

In late June or early July of 1988, Luper was informed by Steve Clark, the company's assistant vice-president and Luper's supervisor, that as of August 1st Luper's monthly expense allowance would be cut to $500.00, and that as of September 1st his monthly expense allowance would be eliminated, effectively putting Luper on straight commission. Luper testified that he continuously questioned this reduction, asking Clark to have Jane Brightop call him. Luper said he never heard from Brightop.

In August, in the midst of this dispute, a question of possible impropriety in the preparation of some loan documents arose.

Conflicting testimony was offered concerning the details, but Luper testified that the end result was his being forced to submit his resignation. Witnesses for ERC Mortgage Group testified that Luper had committed an error in the preparation of an employment verification form that would have led to his being fired had he not resigned. Four months after his resignation, Luper brought this action.

Appellant argues that there was no substantial evidence of a breach of contract by it, and that the trial court should therefore have granted its motion for directed verdict or its motion for judgment notwithstanding the verdict. When asked to review the denial of a motion for directed verdict, this court examines the evidence, along with all reasonable inferences deducible from it, in the light most favorable to the party against whom the motion is sought; only if the evidence viewed in that light would require the setting aside of a jury verdict should a trial court grant a directed verdict. *Thomas* v. *Allstate Ins. Co.*, 27 Ark. App. 27, 766 S.W.2d 31 (1989); *First Nat'l Bank of Wynne* v. *Hess*, 23 Ark. App. 129, 743 S.W.2d 825 (1988). Only when the proof of one party is so clear, convincing and irrefutable that no other conclusion could be reached by reasonable men, should the issue be taken from the jury and decided by the court. *Barger* v. *Farrell*, 289 Ark. 252, 711 S.W.2d 773 (1986). A judgment notwithstanding the verdict may be entered only if there was no substantial evidence to support the jury verdict. *First Nat'l Bank of Wynne* v. *Hess*, 23 Ark. App. 129, 743 S.W.2d 825 (1988).

Appellant's contention is that there could not have been a contract because (1) the letter from Brightop to Luper was not signed by Luper, and (2) there was no "meeting of the minds" and therefore no mutual agreement. There is no general requirement in the law of contracts that a contract or agreement be signed by both parties, although the statute of frauds requires certain contracts to be signed by "the party to be charged." In the case at bar the jury could find that the letter from Brightop was an offer, which is defined as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement (Second) of Contracts § 24 (1981). "Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any

medium reasonable in the circumstances." Restatement (Second) of Contracts § 30. "Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." Restatement (Second) of Contracts § 50. Here the evidence would support a finding that the appellee accepted appellant's offer either verbally or by his subsequent performance. *See* Restatement of Contracts § 30 and § 50. While it is true that the terms of a contract must be reasonably certain, they are sufficiently so if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. Restatement (Second) of Contracts § 33. The law does not favor the destruction of contracts because of uncertainty. *Shibley* v. *White*, 193 Ark. 1048, 104 S.W.2d 461 (1937). And while it is also true that a "meeting of the minds" or a manifestation of mutual assent is a requirement for the formation of a contract, Restatement (Second) of Contracts § 17, the standard is an objective one. *See Dziga* v. *Muradian Business Brokers, Inc.*, 28 Ark. App. 241, 773 S.W.2d 106 (1989); Restatement (Second) of Contracts § 17, comment c. A manifestation of assent may be made wholly by spoken words or by conduct. *See* Restatement (Second) of Contracts § 19.

On the facts of the case at bar we cannot say there was no substantial evidence to support the jury's finding that there was a contract between the parties.

After the jury returned the verdict for $5,624.00, Luper was awarded an attorney's fee by the court of $1,500.00 pursuant to Ark. Code Ann. § 16-22-308. That section provides in part:

> In any civil action to recover on [a] . . . breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney fee to be assessed by the court and collected as costs.

Appellant agrees that an award of attorney's fees is discretionary with the trial court under the code provision, but contends that under the circumstances Luper was not the "prevailing party." The basis of the argument is that six of the seven counts contained in Luper's complaint were dismissed on the appellant's motion at the close of Luper's case-in-chief.

Quapaw Co. v. *Varnell*, 566 P.2d 164 (Okla. Ct. App. 1977), was a suit based on an oral contract of employment. The plaintiff's complaint contained four causes of action. Two of the causes of action were stricken by the Oklahoma Supreme Court on appeal from the trial court's denial of motion for summary judgment. The remaining two causes of action were submitted to a jury which awarded Varnell $6,000.00 on one and nothing on the other. Under an Oklahoma statute providing for the award of an attorney's fee to the prevailing party, the trial court found that both parties prevailed and awarded each an attorney's fee.

The Oklahoma Court of Appeals reversed and cited with approval *Ozias* v. *Haley*, 141 Mo. App. 637, 125 S.W. 556 (1910):

> There can be but one prevailing party in an action at law for the recovery of a money judgment. It transpires frequently that in the verdict each party wins on some of the issues and as to such issues he prevails, but the party in whose favor the verdict compels a judgment is the prevailing party. Each side may score but the one with the most points at the end of the contest is the winner, and . . . is entitled to recover his costs.

See also Hansen v. *Levy*, 139 Misc. 693, 248 N.Y.S. 200 (N.Y. App. Term. 1930) and *Sharpe* v. *Ceco Corp.*, 242 So. 2d 464 (Fla. Dist. Ct. App. 1970); *cf. Garner* v. *Limbocker*, 28 Ark. App. 68, 770 S.W.2d 673 (1989) (attorney's fees awarded to prevailing party pursuant to 42 U.S.C. § 1988 even when recovery was "extremely slight" in view of complaint). The Oklahoma Court of Appeals adopted the rule stated in *Ozias*, holding that Varnell was the prevailing party. The holding in *Quapaw* has since been expressly approved by the Oklahoma Supreme Court. *The Company, Inc.* v. *Trion Energy*, 761 P.2d 470 (Okla. 1988).

We agree with the view of the trial court here that the appellee was the "prevailing party" under Ark. Code Ann. § 16-22-308. There is no contention that the amount awarded was an abuse of the trial court's discretion.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

Floyd KILLIAN and Wife Mary Killian *v.*
Truman HILL and Wife Loretta Hill

CA 89-422 795 S.W.2d 369

Court of Appeals of Arkansas
Division I
Opinion delivered September 19, 1990

Edwin J. Alford, for appellant.

No brief filed.

JOHN E. JENNINGS, Judge. This is a dispute over a fifteen foot wide strip of land between two adjacent landowners, the appellants Floyd and Mary Killian and the appellees Truman and Loretta Hill.

Both parties had surveys of the land in question performed by licensed surveyors, Charles H. Webb for the appellants and Fred D'Aryan for appellees. The Webb survey favored the appellants and the D'Aryan survey favored the appellees. The court appointed its own expert, C.T. Patterson, an engineer, to review the surveys. Patterson preferred the D'Aryan survey and the court eventually found for the Hills.

On appeal the Killians contend (1) that the court erred in admitting the D'Aryan survey because it was performed by "unauthorized persons," (2) the court erred in admitting the D'Aryan survey and D'Aryan's testimony regarding it because they were based on hearsay, and (3) the court's finding that the D'Aryan survey was correct was clearly against a preponderance of the evidence. We find no error and affirm.

D'Aryan testified that he did the survey for the Hills. He testified that his sons Nathaniel, who was twenty-three, and Othniel, who was sixteen, did the initial field work. He testified that both boys had been helping him since they were eight years old but that neither was legally a "surveyor-in-training" nor a licensed surveyor. He testified that their ability as to accuracy was "very good" and that "they are just as qualified as the vast majority of people working on field crews in the State of Arkansas." He testified that he checked their work in the office and at the site, but did not go back and redo all of the field work

that they had done.

Surveying has been described both as an art, F. Clark, *A Treatise on the Law of Surveying and Boundaries* § 8 (J. Grimes 3d ed. 1959), and as a science, *Gehrig, Hoban & Co.* v. *United States*, 293 F. Supp. 433 (Cust. Ct. 1968). Rule 702 of the Arkansas Rules of Evidence provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Whether a witness may give expert testimony rests largely within the sound discretion of the trial court and that determination will not be reversed unless an abuse of that discretion is found. *Hardy* v. *Bates*, 291 Ark. 606, 727 S.W.2d 373 (1987). There is a decided tendency to permit the fact finder to hear the testimony of persons having superior knowledge in a given field, unless they are clearly lacking in training or experience. *Dildine* v. *Clark Equipment Co.*, 282 Ark. 130, 666 S.W.2d 692 (1984). If there is a reasonable basis for saying a witness knows more of the subject at hand than a person of ordinary knowledge, his evidence is admissible. *Courteau* v. *Dodd*, 299 Ark. 380, 773 S.W.2d 436 (1989). Most courts have recognized surveyors as "expert witnesses," Clark, *supra*. The courts of this state seem to agree. *See, e.g., State Highway Commission* v. *Oakdale Development Corp.*, 1 Ark. App. 286, 614 S.W.2d 693 (1981); *Chappel* v. *Carnahan*, 264 Ark. 444, 572 S.W.2d 141 (1978); *City of Searcy* v. *Roberson*, 256 Ark. 1081, 511 S.W.2d 627 (1974).

An expert may base his opinion on facts learned from others, despite their being hearsay. *Dixon* v. *Ledbetter*, 262 Ark. 758, 561 S.W.2d 294 (1978). Rule 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or an inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in

evidence.

The test under Rule 703 is whether the expert's reliance is reasonable. *Dixon, supra.* In the case at bar, C.T. Patterson, a professional engineer, testified that services performed by survey crews composed "part of the matrix of surveying." *See also Witkowski* v. *White*, 248 Ark. 298, 451 S.W.2d 749 (1970), and Clark, *supra* at § 49. In the language of the court in *Dixon*, it was not prima facie unreasonable for D'Aryan to rely on field work done by his sons in preparing his survey. D'Aryan's survey was not rendered inadmissible hearsay by such reliance.

The Killians also argue that, since D'Aryan's sons were not licensed "surveyors-in-training," the survey is inadmissible. In support appellants rely on the code provisions regulating surveyors, Ark. Code Ann. § 17-41-101 through 17-41-206. Those code sections provide for the registration of "land surveyors-in-training" and establish penalties for violations of the Act. Appellant correctly notes that licensing statutes must be strictly construed. *See Wilcox* v. *Safley*, 298 Ark. 159, 766 S.W.2d 12 (1989).

Assuming that D'Aryan's sons were required to be licensed as "land surveyors-in-training," we cannot agree that this renders the survey itself inadmissible as evidence. The strength or lack of strength of the evidence on which an expert's opinion is based goes to the weight and credibility, rather than to the admissibility, of the opinion in evidence. *See Higgs* v. *Hodges*, 16 Ark. App. 146, 697 S.W.2d 943 (1985). Where the testimony shows a questionable basis for the opinion of the expert, the issue becomes one of credibility for the fact finder, rather than a question of law. *Arkansas State Highway Commission* v. *First Pyramid Life Ins. Co. of America*, 265 Ark. 417, 579 S.W.2d 587 (1979).

Finally, appellants argue that greater credibility should be given to the Webb survey. Matters of credibility are for the trial court to determine. *Lopez* v. *State*, 29 Ark. App. 145, 778 S.W.2d 641 (1989). The location of a boundary is a question of fact and we must affirm the decree unless the chancellor's finding is clearly against a preponderance of the evidence. *Rabjohn* v. *Ashcraft*, 252 Ark. 565, 480 S.W.2d 138 (1972). In the case at bar C.T. Patterson, the engineer, explained why he thought the

D'Aryan survey was more likely correct. We cannot say that the trial court's finding in accordance with Patterson's opinion was clearly against a preponderance of the evidence.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

Ronald Dale KENDRICK *v.*
PEEL, EDDY, AND GIBBONS LAW FIRM, et al.

CA 89-520 795 S.W.2d 365

Court of Appeals of Arkansas
Division I
Opinion delivered September 19, 1990

Young & Finley, by: *James K. Young*, for appellant.

Jones, Gilbreath, Jackson & Moll, by: *Randolph C. Jackson*, for appellee.

MELVIN MAYFIELD, Judge. The appellant in this appeal from the Workers' Compensation Commission is the minor son of Kathy Kendrick, who was shot and killed at her employer's law office by Ronald Gene Simmons on December 28, 1987. It is contended that the child, who was four years old at the time of his

mother's death, is entitled to workers' compensation benefits based on the doctrine of positional risk. The Commission did not agree that the doctrine applied and held the evidence failed to establish that decedent's death arose out of and in the scope of her employment.

In *J. & G. Cabinets* v. *Hennington*, 269 Ark. 789, 600 S.W.2d 916 (Ark. App. 1980), this court said:

> A claimant before the Workers' Compensation Commission must prove that the injury sustained was the result of an accident arising out of and in the course of employment. The phrase "arising out of the employment" refers to the origin or cause of the accident and the phrase "in the course of the employment" refers to the time, place, and circumstances under which the injury occurred.

269 Ark. at 792-93, 600 S.W.2d at 918. The doctrine of positional risk relied upon by the appellant in the instant case is explained in 1 Larson, *The Law of Workmen's Compensation*, § 6.50 (3/90), as follows:

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

Although the positional risk doctrine has not yet been applied in Arkansas to sustain an award of compensation, our cases have indicated that the doctrine would be applied in a proper case. In *Pigg* v. *Auto Shack*, 27 Ark. App. 42, 766 S.W.2d 36 (1989), we cited the case of *Parrish Esso Service Center* v.

Adams, 237 Ark. 560, 374 S.W.2d 468 (1964), where compensation was awarded to a claimant who was injured at work by a gust of wind which "lifted appellee into the air, carried him approximately seventy-five feet, and dropped him on the concrete apron." We said in *Pigg* that while the words "positional risk" were not used in *Parrish*, that case represents the type of fact situation where the positional risk doctrine arises. However, in *Pigg*, we relied upon 1 Larson, *Workmen's Compensation Law* § 11.21 (now 1 Larson, *The Law of Workmen's Compensation*, § 11.21(c)(3/90)) to hold that the positional risk doctrine applies "only when the risk is neutral," and we agreed with Larson that neutral means "that the risk which caused the injury was neither personal to the claimant nor distinctly associated with the employment." 27 Ark. App. at 45, 766 S.W.2d at 38. Because we found that the risk which caused the worker's injury was not "neutral," we also refused to apply the positional risk doctrine in *Burks* v. *Anthony Timberlands, Inc.*, 21 Ark. App. 1, 727 S.W.2d 388 (1987), and *Adkins* v. *Teledyne Exploration Co.*, 8 Ark. App. 342, 652 S.W.2d 55 (1983).

In the case at bar, the evidence showed that on the morning of December 28, 1987, Kathy Kendrick was killed while performing her duties as receptionist at the law firm where she worked. Brenda Jones, who was seated in the waiting room, testified that Kendrick was in another office when Simmons came in. She said that Kendrick approached Simmons without any sign of recognition and asked, "Can I help you?" At that point, Simmons shot Kendrick several times, then turned around, looked directly at Jones, and walked out of the office. Jones said Simmons did not attempt to go into any of the offices of the attorneys in the firm nor did he make any threatening moves toward her (Jones).

It was stipulated that before Simmons came to the law office he had already killed fourteen of his family members, and that after he shot Kendrick, he went to the Taylor Oil Company where he shot his former employer and another man, then to the Sinclair Mini-Mart where he shot a former co-worker, and finally to Woodline Motor Freight where he shot his former supervisor. It was also stipulated that Kendrick and Simmons had previously worked together at Woodline Motor Freight and that Kendrick left her employment with Woodline on March 2, 1987, and Simmons left his employment there on November 19, 1986.

Vicki Lynn Jackson, a friend of Kendrick's who also worked at Woodline, testified that Kendrick and Simmons were acquainted. She said Kendrick confided to her that Simmons kept asking her (Kendrick) to go out with him but that she refused because he was married; that Kendrick said Simmons wrote her notes, followed her, and would sometimes be found sitting on her doorstep; and that Kendrick said she had told Simmons to just "go away."

Jackson also testified that she saw Simmons come into Woodline and shoot his former supervisor, Joyce Butts, and that he then came into the computer room where Jackson was working, held a gun on her and ordered her to call the police. She said he kept the gun on her until he surrendered to the chief of police, but he did not attempt to hurt her. According to Jackson, Simmons told her, "it was all over now, . . . he had gotten everybody that hurt him."

David Eddy, of the appellee law firm, testified that as far as he could determine Simmons had no connection with his law firm or any of its clients. He said none of the attorneys in the firm had ever represented Simmons or were even acquainted with him prior to this incident.

The Commission concluded that the doctrine of positional risk did not apply because the shooting of Kathy Kendrick resulted from a personal vendetta against individuals Simmons felt had harmed him and consequently did not arise out of and in the course of her employment.

Appellant argues that the Commission's decision is not supported by substantial evidence. He submits that Ms. Jackson's testimony was not admissible because it was not corroborated, as required by Ark. Code Ann. § 11-9-705(a)(2) (1987), which provides:

> Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made, or the hearing conducted, may be received in evidence and may, if corroborated by other evidence, be sufficient to establish the injury.

We do not believe this section is applicable to this case because

Ms. Jackson's testimony was not about a deceased employee's statement concerning an injury but about statements of a deceased employee concerning her relationship with Ronald Gene Simmons.

Appellant also contends that Ms. Jackson's testimony is hearsay and was erroneously admitted under Ark. R. Evid. 803(24) since appellant had not been notified of her testimony. Appellee argues that appellant did not object at the hearing to the lack of notice; only that the testimony was hearsay. This exception specifically provides that the statement "may not be admitted . . . unless the proponent of it makes known to the adverse party sufficiently in advance" that the statement will be offered. Thus, it seems clear that without showing that the required notice has been made, the adverse party is required only to object that the testimony is hearsay.

However, even if Jackson's testimony about Kendrick's relationship with Simmons was hearsay and erroneously admitted, we find that when it is completely disregarded, the record contains sufficient evidence to support the Commission's finding that the positional risk doctrine does not apply in this case. It was stipulated that Kendrick and Simmons had worked together and that all but one of the people shot by Simmons were either members of his family or someone he had worked with. (The evidence does not show whether Simmons was acquainted with one of the men shot at Taylor Oil Company.) There is also evidence in the record that Simmons made no attempt to harm several other people who were in close proximity to those killed, and Ms. Jackson testified that while waiting for the police to come get him, "he said that it was all over now, that he had gotten everybody that hurt him." Clearly, the evidence does not show that Kathy Kendrick's death resulted from a "neutral" risk which, as we have discussed, means a risk that is "neither personal" to her nor "distinctly associated" with her employment. Certainly it was not like the gust of wind in the *Parrish Esso Service Center* v. *Adams* case, *supra*, which affected everything in its path, or like a "roving lunatic," referred to by Larson, who would be expected to kill without the selectivity demonstrated by the evidence in this case.

While the appellant also complains that Ms. Jackson

should not have been allowed to testify to the above statement made by Simmons, we disagree. The statement was made within minutes after Simmons had shot at least four people, and we think the statement falls under the hearsay exception of an excited utterance. *See* Ark. R. Evid. 803(2) which provides that "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is an exception to the hearsay rule. Furthermore, the Commission is not bound by technical or statutory rules of evidence. Ark. Code Ann. § 11-9-705(a)(1)(1987). The Commission has broad discretion with reference to admission of evidence and its decision will not be reversed absent a showing of abuse of discretion. *Linthicum* v. *Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987).

Appellant further complains about the handwritten and transcribed note found in Simmons' safety deposit box which was offered into evidence by the appellee. The only possible relevance the note might have to this case is that on the bottom of one of the pages is printed "T W I M C" with a circle around it, then "Kendrick Kathy Michelle [the next word is scratched out] was a contributing factor." The law judge's opinion states that "no ruling is necessary on the admissibility of this note, and none has been made." (The Commission's opinion does not even mention the point.) Again, the Commission is not bound by the rules of evidence. However, if the note is added to Kendrick's hearsay statements to be disregarded, we think the remaining evidence, considered in the light of the definition of a "neutral" risk, is still sufficient to support the Commission's decision; and we must give the evidence its strongest probative force in favor of the Commission's decision and affirm if that decision is supported by substantial evidence. *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979); *Fowler* v. *McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

We also point out that while the appellant has relied upon the doctrine of positional risk, there are cases which hold that injuries resulting from an assault are compensable where the assault is causally related to the employment, but not if the assault arises out of purely personal reasons. *See San Antonio Shoes* v. *Beaty*, 28 Ark. App. 201, 771 S.W.2d 802 (1989); *Burks* v. *Anthony Timberlands, Inc.*, 21 Ark. App. 1, 727 S.W.2d 388

(1987). This theory is distinguished from the doctrine of positional risk. *See* 1 Larson, *The Law of Workmen's Compensation* § 11.21(c) (3/90). It is obvious, however, that the evidence in this case would not support a finding that the assault on Kathy Kendrick was causally related to her employment with the appellee law firm. We simply note this in order to explain why we have discussed positional risk only and why the appellant relied only upon that doctrine.

Affirmed.

COOPER and JENNINGS, JJ., agree.

DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND *v.* HEMPSTEAD COUNTY and Public Employee Claims Division

CA 89-523 796 S.W.2d 351

Court of Appeals of Arkansas
En Banc
Opinion delivered October 3, 1990
[Rehearing denied October 31, 1990.*]

*Cracraft, Mayfield, and Rogers would grant rehearing.

David L. Pake, for appellant.

Michael E. Surguine, Public Employee Claims Division, for appellee.

ERNIE E. WRIGHT, Acting Chief Judge. Appellant, Death and Permanent Total Disability Trust Fund, appeals from a November 2, 1989, decision of the Arkansas Workers' Compensation Commission finding that appellee, Public Employee Claims Division, in calculating its maximum liability under Ark. Stat. Ann. § 81-1310(c)(2) (Repl. 1976), is entitled to credit for both permanent total disability benefits paid to the claimant during his lifetime and death benefits paid to claimant's dependent.

The facts in the case are not in dispute. The claimant suffered a compensable injury to his hip on July 30, 1977, and reached the end of his healing period on September 17, 1979. He was assigned a permanent physical disability rating of 40% to the body as a whole. On September 17, 1979, appellee Public Employee Claims Division began paying permanent total disability benefits to the claimant at the rate of $84.00 per week. On November 14, 1981, the claimant died as a result of complications from surgery to replace his injured hip. The claimant was survived by his wife and on November 15, 1981, appellee Public Employee Claims Division began paying widow's benefits to claimant's wife in an amount equal to $47.60 per week.

The only issue on appeal is whether the Commission erred as a matter of law by allowing appellee to credit weekly permanent disability benefits paid the employee during his lifetime against its maximum obligation to the surviving spouse. The date of the injury was July 30, 1977, and Ark. Stat. Ann. § 81-1310(c)(2) is applicable. The statute reads in part:

> The first Fifty Thousand Dollars ($50,000) of weekly benefits for death or permanent total disability shall be paid by the employer or his insurance carrier in the manner provided in this Act [§§ 81-1301—81-1349]. An employee or dependent of an employee who receives a total of Fifty Thousand Dollars ($50,000) in weekly benefits shall be

> eligible to continue to draw benefits at the rates prescribed in this Act but all such benefits in excess of Fifty Thousand Dollars ($50,000) shall be payable from the Death and Permanent Total Disability Bank Fund.

Appellant, citing *Bolden* v. *Watt*, 290 Ark. 343, 719 S.W.2d 428 (1986), asserts that the first rule in interpreting a statute is to construe it just as it reads by giving the words their ordinary and usually accepted meaning. Appellant argues that the disjunctive particle "or" in the first sentence of the statute permits only one reasonable interpretation, that being before benefits become payable from the Death and Permanent Total Disability Bank Fund, there must either be payment of a total of $50,000 of weekly permanent total disability benefits *or* there must be payment of a total of $50,000 of weekly death benefits.

Additionally, appellant contends a claimant's permanent total disability benefits and a dependent's death benefits are "two entirely separate entities" that derive from two separate statutory sources, Ark. Code Ann. §§ 11-9-519 and 11-9-527 (1987). Appellant argues that because the beneficiary of one benefit has no right to share in the benefits of the other beneficiary, the employer cannot take credit for its payments to one beneficiary in calculating its maximum liability to the other. Appellant contends that other provisions of the Workers' Compensation Law support this interpretation. We disagree and affirm the decision of the Commission.

This court, when construing statutes with no indication of a different legislative intent, gives words their ordinary and usually accepted meaning in common language; however, the ordinary and generally accepted meaning must yield to the meaning intended by the General Assembly when it is clear from the act in its entirety that a different meaning is intended. *Second Injury Fund* v. *Yarbrough*, 19 Ark. App. 354, 721 S.W.2d 686 (1986). Furthermore, the supreme court in *Holt* v. *City of Maumelle*, 302 Ark. 51, 786 S.W.2d 581 (1990), held that in statutory construction the basic rule to which all other interpretative guides are really subordinate is to give effect to the intent of the legislature.

As there is some ambiguity in the statute, the court is required to determine what the legislature intended when it

drafted the statute. Prior to the adoption of Initiated Act 1 in 1968, amending the Workers' Compensation Law, Ark. Stat. Ann. § 81-1310 limited the total disability benefits payable to $12,000 and total death benefits to $12,500. The 1968 Act eliminated the maximum benefits payable for total permanent disability and death. Act 221 of 1973, brought Ark. Stat. Ann. § 81-1310(c)(2) into the code, and its purpose was clearly to create a maximum weekly benefit for which the employer or his insurance carrier would be liable. The Act does not limit the maximum benefits payable for total permanent disability or death but fixes the maximum for which the employer or his carrier is liable. The Act also creates and provides for the funding of the Death and Permanent Total Disability Bank Fund which is made responsible for payment of benefits in excess of the maximum to be paid by the employer or his carrier. In § 81-1310(c)(2), after referring to both death benefits and permanent total disability benefits, the following language appears:

> [A]ll such benefits in excess of Fifty Thousand Dollars ($50,000) shall be payable from the Death and Permanent Total Disability Bank Fund.

We believe this language makes it clear that the intent of the legislature in passing Act 221 of 1973, was to place an overall limit on the weekly benefits payable by the employer or his carrier to $50,000, whether the benefits were for death or permanent total disability or both. The opinion of this court in *Hill* v. *CGR Medical Corporation*, 9 Ark. App. 334, 660 S.W.2d 171 (1983) in touching upon the issue here appears to support this view in saying:

> We agree with the Commission that a fair reading of the statute requires that the first $50,000 be paid in weekly benefits by the employer or his carrier and received by the employee or the dependents of an employee before the liability of the Death and Permanent Total Disability Bank Fund arises. . . .

The phrase "for permanent total disability or death benefits" upon which appellant bases his argument merely describes the types of weekly benefits to which the maximum liability of the employer or his insurance carrier applies.

Affirmed.

MAYFIELD AND CRACRAFT, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. This case involves the interpretation of Ark. Stat. Ann. § 81-1310(c)(2) (Repl. 1976), which reads as follows:

> The first Fifty Thousand Dollars ($50,000) of weekly benefits for death *or* permanent total disability shall be paid by the employer *or* his insurance carrier in the manner provided in this Act. [§§ 81-1301 — 81-1349]. An employee *or* dependent of an employee who receives a total of Fifty Thousand Dollars ($50,000) in weekly benefits shall be eligible to continue to draw benefits at the rates prescribed in this Act but all such benefits in excess of Fifty Thousand Dollars ($50,000) shall be payable from the Death and Permanent Total Disability Bank Fund. [Emphasis added.]

Mr. Coy Hutson received an injury to his hip in July of 1977. After his healing period ended, he began receiving permanent total disability payments which continued for about two years at which time he died from complications of hip replacement surgery. His widow then began receiving death benefits. The issue before us is whether the Commission erred in allowing the appellee to credit the disability payments to Mr. Hutson on its obligation to pay death benefits to Mrs. Hutson thereby allowing it to combine the disability and death benefits in computing its $50,000.00 maximum liability under the above statute.

In affirming the Commission's decision, this court's majority opinion, in my judgment, has failed to carefully consider what the law passed by the legislature provides and what the appellate courts of this state have held in previous cases involving similar questions. This failure has caused the majority to find a "clear" legislative intent with which I cannot agree.

In the first place, this court held in *Sparks Regional Medical Center* v. *Death and Permanent Total Disability Bank Fund*, 22 Ark. App. 204, 737 S.W.2d 463 (1987), that the above statute does not allow an employer to credit its *temporary* total disability payments against its statutory limit of $50,000.00 for *permanent* total disability. The employer argued the statute was ambiguous

and its interpretation should prevail, but we did not agree.

Our decision in *Sparks* was in harmony with our decision in *Hill* v. *CGR Medical Corp.*, 9 Ark. App. 334, 660 S.W.2d 171 (1983), where it was held that the Bank Fund did not have to make payments to the dependents of a deceased worker until the dependents had received the $50,000.00 provided in the statute even though an amount in excess of $50,000.00 had been recovered in the settlement of a tort suit and the employer's liability for future death benefits had been settled by the employer's waiver of its subrogation rights. We held that because the settlement proceeds were invested and would be paid to the dependents in installments, the Bank Fund's liability to pay would not start until the dependents had actually received a total of $50,000.00. Our decision in *Hill* was affirmed by the Arkansas Supreme Court. *See* 282 Ark. 35, 665 S.W.2d 274 (1984).

And again, in *J.A. Riggs Tractor Co.* v. *Etzkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990), we rejected an employer's attempt to get credit on its maximum liability for permanent total disability in the amount paid for temporary total disability. The main argument was that we should reverse our decision in *Sparks, supra.* Although *Sparks* and *Riggs* were neither en banc decisions, the two opinions were approved by five of the six regular judges of this court. It is generally thought that an organized society should have some degree of predictability in the law by which it is governed and that the doctrine of stare decisis tends to aid that predictability.

In addition, it seems to me that a careful consideration of the statute itself would indicate the opposite result from that reached by the majority opinion. Looking at the statute as set out above, it very clearly contains the word "or" three times. The very first definition of that word in *Webster's New Collegiate Dictionary* (1979) is "used as a function word to indicate an alternative," and examples of the word's usage are given as "coffee or tea," and "sink or swim." It is hard for me to believe that any member of the Arkansas General Assembly, when hearing the words "coffee or tea," would think the inquiry was "do you want both coffee and tea."

The statute set out above reads: "The first Fifty Thousand Dollars ($50,000) of weekly benefits for death *or* permanent total

disability. . . ." Surely the General Assembly did not use the word "or" to mean "and." If that was its intent, how about the next phrase "shall be paid by the employer *or* his insurance carrier. . . ." Does the word "or" in this phrase mean "and"? Do we really think the General Assembly means *both* the employer *and* his insurance carrier shall pay the first $50,000.00? And in the second sentence of the statute we find, "An employee *or* dependent of an employee who receives. . . ." Does this "or" mean "and" also? I suggest it means just what it says "an employee *or* dependent of an employee who receives. . . ." Thus, by reading the word "or" as it is written, in the dictionary meaning of the word, each time it is used in the above statute we give the word a reasonable and consistent meaning. To substitute "and" for "or" in any place in the statute results in absurd and inconsistent meanings and causes the statute to operate out of harmony with the previous decisions of the Arkansas Supreme Court and Court of Appeals.

There are other factors which suggest that the interpretation given by the majority opinion to the statute under consideration is in error. For example, Ark. Stat. Ann. § 81-1313(a) (Repl. 1976) authorizes an award for permanent total disability, and death benefits for dependents are authorized by Ark. Stat. Ann. § 81-1315 (Repl. 1976). These are entirely different sections and were different sections when Initiated Act No. 4 of 1948 was enacted. (That is the basic act still in effect. The sections of that act referred to above were sections 13 and 15.) The point I am attempting to make is that the original act clearly indicates that awards to an injured claimant are entirely separate from any benefits that may be awarded to a surviving dependent. In fact, Ark. Stat. Ann. § 81-1310(b) (Repl. 1976) specifically provides that "Compensation payable to the dependent of a deceased employee as above provided shall be in addition to funeral allowance and those benefits which were paid or to which the injured employee was entitled in his lifetime. . . ." Also, Ark. Stat. Ann. § 81-1321 (Repl. 1976) provides that "Money compensation to dependents of a deceased employee shall not constitute assets of the estate of the deceased employee and shall be payable to and for the benefit of the dependents alone."

Surely it is incongruous to have an act which provides for disability for injured workers in one section of the act and for

benefits to the dependent survivors of that employee in another section and which provides that compensation payable to the dependent of a deceased employee is *in addition* to the disability benefits paid to the injured employee and that the compensation paid to a dependent is for the benefit of the dependent *alone*, and to hold that the act also provides that disability payments may be credited against the liability for benefits due a dependent so that these separate payments can be added together to reach the employer's $50,000.00 maximum liability.

For the reasons discussed above, I respectfully dissent.

CRACRAFT, J., joins in this dissent.

A. TENENBAUM COMPANY *v.* DIRECTOR OF LABOR and Terry Thrasher

E 89-88 796 S.W.2d 348

Court of Appeals of Arkansas
Division I
Opinion delivered October 3, 1990

Gruber Law Firm, by: *Wayne A. Gruber*, for appellant.

Allan Pruitt, for appellee.

JAMES R. COOPER, Judge. The appellee in this unemployment compensation case, Terry Thrasher, was employed by the appellant as a truck driver. On October 4, 1988, while off duty and driving his own automobile, the appellee was charged with driving while intoxicated. He was placed on unpaid leave by his employer the next day. The appellee was awarded unemployment benefits on November 30, 1988. The employer appealed to the Appeal Tribunal, which found that the appellee was discharged for reasons other than misconduct connected with the work. The employer appealed this decision to the Board of Review. Prior to a decision by the Board, the appellee was convicted of driving while intoxicated and the conviction was entered into evidence. The Board affirmed the decision by the tribunal. From that decision, comes this appeal.

For reversal, the appellant contends that the Board erred in concluding that the appellee's off-duty DWI did not constitute misconduct connected with the work, and that the Board's decision is not supported by substantial evidence. We affirm.

Citing *Feagin* v. *Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983), the appellant contends that when an off-duty arrest has some nexus with the work and results in harm to the employer the employee has engaged in misconduct as defined by Ark. Code Ann. § 11-10-514 (1987). While it is true that an off-duty arrest may constitute misconduct, the issue of misconduct is a question of fact for the Board of Review, and, on appeal, the Board's findings are conclusive if they are supported by substantial evidence. *Dillaha Fruit Co.* v. *Everett*, 9 Ark. App. 51, 652 S.W.2d 643 (1983). We review the evidence in the light most favorable to the successful party and, even if there is evidence upon which the Board might have reached a different result, we do not substitute our findings for those of the Board even though we might have reached a different conclusion had we made the original determination upon the same evidence. *Grigsby* v. *Everett*, 8 Ark. App. 188, 649 S.W.2d 404 (1983).

The facts are not in serious dispute. The appellant's written policy provided that a driving record which contained a DWI

would render an applicant ineligible for employment or would warrant firing a driver. According to the appellant's fleet supervisor, Robert Forgy, the appellee knew of the policy. Mr. Forgy stated that the reason for the policy was the difficulty in insuring drivers who had been cited for driving while intoxicated and because employing a driver who had been cited for driving while intoxicated left the company vulnerable in lawsuits. However, the record shows that, although the appellant informed the employer that he had been charged with DWI while off duty and that he was going to plead not guilty, there is no indication that the employer asked the appellee whether he had, in fact, been driving while intoxicated, or made any other effort to determine whether the charges had any basis in fact prior to terminating the appellee.

"Misconduct" involves: (1) disregard of the employer's interests, (2) violation of the employer's rules, (3) disregard of the standards of behavior which the employer has a right to expect of his employees, and (4) disregard of the employee's duties and obligations to his employer. *Feagin* v. *Everett, supra.* Moreover, there is an element of intent associated with a determination of misconduct. Mere inefficiency or poor performance does not, in itself, constitute misconduct: the Board must determine that there was an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design in order to find misconduct. *Id.* at 64, 652 S.W.2d at 842.

Arkansas Code Annotated § 11-10-514 (1987) provides for disqualification for benefits where the employee is discharged for misconduct connected with the work. The reason for the employee's discharge is thus a crucial fact in determining whether the disqualification applies, and the employer's reason must, of necessity, be based on the employer's knowledge at the time of the discharge. The record in this case shows only that the employer knew that the appellee had been cited for DWI and that he intended to plead not guilty at the time the appellee was discharged, and that the mere fact that an employee was cited for DWI would have an adverse effect on the employer. Viewing the evidence, as we must, in the light most favorable to the Board's decision, we think that the Board could reasonably find that the appellee was discharged merely because he had been issued a citation for DWI, without regard to the truth or falsity of the

charge against him. Because there was relevant evidence from which reasonable minds could conclude that the appellee was not discharged because of his conduct, but instead was discharged merely because he had been ticketed for DWI, we hold that the Board did not err in finding that the appellee was discharged for reasons other than misconduct connected with the work. We affirm.

Affirmed.

MAYFIELD, J., agrees.

JENNINGS, J., concurs.

JOHN E. JENNINGS, Judge, concurring. A number of courts have been faced with the issue presented here and the decisions are in conflict. For a comprehensive review of those decisions *see Yardville Supply Co.* v. *Bd. of Review, Dep't. of Labor*, 536 A.2d 324 (N.J. Super. Ct. App. Div. 1988), reversed on appeal in *Yardville Supply Co.* v. *Bd. of Review, Dep't. of Labor*, 554 A.2d 1337 (N.J. 1989). I am persuaded by the reasoning of the Minnesota Court of Appeals in *Schnaare* v. *Five G's Trucking, Inc.*, 400 N.W.2d 762 (Minn. Ct. App. 1987). Furthermore, the question seems to me to be one of law, because the facts are not in dispute. *See Arkansas Employment Sec. Div.* v. *National Baptist Convention, U.S.A., Inc.*, 275 Ark. 374, 630 S.W.2d 31 (1982).

IN THE MATTER OF THE GUARDIANSHIP OF
Lisa Renee MARKHAM, A Minor
Beth Markham and Virgil Wayne Markham *v.*
Randall Buck and Brenda Buck

CA 90-36 795 S.W.2d 931

Court of Appeals of Arkansas
Division I
Opinion delivered October 3, 1990

Harmon & Garrett, by: *Dan Harmon*, for appellants.

Janice Williams Wheeler, for appellees.

JOHN E. JENNINGS, Judge. The appellants, Beth and Wayne Markham, the natural parents of Lisa Renee Markham, appeal from an order of the Clark County Probate Court refusing to terminate a guardianship previously established for Lisa. The sole argument on appeal is that the probate judge's failure to terminate the guardianship constituted an abuse of discretion. We disagree and affirm.

Lisa Renee was born on March 27, 1986, three months premature. She weighed one and one-half pounds and spent the first four months of her life in the hospital. The child has had various physical problems since her birth. In April of 1988, Lisa's parents took her to the home of Wayne's aunt, Brenda Buck, and her husband Randall, the appellees here. In May of 1988, the

appellants returned to pick up the child, but returned her to the Bucks within a few hours. At that time Mrs. Buck insisted on obtaining legal guardianship of the child and the Markhams agreed. The parents subsequently signed a formal consent to the guardianship. Mrs. Buck testified that the Markhams left Lisa with her and told her to raise the child. The Markhams testified that Mrs. Buck was just keeping the child for them until they "get back on their feet." There was considerable evidence of the child's physical and emotional improvement while she was in the Buck's care.

On August 9, 1988, the Clark County Probate Court entered an order appointing the Bucks guardians for Lisa Renee. On February 27, 1989, the Markhams filed a petition to set aside the guardianship. A hearing on the petition was held on April 25, 1990. At that hearing it was undisputed that Mrs. Buck had refused to permit the parents to take the child from her home, contending that the parents' smoking might be detrimental to the child. Medical evidence was offered that tobacco smoke could harm the child. There was conflicting evidence as to the care appellants had given the child while Lisa was with them, their cooperation in following medical recommendations, and whether or not they had used marijuana in the past. There was evidence that the Markhams had had a somewhat stormy marriage, but that they were presently getting along well, living together in a rented apartment, and that Mr. Markham was employed, earning about $400.00 per month.

Mrs. Buck testified that she did not want the guardianship terminated because the child had done so well in her care. There was evidence that the Bucks had spent approximately $1,000.00 for medical expenses for the child and that the Markhams had not attempted to reimburse them.

Appellants argue that, given the law's preference for the natural parents, it was error for the trial court not to terminate the guardianship, citing *Phifer* v. *Phifer*, 198 Ark. 567, 129 S.W.2d 939 (1939), and *Hancock* v. *Hancock*, 197 Ark. 853, 125 S.W.2d 104 (1939). Appellants also rely on Ark. Code Ann. § 28-65-204 (1987) which establishes a preference for a natural parent in the appointment of a guardian of the person.

This proceeding to terminate the guardianship was governed

by Ark. Code Ann. § 28-65-401(b)(3) (Supp. 1989), which provides that a guardianship may be terminated by court order if the guardianship is no longer necessary or for the best interest of the ward. *Phifer* v. *Phifer* was a custody dispute between the mother and the paternal grandmother. The chancellor had awarded custody to the grandmother and the supreme court reversed. In recognizing the principle that the natural parents are greatly to be preferred in a custody dispute, the court said:

> It is one of the cardinal principles of nature and of law that as against strangers or relatives, the parent, however poor and humble, if able to support the child in his own style of life, and of good moral character, cannot, without the most shocking injustice, be deprived of the privilege by anyone whatever, however brilliant the advantage he may offer. It is not enough to consider the interest of the child alone. [Citing *Verser* v. *Ford*, 37 Ark. 27 (1881)].

198 Ark. at 573.

On the other hand, the rights of parents are not proprietary and are subject to their related duty to care for and protect the child, and the law secures their preferential rights only so long as they discharge their obligations. *Jones* v. *Jones*, 13 Ark. App. 102, 680 S.W.2d 118 (1984). *Jones* v. *Strauser*, 266 Ark. 441, 585 S.W.2d 931 (1979), although a custody case in chancery, states the principles that seem applicable in the case at bar:

> The welfare of the child is the polestar in every child custody case. Ordinarily it is true that, as between a parent and a grandparent, the law awards custody to the parent unless he is incompetent or unfit to have custody of the child. In this case, the award of the custody of the child to her maternal grandparents was based on an agreement to which appellant was a party. While his parental preference was not thereby forfeited forever, its effect was so diminished that he bore the burden of showing a change in circumstances subsequent to that award which required or justified a change in the custody when considered from the standpoint of the welfare of the child.

266 Ark. at 443 (citations omitted).

Likewise, in the case at bar the evidence justifies a finding that the appellants voluntarily consented to an order appointing Mrs. Buck as the guardian for their daughter and that they asked Mrs. Buck to raise the child. While they did not thereby forfeit their parental rights, the burden was upon them to show that a termination of the guardianship would be in Lisa's best interest. Under circumstances similar to those shown here, the court in *Martin* v. *Sand,* 444 A.2d 309 (Del. Fam. Ct. 1982), held that after the appointment of a guardian, the child will not be returned to the parents unless it is in the child's best interest.

The language of Ark. Code Ann. § 28-65-401(b)(3) indicates that the termination of a guardianship for the best interest of the ward is a matter which lies within the probate court's discretion. In the case at bar there was evidence from which the probate court could have determined that it was in Lisa's best interest to remain in the Buck's home, at least for the present. The Markham's parental rights have not been terminated, and they are not prohibited from seeking further relief in the trial court as circumstances may permit.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

HELENA-WEST HELENA SCHOOL DISTRICT #2
v. Wayne RANDALL, et al.

CA 89-473 796 S.W.2d 586

Court of Appeals of Arkansas
Division II
Opinion delivered October 3, 1990

David Solomon, for appellant.

Mitchell and Roachell, by: *Paul J. Ward*, for appellee.

JUDITH ROGERS, Judge. This appeal involves a salary dispute wherein appellees, all former or present athletic staff members, filed suit seeking judgment for uncompensated wages claimed due them based on a provision contained in the salary schedule adopted by appellant school district. The circuit court, sitting without a jury, concluded that the provision in question, entitled "Extended Terms Contracts," applied to appellees, and granted judgment, individually, in their favor. Appellant raises two points on appeal, arguing alternatively that the trial court's

finding that appellees had extended terms contracts is clearly erroneous, or that, if the court were not in error, then any amounts due appellees should be reduced by the supplements received by them for the same period of time. We affirm.

In this lawsuit, appellees claimed that they were owed back pay for extra days worked in the school years from 1982 through 1986. The following facts were undisputed. Appellees' written contracts provided for a term of ten months, or 203 days for each year at issue, beginning on August 1, which was beyond the term for regular teachers, being nine and a half months, or 190 days. Appellees' contracts provided for payment in accordance with salary schedules adopted each year by the school district, which were based on the number of years teaching experience and the education degree held by each teacher. Appellees, as coaches, also received supplements in varying amounts depending on the coaching duties assigned.

The teacher's salary schedules at issue contained the following provision:

> Extended Term Contracts (those that exceed 194 days) shall be paid at a daily rate of pay, depending on degree and experience, multiplied by the number of days to be worked. The number of days constituting the school year shall be established by the Board of Directors each year.

The schedule for the 1985-1986 school year did not include the parenthetical language, "those that exceed 194 days." The schedules also contained a clause providing that "[a]ll other Compensated Extra Duties shall be paid for at set supplements." The school district also adopted a policy stating that "the salary of personnel shall be in accordance with the board's salary schedule."

At trial, appellees contended that, because they worked more days than other teachers, the extended term provision applied to them, and they claimed that they were owed for the extra days of work at a daily rate of pay in accordance with the provision. On the other hand, appellant argued that the extended term provision was not applicable, as appellees were paid by contract for a fixed term and amount, including the supplement, which it claimed compensated appellees for all extra duties

performed.

The case was tried on the theory that an ambiguity existed between the written contracts and the salary schedules. The circuit judge heard testimony presented by the appellees to the effect that appellees, in reporting early on August 1, performed various duties in addition and unrelated to their coaching responsibilities. There was also testimony given that some were told that their pay would be docked for failing to report on the days between August 1 and the beginning of the school year. There was further testimony that some coaching activities took place after school and on weekends. Tom Cheney, superintendent of schools in the district, testified on behalf of appellant that appellees were not traditionally considered as having extended term contracts. He explained that personnel, such as deans, counselors and vocational teachers, who worked longer than regular teachers, were paid on an extended term basis. Mr. Cheney said that the supplements, or stipends, received by appellees covered the extra duties performed by them.

In its judgment of April 29, 1989, the trial court found that the provision on extended contracts applied to appellees' contracts, and was in addition to the stipend paid coaches for athletic work. On appeal, appellant argues that this finding is clearly against the preponderance of the evidence.

Arkansas Code Annotated section 6-17-201 (Supp. 1989) provides that "[e]ach school district in the state shall have a set of written personnel policies, *including the teacher salary schedule*" (emphasis supplied). *See also Nathaniel* v. *Forrest City School District No. 7*, 300 Ark. 513, 780 S.W.2d 539 (1989). By statute, personnel policies in effect at the time a teacher's contract is entered into or renewed are considered as being incorporated into the contract, and are binding on both parties unless altered by mutual consent. Ark. Code Ann. § 6-17-204(a) (1987). While personnel policies do not have the force of law, *Maxwell* v. *Southside School District*, 273 Ark. 89, 618 S.W.2d 148 (1981), as a matter of contract law and fair dealing a teacher may reasonably expect the district to comply substantially with its own declared policies. *Whitfield* v. *Little Rock Public Schools*, 25 Ark. 207, 756 S.W.2d 125 (1988). We note that traditional contract principles apply to teacher employment

contracts, and any ambiguity in a contract must be construed against the party who drafted it. *Maddox* v. *St. Paul School District*, 16 Ark. App. 112, 697 S.W.2d 130 (1985). The appellate court will reverse only if it finds, on review of the trial court's decision, that the trial court's findings were clearly erroneous. *Whitfield* v. *Little Rock Public Schools, supra.*

Based on statutory authority, it is readily apparent that the salary schedule, as a personnel policy, was incorporated as part of the appellees' written contracts. Thus, it was for the trial court to reconcile the differing salary provisions at issue. We regard the trial court's decision as being reasonable both in terms of the facts presented and the clauses themselves. It was established that appellees' contracts provided for a term longer than that of other teachers, and required their attendance earlier than regular teachers. These facts plainly fit within the definition of the extended contract provision which provides extra compensation at a daily rate of pay. Moreover, we perceive no inconsistency in the trial court's ruling that payment under the extended term provision was to be additional to the supplements received. The clause in the schedule referring to supplements stated "[a]ll *other* Compensated Extra Duties shall be paid for a set supplements" (emphasis ours). By usage of the word "other," it is reasonable to conclude that the payment for extra days worked, and extra duties, are not mutually exclusive. Based on our analysis, we cannot say that the decision of the trial court is clearly erroneous.

As its second issue, appellant argues that it is entitled to a set off for the supplements received by appellees against the amounts due under the extended term provision. We have briefly touched upon this issue, and decline to discuss it further, inasmuch as it is being raised for the first time on appeal. *See, St. Louis Southwestern Railway Co.* v. *White*, 302 Ark. 193, 788 S.W.2d 483 (1990).

Affirmed.

COOPER AND MAYFIELD, JJ., agree.

Thomas and Catherine JANUARY *v.*
MASOUMEH-PARIVASH

CA 90-246 795 S.W.2d 934

Court of Appeals of Arkansas
En Banc
Opinion delivered October 3, 1990

Pettus Law Firm, by: *James H. Bingaman*, for appellants.

Davis, Cox & Wright, by: *Tim E. Howell*, for appellee.

PER CURIAM. The motion to file a belated brief is granted.

MELVIN MAYFIELD, Judge, dissenting. The majority of this court, without written opinion, has today granted a motion allowing a belated brief to be filed on behalf of the appellee in this case. I dissent because (1) the motion filed by an attorney who I believe is not authorized to represent the appellee, but even if he is, (2) his motion clearly shows that there is no good, valid, or equitable reason to allow his brief to be filed late.

An affidavit by the attorney, filed in support of his motion, states:

> Our law firm was retained on approximately March 22, 1990, by Employers Mutual Insurance Company, which had posted a $13,000 bond on behalf of the appellee, Masoumeh-Parivash. Our firm was requested to see what we could do to assist the appellee on appeal.

The motion to file the belated brief states: "The appellee . . . by counsel . . . requests permission to file a belated brief. . . ." While the motion does not say that counsel has authority to represent the appellee, it does leave the impression. However, the affidavit makes it clear that counsel was actually employed by the company which posted the bond. Counsel does not tell us why he thinks he is authorized to file a brief for appellee, but apparently he relies upon the following provision in the indemnity agreement between the appellee and the company which posted the bond for appellee:

> THIRD, that the Surety shall have the right and is

> hereby authorized but not required: (a) to adjust, settle or compromise any claim, demand, suit, or judgment upon said bond, continuations or renewals thereof, unless the Indemnitors shall request said Surety to litigate such claim or demand, or to defend such suit *or to appeal from such judgment*, and shall deposit with the Surety satisfactory collateral sufficient to pay any judgment or judgments rendered or that may be rendered, with interests, costs, expenses and attorneys' fees;. . . . (Emphasis added.)

I will agree that the above provision does grant the surety authority *to appeal from the judgment*, but I cannot agree that it authorizes the surety to employ an attorney *to represent the appellee.*

The affidavit filed by counsel helps to clarify another point. It states that after counsel's law firm was retained by the surety company, counsel spoke with Mr. Jones, the attorney for appellee, "who informed me" that he "did not intend to represent her any further." Counsel's affidavit then states: "Since this case had already been finally adjudicated at the trial court level, it was my intention to attempt to enter an appearance with this court upon being notified by Mr. Jones that this transcript and appeal had been docketed." Thus, it is clear that the attorney who filed the motion asking that "the appellee" be allowed to file a belated brief has known from the time he was employed that he would have to obtain court permission to file a brief to argue appellee's side of this case.

The case was started with a complaint by the appellants against the appellee. The appellants alleged they had leased a commercial building to the appellee, that the lease had expired and appellee had not complied with the requirements necessary to extend the lease, that the appellee had "unlawfully detained" the property, and that appellants were entitled to a writ of possession and judgment for rent and damages. In order to retain possession of the property pending trial, the appellee posted the surety bond (referred to above) for $13,000. The trial court found for the appellants in an amended judgment entered on March 8, 1990. The appellants are appealing that judgment because the court did not award them treble damages. The notice of appeal was filed on March 9, 1990. The record of appeal was filed in this court on

June 8, 1990, and appellants' brief was filed on the date due, July 18, 1990.

Terry Jones, who represented the appellee in the trial court, has filed in the appellate court a "Statement of Intent Not to File a Responsive Brief." In this statement Mr. Jones states that upon the date the trial court rendered its decision, the appellee expressed her outrage at the decision, told Mr. Jones he was fired, and promised never to pay him for the services he had rendered. Mr. Jones states that appellee has been true to her word and that he does not know where she is or how to contact her. He also says that counsel for the surety company has spoken with him on several occasions. Jones says that at one time he told counsel he would forward appellants' appeal documents to counsel. However, he said he did not do so because counsel said he would file a motion to intervene for the surety company and Jones assumed this would "position him as a party" and he would receive "appeal documents duplicating mine."

Under the circumstances in this case, the trial court probably would have allowed the surety company to intervene in that court even after the judgment appealed from was entered, provided the motion to intervene was timely filed. *See UHS of Arkansas, Inc.* v. *City of Sherwood*, 296 Ark. 97, 752 S.W.2d 36 (1988); *Bank of Quitman* v. *Phillips*, 270 Ark. 53, 603 S.W.2d 450 (Ark. App. 1980). The trial court's judgment was entered on March 8, 1990, notice of appeal was filed the next day, and counsel for the surety company says he was retained March 22, 1990. Since the record on appeal was not filed until June 8, 1990, the surety company had over two months in which to petition the trial court for permission to intervene as a party. This, of course, assumes that the trial court would have jurisdiction to allow the intervention up to the time the record was filed in the appellate court. I think it had that jurisdiction. *See Andrews* v. *Lauener*, 229 Ark. 894, 318 S.W.2d 805 (1958). However, even if it did not, I think we would have jurisdiction to allow the surety company to intervene in this court. 4 Am. Jur. 2d *Appeal and Error* § 200 (1962) points out that some jurisdictions "sustain the right of a surety to appeal from a judgment against his principal on the theory that the surety is bound by the judgment, in the absence of fraud or collusion, and is therefore a party aggrieved." And while the bond here was not a supersedeas bond, the situation is

analogous and our supreme court has held that sureties on a supersedeas bond have made themselves parties to the suit by entering into the bond. *Morse Brothers Lumber Co.* v. *Burkart Manufacturing Co.*, 155 Ark. 350, 244 S.W. 350 (1922).

In sum, I think the attorney who filed the motion asking that the appellee be given permission to file a belated brief in this court does not represent the appellee, and the motion should be denied for that reason. But even if that motion asked that the surety company be allowed to file a brief in this court, I think it should be denied as it was not timely filed. According to his own affidavit, counsel was told on March 27, 1990, that Mr. Jones did not intend to represent the appellee in this appeal; however, counsel took no action to obtain permission to file a brief in behalf of the appellee's position until August 31, 1990, when he filed the motion in this court asking for permission to file a belated brief. This was 14 days after the appellee's brief was due, and under the circumstances, I find no good, valid, or equitable reason to grant the motion.

CRACRAFT, J., joins in this dissent.

Christopher TERRELL *v.* STATE of Arkansas

CA CR 89-80 796 S.W.2d 348

Court of Appeals of Arkansas
En Banc
Opinion delivered October 3, 1990

Wayne Moody, for appellant.

Steve Clark, Att'y Gen., by: *Kay J. Jackson Demailly*, Asst. Att'y Gen., for appellee.

PER CURIAM. In an opinion not designated for publication, we affirmed the revocation of the appellant's suspended imposition of sentence. *Terrell* v. *State*, CA CR 89-80 (*op. del.* December 6, 1989). On August 22, 1990, over eight months after our decision was rendered, the appellant's attorney filed this motion for attorney's fees. We deny the motion.

A two-month delay between the rendition of our decision and the motion for attorney's fees prompted us in 1982 to advise the bar that motions for attorney's fees should be filed in this court in time for them to be considered at the time the case is considered on its merits. *Cristee* v. *State*, 4 Ark. App. 33, 627 S.W.2d 34 (1982). We explained in *Cristee* that when motions for fees are delayed we are required to obtain and reconsider the briefs in order to determine the fee. *Id.*

A three-month delay prompted a similar explanation in *Stefanovich* v. *State*, 10 Ark. App. 233, 662 S.W.2d 476 (1984). Our request that motions for attorney's fees be filed so that we could consider them at the time the case was decided was, in *Stefanovich*, coupled with a warning that failure to do so could prevent an allowance of attorney's fees. *Id.*

We granted attorney's fees in both *Cristee* and *Stefanovich*. However, in *Fiveash* v. *State*, 12 Ark. App. 391, 676 S.W.2d 769 (1984), we denied a motion for attorney's fees filed eight months after our decision was rendered.

In *Scott* v. *State*, 28 Ark. App. 329, 775 S.W.2d 513 (1989), we granted a motion for attorney's fees filed four months after our decision was rendered, and repeated the warnings in *Fiveash*, *Stefanovich*, and *Cristee*, supra.

Considerations of efficient use of judicial time and

resources require that we consider motions for fees while the briefs are in our possession and the case is fresh in our minds. We recommend that counsel for indigent defendants in criminal cases file a separate motion for attorney's fees with our Clerk on the day that the reply brief is due so that they may be promptly compensated for their services and so we may avoid the unnecessary duplication of effort required when such motions are delayed.

"Shane" Zachary BURKETT *v.* STATE of Arkansas

CA CR 90-17 796 S.W.2d 355

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

Linda Scribner, Deputy Public Defender, for appellant.

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

GEORGE K. CRACRAFT, Judge. "Shane" Zachary Burkett appeals from the denial of his motion to reduce his sentence by deleting the requirement that he pay restitution. We affirm.

Appellant was arrested for the theft of a 1989 Ford Mustang belonging to Lewis Ford Company. When the vehicle was recovered, it was determined to be a total loss, and the victim's insurance company paid all but a deductible sum of $987.47. Because of his age, appellant was charged in the Washington County Circuit Court, Juvenile Division, with juvenile delinquency. On September 12, 1989, appellant entered a plea of guilty. Sentencing was deferred until October 3, 1989, at which time appellant was placed on probation for six months and ordered to pay restitution.

Appellant then moved to reduce his sentence by excluding restitution. At a hearing held on November 14, 1989, appellant contended that the court should not order restitution because appellant's accomplice in the theft had previously been ordered by another court to pay restitution in the full amount of the loss. The court denied appellant's motion and ordered that he pay restitution in the amount of $329.16, or one-third of the total loss suffered by the victim. Appellant appeals from that order.

Initially, we note that the State contends that this appeal should be dismissed because appeals do not lie from guilty pleas. While appeals ordinarily do not lie from guilty pleas, *see Jenkins* v. *State*, 301 Ark. 20, 781 S.W.2d 461 (1990), a trial court has authority under Ark. Code Ann. § 16-90-111(b)(1) (Supp. 1989) to reduce a sentence on motion within 120 days of the imposition of the sentence. *Jones* v. *State*, 301 Ark. 510, 785 S.W.2d 217, *supp. op. on denial of reh'g*, 301 Ark. 512-A, 789 S.W.2d 730 (1990); *see State* v. *Sherman*, 303 Ark. 284, 796 S.W.2d 339 (1990). *Jones* holds that the appellate courts have jurisdiction to consider on appeal the actions taken by trial courts on such motions. Here, appellant was sentenced on October 3, 1989. He then timely moved for a reduction of that sentence. That motion was denied on November 14, 1989, and appellant has appealed from that order. We conclude that we have jurisdiction to consider this appeal.

Appellant contends that the trial court erred in not deleting the requirement that he pay restitution. He contends that the court illegally is effecting a double recovery for the victim, since appellant's accomplice had been ordered to pay restitution in the full amount of the outstanding loss. We do not address this issue as the record contains no proof that anyone else had been ordered to pay such restitution for this crime. Although appellant's counsel referred to a document that she claimed required appellant's accomplice to pay restitution for this loss, that document was not introduced, and it is clear that statements and argument of counsel are not evidence. The only witness at the hearing, a representative of the victim, testified the he was unaware of any such order and that no one had made restitution in any amount.

Affirmed.

WRIGHT, Acting C.J., and JENNINGS, J., agree.

Rucker A. HOLIMAN and Linda A. Holiman v.
HAGAN'S MOTORS, INC.

CA 90-44 796 S.W.2d 356

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

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

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

JAMES R. COOPER, Judge. The appellants purchased an automobile from the appellee, stopped making payments, and returned it. The appellee gave notice of private sale, resold the automobile about eight months later for a price which exceeded the appellant's indebtedness, and brought an action against the appellants for a deficiency. The trial court entered a deficiency judgment for the appellee in the amount of $3,300.00. From that decision, comes this appeal.

For reversal, the appellants contend that the evidence was insufficient to support the trial court's finding of a deficiency. We

agree, and we reverse.

The record shows that the automobile was resold for a contract price in excess of the appellant's indebtedness, but the appellee claimed at trial that the new purchaser had been given an overallowance of $2,600.00 on a vehicle taken in trade, and that the total deficiency was $3,055.00. The appellee's witness testified that the trade-in vehicle was sold, but that he did not know the price for which the trade-in vehicle was sold.

We agree with the appellant's contention that the trial court erred in determining there was a deficiency. *Thrower* v. *Union Lincoln-Mercury, Inc.*, 282 Ark. 585, 670 S.W.2d 430 (1984), holds that surplus or deficiency should be computed on the basis of the fair market value of any trade-in vehicle together with cash received by the dealer, rather than on the basis of the trade-in allowance given by the dealer to the purchaser of the collateral.

The primary concern of both debtor and creditor is that every aspect of the disposition of the collateral be conducted in a commercially reasonable fashion, as required by Ark. Code Ann. § 4-9-504 (3) (1987). *See Thrower, supra.* Where the debtor is concerned over the price received for the trade-in or the collateral, he should challenge the aspect of the sale which he feels has made the disposition commercially unreasonable so as to result in an insufficient price. *Id.* The appellants did so in the case at bar by objecting to the appellee's failure to offer evidence proving the amount received for the sale of the vehicle taken in trade. The burden is on the secured party as the plaintiff to establish the deficiency, and if the secured party's handling of the disposition of the collateral is attacked, it has the burden of proving that every aspect of that disposition was commercially reasonable, including the value of the trade-in. *Id.*

In the case at bar, the appellee's finance manager testified that an overallowance of $2,600.00 was given on the trade-in vehicle. However, he also testified that he did not know how much was given on the trade-in, nor what the trade-in vehicle was sold for. We think it clear that the record contains no evidence of the fair market value of the trade-in vehicle, and we hold that the appellee therefore failed to prove that the disposition was commercially reasonable under Ark. Code Ann. § 4-9-

504(3). We reverse. Nevertheless, because there has been a simple failure of proof, we remand the case to allow the appellee an opportunity to supply the defect. Only where the record affirmatively shows that there can be no recovery on retrial should the case be dismissed. *Colonial Life & Accident Ins. Co.* v. *Whitley*, 10 Ark. App. 304, 664 S.W.2d 953 (1984). Here the record does not affirmatively show that there could be no recovery, or that the sale was conducted in a commercially unreasonable manner, *see generally Cheshire* v. *Walt Bennett Ford, Inc.*, 31 Ark. App. 90, 788 S.W.2d 490 (1990), and we therefore reverse and remand for a new trial.

Reversed and remanded.

MAYFIELD and ROGERS, JJ., agree.

Carole G. BOLAN *v.* Robert M. BOLAN

CA 90-29 796 S.W.2d 358

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

Baim, Gunti, Mouser, DeSimone, Robinson & Kizer, by: *Maxie G. Kizer*, for appellant.

Bart Mullis, for appellee.

JUDITH ROGERS, Judge. The parties to this action were divorced after six years of marriage by decree of April 25, 1989. The chancellor deferred rendering a decision as to the division of marital property, and in an opinion dated September 13, 1989, the chancellor set out his findings with regard to the property issues. Pursuant to the opinion, an amended decree was entered on October 6, 1989. It is from the amended decree that appellant brings this appeal.

In seeking reversal, appellant raises the following three issues: (1) the chancellor erred in denying rehabilitative alimony; (2) the chancellor erred in the method he used to value appellee's C.P.A. practice and in finding that the firm had decreased in value during the marriage; and (3) the chancellor erred in awarding the parties' dog to the appellee. We find no error and

affirm.

The record reflects that the parties were married in May of 1983. At the time the divorce, appellant was thirty years old, while appellee was forty-eight years of age. No children were born of the marriage. At the time of trial, the parties had essentially agreed upon the value and division of the personal property acquired during the marriage. It was also agreed that the real property had been acquired by appellee prior to the marriage, and thus was not in contention. The only matters in dispute concerned the appellant's claim for rehabilitative alimony, the value of appellee's C.P.A. firm, and the possession of the family dog.

In his opinion of September 13, 1989, the chancellor found that the appellant was not entitled to rehabilitative alimony, and that the appellee was entitled to possession of the dog. The chancellor further determined that appellee's C.P.A. practice had decreased, rather than increased in value, and thus awarded appellant no interest in the business.

At trial held on April 20, 1989, appellant testified that she had a bachelor's degree in early childhood education, and was certified to teach in Arkansas. She said that she had done practice and substitute teaching, but had not held a full-time position. Appellant stated that she had applied for a position at a private school, and that she intended to apply for a position in the Pine Bluff school system. Appellant said that she was presently working at Dillard's as a clerk for thirty-five to thirty-seven hours a week, earning $4.00 an hour. Appellant further related that during the marriage they had lived a comfortable lifestyle, and that appellee provided her $800 to $1,000 a month to be spent on small household expenses or on whatever she wanted. She said that appellee paid the house notes, utilities and other bills. Appellant related that since their separation, her lifestyle had declined, and she asked that she receive $3,000 a month in alimony for at least two years.

As her first point, appellant contends that the trial court erred in failing to award her rehabilitative alimony.[1] We

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[1] Rehabilitative alimony has been defined as alimony payable for a short, but specific

disagree.

An award of alimony lies within the sound discretion of the chancellor, whose decision will not be reversed absent a clear abuse in the exercise of that discretion. *Aldridge* v. *Aldridge*, 28 Ark. App. 175, 773 S.W.2d 103 (1989). Numerous factors are considered in determining whether to set alimony. *Boggs* v. *Boggs*, 26 Ark. App. 188, 761 S.W.2d 956 (1988). These factors include:

> Among [the factors] are the financial circumstances of both parties, the financial needs and obligations of both the couple's past standard of living, the value of jointly owned property, the amount and nature of the income, both current and anticipated, of both husband and wife, the extent and nature of the resources and assets of each that is "spendable," the amounts which, after entry of the decree, will be available to each of the parties for the payment of living expenses, the earning ability and capacity of both husband and wife, property awarded or given to one of the parties, either by the court or the other party, the disposition made of the homestead or jointly owned property, the condition of health and medical needs of both husband and wife, the relative fault of the parties and their conduct, both before and after separation, in relation to the marital status, to each other and to the property of one or the other

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and terminable period of time, which will cease when the recipient is, in the exercise of reasonable efforts, in a position of self support. *Turner* v. *Turner*, 158 N.J. Super. 313, 385 A.1d 1280 (1978). We note that there is no case law or statutory law in Arkansas expressly recognizing the concept of rehabilitative alimony. Alimony in Arkansas has been traditionally defined as a continuing allowance payable at regular intervals. *See, Brown* v. *Brown*, 38 Ark. 324 (1881). It has long been an established rule that an award of alimony in fixed installments for a specific period of time was prima facie erroneous, as being an award of a gross sum instead of a continuing allowance. *Webb* v. *Webb*, 262 Ark. 461, 557 S.W2d 878 (1977). *See, also*, e.g., *Beasley* v. *Beasley*, 247 Ark. 338, 445 S.W.2d 500 (1969); *Birnstill* v. *Birnstill*, 218 Ark. 130, 234 S.W.2d 757 (1950); *McIlroy* v. *McIlroy*, 191 Ark. 45, 83 S.W.2d 550 (1935); *Walker* v. *Walker*, 147 Ark. 376, 227 S.W. 762 (1921); *Wood* v. *Wood*, 59 Ark. 441, 27 S.W. 641 (1894); *Linehan* v. *Linehan*, 8 Ark. App. 177, 649 S.W.2d 837 (1983); and *Stout* v. *Stout*, 4 Ark. App. 266, 630 S.W.2d 53 (1982). We point out, however, that with the passage of Act 657 of 1981, now codified as Ark. Code Ann. § 9-12-312(a)(4)(b) (Supp. 1989), an award of alimony, under proper circumstances, may be made in fixed installments for a specified period of time.

> or both, the duration of the marriage and even the amount of child support.

Franklin v. *Franklin*, 25 Ark. App. 287, 290, 758 S.W.2d 8 (1988) (*quoting Boyles* v. *Boyles*, 268 Ark. 120, 124, 594 S.W.2d 17, 20 (1980). The primary factors to be considered are the need of one spouse, and the ability of the other spouse to pay. *Aldridge* v. *Aldridge, supra.*

In declining the award of alimony, the chancellor made the following findings:

> The plaintiff requests alimony in the amount of $3,000 for a period of 24 months. The strongest factor in favor of an award of alimony is the gross disparity in earning power. On the other hand, there are several factors that militate against a finding of alimony. First, the marriage was of relatively short duration (6 years). Plaintiff is relatively young (31), has a college degree in education and a teaching certificate and no health problems. After considering these factors, as well as the substantial increase in debt that came about during the marriage which is the defendant's responsibility, the Court is of the opinion that an award of alimony is inappropriate.

It is evident from the chancellor's decision that he considered the pertinent factors and applied them to the facts of this case in concluding that the award of alimony was not warranted under the circumstances. We also note that appellant received personal property valued at $38,315 and $5,947.50 in cash. The record reveals that the debts, for which appellee was held responsible, were substantial, including $37,590 owed on credit cards. Moreover, appellant is educated and has the present ability to support herself. All things considered, we cannot say that the chancellor clearly abused his discretion.

As her second issue, appellant argues that the chancellor erred in the method he used in valuing the appellee's C.P.A. practice. Appellee is the sole stockholder of Robert Bolan, Ltd., his C.P.A. firm. The parties proceeded on the theory that appellant's marital interest in the firm was to be determined by the increase in the market value of the practice over the course of

the marriage.[2]

Appellant's expert testified that the proper method of valuing appellee's business was to multiply gross income by a factor of 1.5. He said that this method was an industry rule of thumb for valuing small businesses, particularly C.P.A. firms. The appellee and his expert testified that a more appropriate formula was to multiply annual earnings by three. It was established that the gross income of the practice in 1983 was $232,119 with net income of $64,378. In 1988, the gross income was shown to be $264,910, while the net income for that year was $42,014. The use of appellant's method placed the value of the firm at $348,178.50 at the time of the marriage, and $397,365 at the time of the divorce, the difference resulting in an increased value of $49,186.50 during the marriage. Conversely, the method used by appellee reflected a decrease in value of $67,042. Based on this conflicting evidence, the chancellor found that the business had decreased in value.

Appellant contends that it was error for the chancellor to have accepted appellee's method of valuing the business. She argues that appellee's formula, based on net earnings, was misleading due to appellee's ability to manipulate expenses, and thus net income. She points to several expense items in 1988 which she argues were over and above what was expended in the previous year.

The question on appeal essentially involves the weight and credibility of the witnesses' testimony. Cases on appeal from the chancery court are tried *de novo*, but this court will not reverse the findings of the chancellor unless his findings are clearly erroneous, giving due deference to the chancellor's superior position to determine the credibility of the witnesses and the weight to be given their testimony. *Jones* v. *Jones*, 29 Ark. App.

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[2] Although the record does not reveal upon what legal basis this theory of division rests, such a division is consistent with the supreme court's decision in *Layman v. Layman*, 292 Ark. 539, 731 S.W.2d 771 (1987). The record seems to suggest, although it is not entirely clear, that the appellee's practice antedated the marriage. If that is so, as recognized in *Layman*, and so ruled by this court in *Yockey v. Yockey*, 25 Ark. App. 321, 758 S.W.2d 421 (1988), the increase in value of property acquired prior to the marriage is specifically excluded from the definition of marital property under Ark. Code Ann. § 9-12-315 (Supp. 1989).

133, 777 S.W.2d 873 (1989).

Here, the chancellor included a lengthy and detailed discussion on this issue in his opinion, in which he compared and contrasted the differing methods, and additionally, made calculations of his own. He ultimately concluded that appellee's method was the more reasoned approach. In his calculations, the chancellor added the cost of the expenses in 1988, questioned by appellant, to the net income for that year, which, by use of appellee's formula, nevertheless resulted in a value below that for 1983. Upon our *de novo* review, we cannot say that the chancellor's findings in this regard are clearly against the preponderance of the evidence.

As her final point, appellant argues that the chancellor erred in awarding the family dog to appellee. The record discloses that the parties had two pets, a cat and a dog. Appellant received the cat, and we cannot conclude that the chancellor's decision as to the dog is clearly erroneous.

Affirmed.

MAYFIELD, and COOPER, JJ., agree.

ST. VINCENT INFIRMARY MEDICAL CENTER *v.* DIRECTOR OF LABOR

E 89-243 797 S.W.2d 460

Court of Appeals of Arkansas
En Banc
Opinion delivered October 17, 1990
[Rehearing denied October 31, 1990.]

Jack, Lyon & Jones, P.A., by: *Philip K. Lyon* and *Gary D. Jiles*, for appellant.

Bruce H. Bokony, for appellee.

ERNIE E. WRIGHT, Acting Chief Judge. Appellant, St. Vincent Infirmary Medical Center (hereinafter referred to as SVI), made application in 1988 to the Arkansas Employment Security Division for a determination that services performed in its employ are exempt from coverage as an employer under the Arkansas Employment Security law. After a hearing by the Board of Review, the Board entered its order denying the exemption. This appeal is from that decision.

The applicable statute is Ark. Code Ann. § 11-10-210(a)(4) (1987). The statute provides that "employment" within the meaning of the Act does not apply to services performed:

> (A) In the employ of:
>
> (i) A church or convention or association of churches; or
>
> (ii) An organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches[.]

In 1972 SVI was determined to be liable for the unemploy-

ment tax and this had not been contested. As SVI was exempt from federal income tax it exercised its option to reimburse ESD in lieu of paying the employment security tax.

Appellant contends the Board of Review erred in finding that SVI is not operated primarily for religious purposes, and in denying the exemption on that ground.

We agree with appellant and reverse.

The finding and decision of the Board recognizes the evidence establishes that appellant met all of the requirements for exemption under Ark. Code Ann. § 11-10-210(a)(4)(A)(ii) with the exception of the finding SVI is not operated "primarily for religious purposes." Therefore, we examine the evidence applicable to this specific issue.

The Sisters of Charity of Nazareth ("SCN") is a religious order of Catholic Sisters whose corporate name is Nazareth Literary and Benevolent Institution, a Kentucky charitable corporation organized in 1829 ("NLBI"). As a religious apostolate, the Sisters of Charity performs many charitable functions in the United States and abroad, including the operation of St. Vincent Infirmary in Little Rock, Arkansas, since 1888. St. Vincent Infirmary was organized as a separate Arkansas charitable corporation in 1958. Sisters of Charity of Nazareth Health Corporation, a Kentucky charitable corporation ("SCNHC"), was formed as a subsidiary of NLBI to manage health care operations for the Sisters of Charity of Nazareth. St. Vincent Infirmary is a subsidiary of SCNHC.

One of the stated purposes of SCNHC is: "To further any and all religious, charitable, scientific, literary or educational purposes in which Sisters of Nazareth now are and hereafter may become engaged, both within and outside the State of Kentucky, in carrying out the apostolate of the Sisters of Charity of Nazareth."

Article I of the Articles of SCNHC includes the following provision:

> The Corporation shall be operated and conducted in conformance with the theology, philosophy, teachings, and doctrine of the Roman Catholic Church of the United

States; the philosophy and mission of the Sisters of Charity of Nazareth; the Ethical and Religious Directives of the Catholic Health Facilities; and other medico-moral directives promulgated from time to time by the National Conference of Catholic Bishops.

The three nonprofit corporations to which we have referred have interlocking director arrangements so that SCN has final control, subject only to the directives of the National Conference of Catholic Bishops and the Pope.

Article 1 of the Bylaws of SVI includes the following:

Section 2. Purposes and Catholic Identity. The purposes of the corporation are:

To further any and all religious, charitable, scientific, literary or educational purposes in which SCNHC or Nazareth Literary and Benevolent Institution ("NLBI") now is and hereafter may become engaged, both within and outside the State of Arkansas, in carrying out the apostolate of the Sisters of Charity of Nazareth.

St. Vincent Infirmary is a member of the Catholic Health Association of the United States, which is an ecclesial community participating in the mission of the Catholic Church through its ministry of healing.

The preamble to the Credo of SVI states:

THIS WE BELIEVE

. . . .that, as an integral part of the work of the Church, our basic purpose must be to serve God and preserve the dignity of all people by providing a consistently high quality of health care in response to the needs of our community and state.

The Ethical and Religious Directives for Catholic Health Facilities were approved in 1971 by the National Conference of Catholic Bishops. The preamble states:

Catholic health facilities witness to the saving presence of Christ and His Church in a variety of ways: by testifying to transcendent spiritual beliefs concerning life, suffering

> and death; by humble service to humanity and especially to the poor; by medical competence and leadership; and by fidelity to the Church's teachings while ministering to the good of the whole person.

The directives prohibit a number of procedures which can be performed in Catholic health care facilities based upon religious and moral considerations of the Church.

St. Vincent Infirmary is listed in the official Catholic Directory of the Roman Catholic Church, and if an organization is listed in the official Directory of the Church the Internal Revenue Service deems its employees to be the employees of the church. However, this ruling of the Internal Revenue Service is not binding in the determination of the issue before us.

Sister Margaret V. Blandford, who is presently chairperson of the Board of SVI, testified she has been involved in the health ministry since 1945 and during most of this time has been head of a hospital; that she has served as a member of the legal corporate structure of NLBI and has served as coordinator of all of the Sisters of Charity of Nazareth hospitals. She stated the Sisters of Charity was founded in Kentucky in 1812 and was officially accepted as a religious congregation by having pontifical approval in Rome, and that the constitution and bylaws were approved in Rome. It is a religious order within the Roman Catholic Church. She further testified that once an organization is approved by the Church to carry out pontifically approved work it is governed by canon law as well as by legal laws. When asked the question, "In your opinion is St. Vincent Infirmary a church?" her reply was, "I think it's — it's a wing, so to speak of the church." She went on to say it exists because of the Church and to carry out an apostolic mission of the Church in operating a hospital. When asked if an indigent person unable to pay, came to the hospital in dire need of medical services would SVI take the patient, Sister Blandford answered, "Since the beginning in 1888, if any physician states that a person needs medical care and it has to be a physician, because we can't practice medicine — that patient is admitted to our hospital whether they can pay or not." When she was asked, "Sister, based on your educational background, both in Cannon [sic] Law, as well as the teachings of the church, and your experience in working with St. Vincent

Infirmary Medical Center for years, do you have any doubt in your mind, but that St. Vincent Infirmary Medical Center is an organization which is operated primarily for religious purposes?" her answer in part was, "I have no question in my mind because every day I know what my limitations of authority are as the chairperson and I know what channels that I have to report to, I know the authority of those over me and ultimately I know, that if we do not carry out our mission of service to people, based on our philosophy, our christian philosophy, that we will no longer be there." She testified, "Our basic purpose must be to serve God and preserve the dignity of people by providing consistently high quality of care in response to the needs of the patient — to the community." She stated, "We use the St. Vincent as a big hospital as a means to an end. It's kind of a conduit, so to speak, to carry out our mission of service to the sick." Religious services are conducted in the chapel maintained at the hospital.

When SVI buys, sells or mortgages property it must obtain approval from the Catholic Bishop of the Diocese and the Church in Rome.

Mr. Jack Reynolds, the chief executive officer of SVI testified he considered SVI to be the instrument enabling the Sisters of Charity of Nazareth to carry out the mission of the congregation to care for the sick and injured. He said the mission of SVI is to care for the ill and injured in a Christian environment, that is to minister to them in accordance with the values of SCN and the ethical and moral requirements of the Catholic Church. He identified SCN as a congregation of religious women that have agreed to devote their life to doing works in the service of God, works for mankind that are beneficial in the service of God.

In denying SVI qualifies for exemption from the employment security tax, the Board of Review found that SVI is not a church or convention or association of churches, and that, although it is operated, supervised, controlled and principally supported by the Catholic Church it fails to qualify for exemption under the second part of the statute because it is not "operated primarily for religious purposes" within the meaning of the statute. The Board found the religious purposes of SVI were secondary and incidental to SVI's function of providing health care and medical services.

We conclude the Board of Review properly found that SVI is not entitled to an exemption on the theory that its employees should be deemed to be employees of the Catholic Church as Ark. Code Ann. § 11-10-208 (1987) defines an "employing unit" for purposes of the unemployment insurance taxes as including any corporation which has one or more individuals performing services for it within the State of Arkansas. As SVI is incorporated as a nonprofit corporation it is an employing unit for purposes of the Employment Security Act. Arkansas Code Annotated § 11-10-208(2) (1987) specifically provides that each individual employed for work in the service of an employing unit shall be deemed to be engaged by the employing unit for all purposes. Therefore, the employees of SVI cannot be deemed employees of the Catholic Church.

On the issue as to whether SVI is operated primarily for religious purposes we must determine what is meant by the word "primarily" as used in the context of the statute in question. In *Malat* v. *Riddell*, 383 U.S. 569 (1966) the United States Supreme Court held that the word "primarily" as used in the Internal Revenue Code means "of first importance" or "principally." This is in keeping with the dictionary definition and the ordinary meaning. We believe this to be the meaning of the word as used in the statute in question.

We believe that in order for SVI to be deemed operated primarily for religious purposes, the religious purpose of SVI must be of first importance. While unquestionably SVI delivers health care and health care is not necessarily delivered for religious purposes, we find and conclude from the evidence as a whole that the health care provided by SVI is pursuant to the religious mission and purpose of the Sisters of Charity of Nazareth, a congregation of women existing within the framework of the Roman Catholic Church, and that SVI is operated under the sponsorship of SCN primarily for religious purposes in carrying out its religious mission in the service of God. We believe the religious motivation and purpose of SCN and SVI to be of first importance in the operation of the hospital.

The Arkansas Appellate Courts have not had occasion to decide the precise issue as to the meaning and application of the word "primarily" in the context of the statute in question. We find

that the Idaho Supreme Court in *Nampa Christian Schools Foundation* v. *State*, 110 Idaho 918, 719 P.2d 1178 (1986) dealt with this issue arising under an employment security tax exemption statute almost identical to the Arkansas statute in question. In that case a group of parents had organized a school to provide a Christian education to their children. The school was supported by several churches. The Idaho Industrial Commission found that the school was operated primarily for religious purposes, and was principally supported by a group of churches. On appeal, the decision of the Industrial Commission approving the employment security tax exemption was upheld. The case most directly in point appears to be *Kendall* v. *Director of Division of Employment Security*, 393 Mass. 731, 473 N.E.2d 196 (1985). The issue there was whether a training center for retarded children incorporated as a nonprofit corporation separately from the Catholic Church and owned by a religious order of nuns was exempt from employment security taxes under a statute almost identical to the Arkansas exemption statute. The Massachusetts Supreme Court stated:

> The board found that the Center satisfies these statutory requirements because its purpose, the rehabilitation of the mentally handicapped, is religiously motivated and the Center is subject to control by the Sisters of St. Francis of Assisi and, under canon law, by the Archbishop of Boston.

The Massachusetts court rejected appellant's contention that only a school devoted to religious instruction can be said to operate "primarily for religious purposes" and said:

> The claimant asks us to set aside the board's findings and adopt a narrower definition of "religious purposes" than that applied by the board. Essentially, she contends that only if a school is devoted to religious instruction can it be said to operate "primarily for religious purposes." We decline to impose such rigid criteria in defining religious pursuits. . . .
>
> One of the religious missions of the Center's founders, the Sisters of St. Francis of Assisi, is the educational care of mentally handicapped persons. The fact that the Center is open to handicapped children on a non-denominational basis is entirely consistent with the accomplishment of this

stated purpose. . . .

. . . .

. . .The fact that the religious motives of the Sisters of St. Francis of Assisi also serve the public good by providing for the education and training of the mentally retarded is hardly reason to deny the Center a religious exemption.

This is not a case in which there is conflicting testimony to be resolved. Upon our review of all of the testimony, stipulations and exhibits we find that SVI is a hospital founded and operated primarily for religious purposes. It is clear from the record SVI would not have been founded and would not continue to operate but for the religious motivation and purpose. There is no substantial evidence in the record to support the finding of the Board of Review to the contrary. On appeal, we reverse where there is no substantial evidence to support the finding of the Board of Review upon which its decision is based. *Green* v. *Carder*, 282 Ark. 239, 667 S.W.2d 660 (1984); Ark. Code Ann. § 11-10-308(c) (1987).

In our review of the record we have disregarded reference in appellant's reply brief to facts not in the record.

Reversed and remanded.

JENNINGS AND ROGERS, JJ., dissent.

JOHN E. JENNINGS, Judge, dissenting. Saint Vincent Infirmary Medical Center was originally determined to be liable for unemployment insurance taxes in 1972 and did not contest that decision. SVI had the burden of proof in seeking an exemption under the Employment Security Law. *Employment Sec. Div.* v. *Shiloh Trust*, 249 Ark. 429, 460 S.W.2d 66 (1970).

The issue is, as the majority states, whether the Board's finding that SVI is not operated primarily for religious purposes is supported by substantial evidence. In making that determination we are required to review the evidence in the light most favorable to the findings of the Board. *Harris* v. *Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Rose* v. *Daniels*, 269 Ark. 679, 599 S.W.2d 762 (Ark. App. 1980). We are not free to substitute our findings for those of the Board of Review even though we might reach a different conclusion if we made the original determination upon

the same evidence considered by the Board. *W.C. Lee Construction* v. *Stiles*, 13 Ark. App. 303, 683 S.W.2d 616 (1985). Of course, the testimony of a party is always treated as disputed, as a matter of law. *Courtney* v. *Courtney*, 296 Ark. 91, 752 S.W.2d 40 (1988). Even if the evidence is undisputed, the drawing of inferences is for the Board, not the court. *Harris* v. *Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *W.C. Lee Construction, supra.*

Not all of the facts in this case support the position taken by the majority. Some excerpts from the testimony recited by the Board in its rather lengthy opinion follow:

> The Sister stated that the education and training that she received both as a nurse and as a hospital administrator qualify her to work in either a religious or a nonsectarian hospital. The Sister testified that SVI employees could perform comparable services in a lay hospital. The Sister agreed that SVI had approximately 2600 employees. The Sister stated that the average number of SCN members on the SVI board of directors has been about three and that an SVI director need not be a Catholic to qualify to serve on the Board. The Sister said that SVI was incorporated as a separate entity in 1958 and that lay people have constituted a majority on the SVI board of directors since approximately 1978. . . . The Sister stated that the hospital does not offer any religious classes but does have a chapel in which religious services are conducted. The Sister agreed that SVI generates a total annual income from all sources of approximately $155 million a year and that only about $100 thousand a year is received in private donations from the solicitation of funds. The Sister estimates that about 64 percent of gross revenues are received from federal and state sources, primarily Medicare and Medicaid. The Sister stated that SVI does not receive tithes or donations from the Church. . . . The Sister testified that the services performed by the various SVI employees in 1972 were basically the same as the services performed today. . . .
>
> The CEO testified that he has been the president and chief executive officer of SVI for the past ten years. . . . The CEO said that he considered himself an employee of SCN

and viewed SCN as the owner of the hospital. The CEO testified that he considered SVI a corporate instrument enabling SCN to carry out its mission of caring for the ill and injured.

. . . .The CEO stated that in the course of applying for the ERISA exemption the SVI Director of Personnel noticed that the statutory language in the federal ERISA exemption statute was very similar to the exemption language in the Arkansas unemployment compensation statute. The CEO said that SVI decided at that time to apply for the present exemption. . . . The CEO agreed that SVI's purpose of tending to the ill and injured was grounded in a religious motivation. . . . The CEO testified that when SVI first became covered under the Arkansas Employment Security Law in 1972, SVI probably did not realize it had an option. The CEO stated that SVI therefore decided not to contest the determination of liability and did not elect to be covered. . . . The CEO also agreed that SVI at that time elected to reimburse the fund for sums paid out to claimants rather than to be taxed on its payroll.

The CEO testified that he first began his employment with SVI as an assistant administrator in 1967. The CEO stated that he attended about 60 seminars and a summer program in hospital administration but admitted that none of his education or training was limited to religious hospital administration. The CEO further admitted that if the religious aspects of SVI were removed, the facility would still qualify for JCAH accreditation, but that if the health services aspects were removed, the facility would lose the accreditation.. . . The CEO agreed that he is an employee of SVI and that the services rendered by employees of SVI are patient care services. . . . The CEO testified that less than one percent of the hospital's total revenue comes from donations. The CEO admitted that the hospital does have a collection department and has hired legal counsel to collect debts.... The CEO admitted that less than one percent of the total revenue is spent on the chapel, chaplin and SCN visitors.. . . The CEO estimated that SVI admits approximately 60 to 70 thousand patients annually from inpatient, outpatient and emergency room admissions. The CEO

agreed that the bulk of these patients visit their doctors for medical problems rather than to have their spiritual needs met.

The CEO said that he was not aware whether SVI had to sign a declaration of nonsectarian use to receive Hill-Burton funds. The CEO admitted that SVI represented itself as a health care facility in order to qualify for the Hill-Burton funds. The CEO said that the only type of religious records maintained by SVI are notations on a patient's admission record of the patient's religious preference and whether or not a Catholic patient wants communion. . . . The CEO admitted that both the Workers' Compensation Commission and the Department of Health treat SVI as the employer of its employees. . . . The CEO stated that if SVI were required to perform a morally objectionable procedure it would lose its status as a Catholic hospital. . . . The CEO also admitted that the Department of Health recognizes SVI as a health care facility.

. . . .On the Report to Determine Liability attached as an exhibit to the affidavit, SVI exercised its option to reimburse rather than pay a direct contribution tax on its payroll.

The Senior Vice President for Human Resources testified that he has been responsible for SVI personnel for 19 years. . . . The vice president noted the similarities in language between the ERISA statutes and the exemption provision of the AESL. . . . The vice president stated that SVI has about 2650 employees and is very similar in structure or hierarchy to other hospitals in terms of basic medical operations although SVI does differ in having a Pastor of Care Department. . . . The vice president estimated that 99 percent of the jobs require lay training, education or experience and that only about one percent or eighteen jobs out of a total of about 2600 involved the religious aspect. The vice president testified that there is no requirement that an employee sign a declaration indicating support of the Catholic philosophy and that there is no grievance procedure in the employee handbook providing for the discipline of an employee for failure to support the Catholic philosophy. . . .

. . . .

> The Personnel Director testified that he had served SVI in that capacity for over five years and had worked in the SVI personnel department since 1969. . . . The director said that SVI is self-funded in that it reimburses the fund on the basis of claims paid out to its former employees but does not pay a regular contribution tax on its payroll. . . .

. . . .

The Board explained the basis of its holding and the methodology used in reaching its decision:

> In its discussion under Part I of the Statute, the Board previously found that SVI is engaged in the delivery of health care in a religious context and with a religious motivation and purpose. SVI, therefore, has a commercial function as a hospital, infirmary and medical clinic and has a religious purpose of serving God and fulfilling the apostolate of the Sisters of Charity of Nazareth in delivering these services within a religious context. However, the Board hereby determines that the primary function of SVI is the commercial delivery of health care services as a hospital facility and medical institution and that the religious aspects are secondary. In reaching this conclusion, the Board has considered not only the nature and purpose of the employment of the SVI employees, the "employment itself" test urged by counsel for the ESD, but has used a general weighing and balancing test to ascertain the essential function of SVI. Although SVI was founded by a religious order of the Roman Catholic Church, was first brought into existence through a religious motivation and for a specific religious purpose and mission, and remains under the control of the Church up to the present day, the essential function of the institution remains that of a hospital, infirmary and medical institution. Through both inpatient, outpatient, and emergency admissions, SVI delivers health services to approximately 60,000 to 70,000 patients a year, according to the testimony of the CEO, very few, if any of whom, visit the facility to have their spiritual or religious needs met. SVI is open to all members of the public regardless of religious faith or denomination and none of its medical staff or other employees need be members of the Roman Catholic faith

> to qualify for employment. The record indicates that only 15 to 13 of SVI's 2600 employees are associated with the in-house chapel or the other purely religious aspects of SVI. Less than one percent of the institution's revenues are allocated to the chapel, the payroll of the chaplain and the employees engaged in a purely religious function, or to the maintenance of the religious aspects of SVI. The testimony indicates that regular religious services are not held in the chapel and that the only religious records maintained for the patients are possibly the denomination of each patient and whether those patients of the Catholic faith desire Mass or the administering of other sacraments. Nor does the record indicate that SVI is operated for the religious training or education of those of the Roman Catholic faith. Although SVI does conduct some educational classes, the instruction is in the area of health care and community services rather than religion.

In determining "purpose" the Board obviously considered both motive and function. I do not find this objectionable. The construction of a statute by an administrative agency is entitled to consideration and is "highly persuasive." *Farm Bureau Mutual Ins. Co.* v. *Wright*, 285 Ark. 228, 686 S.W.2d 778 (1985); *Brawley School Dist. No. 38* v. *Kight*, 206 Ark. 87, 173 S.W.2d 125 (1943).

Were we deciding this case *de novo* or functioning as the factfinder I could not quarrel with the result the majority has reached. But that is not what we ought to be doing. This is the point made by Chief Justice Hammond of the Maryland Court of Appeals in *State Insurance Commissioner* v. *National Bureau of Casualty Underwriters*, 248 Md. 292, 236 S.2d 282 (1967):

> The required process [judicial review of administrative agency decisions] is difficult to precisely articulate but it is plain that it requires restrained and disciplined judicial judgment so as not to interfere with the agency's factual conclusions under any of the tests, all of which are similar. . . . [J]udicial review essentially should be limited to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. This need not and must not be either judicial fact-finding or substitution of judicial judgment for agency judgment.

236 A.2d at 292.

In *Kendall* v. *Director of Division of Employment Security*, 393 Mass. 731, 473 N.E.2d 196 (1985), the main case relied upon by the majority, the Massachusetts Supreme Judicial Court did not hold, *as a matter of law*, that the Board was required to find that the Cardinal Cushing School and Training Center was operated "primarily for religious purposes," but rather held only that such a finding was a permissible one.

> The law *requires* that the board's findings be upheld if they are supported by substantial evidence. Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." Furthermore, in reviewing the board's findings we "give due weight to the experience, technical competence and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." We conclude that substantial evidence exists on the record to warrant the board's finding that the Center is "operated primarily for religious purposes."

473 N.E.2d at 199-200. (Emphasis added and citations omitted.)

While we rely on *Kendall* to reverse, we ignore its real basis for decision. In the case at bar the majority, in my view, exceeds our proper scope of review and simply decides the case anew.

Because I believe the findings and conclusions of the Board of Review are supported by substantial evidence, I would affirm.

ROGERS, J., joins in this dissent.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
OCTOBER 31, 1990

Petition for Rehearing denied; Motion to Stay Mandate granted.

Philip Lyon, for appellant.

Bruce H. Bokony, for appellee.

PER CURIAM. The Petition for Rehearing in this case is hereby denied.

The appellee's Motion to Stay Mandate is granted pending disposition of the appellee's Petition for Review filed in the Arkansas Supreme Court.

ROGERS and JENNINGS, JJ., concur in denial of Petition for Rehearing.

JUDITH ROGERS, Judge, concurring. I agree with the denial

of the petition for rehearing as no new grounds for consideration have been advanced. I write separately only to emphasize that I have not altered my position taken in the dissenting opinion in which I joined. I continue to feel that the court abandoned its traditional role and scope of review in ESD cases, which is to determine whether the Board of Review's decision is supported by substantial evidence when viewed in the light most favorable to the Board's decision.

JENNINGS, J., joins in this opinion.

Ferman L. WARD and Ernestine Ward *v.* Robert W. RUSSELL and Vonda K. Russell

CA 90-47 796 S.W.2d 588

Court of Appeals of Arkansas
Division I
Opinion delivered October 17, 1990
[Rehearing denied November 14, 1990.]

Curtis E. Rickard and *Grisham A. Phillips*, for appellants.

Baxter, Eisele, Duncan, Jensen & Smith, by: *Ray Baxter*, for appellees.

GEORGE K. CRACRAFT, Judge. Ferman and Ernestine Ward appeal from a judgment entered against them in favor of Robert and Vonda Russell, in the amount of $22,725.00 for breach of implied warranties in new housing. Appellants contend that the trial court erred in failing to give their proffered instruction on waiver of the breach. We find no error and affirm.

In June 1987, appellees purchased a newly constructed home from appellants, who were also its builders. Appellees subsequently brought this action to recover damages for faulty construction and for breach of implied warranties of fitness, merchantability, and habitability, as recognized in *Wawak* v. *Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970), and its progeny. In their complaint, appellees alleged that they had been damaged as the result of appellants' negligence in the construction of the house and their breach of warranties of fitness and habitability. Appellants answered and denied any negligence in the construction of the house, that there had been a breach of implied warranty, or that appellees had suffered any damage as a result.

At trial, appellees testified that they had obtained a loan in order to purchase the new home from appellants, and had taken possession of the home shortly thereafter. After the first rain, however, they discovered that the windows, doors, and chimney leaked. This resulted in damage to the tile flooring and carpets to the extent that the house was not habitable. They also testified that, although they promptly notified appellants of the defects, little or nothing had been done to correct them. Appellees offered expert testimony that the cause of the water problem was faulty concrete construction coupled with improper landscaping, which had caused water to flow toward and into the house. They also offered testimony as to other defects, including a sagging roof and damage to the brick work, and that the cost of correcting the defects would be in excess of $20,000.00. Appellant Ferman Ward testified and offered corroborating testimony that there were no defects in the construction or landscaping and that, although there were minor deficiencies in the home, he could correct them for less than $2,000.00.

The trial court instructed the jury on the issues of negligent construction and breach of implied warranties, and on the measure of damages as declared in *Carter* v. *Quick*, 263 Ark. 202, 563 S.W.2d 461 (1978). However, the court refused to give appellant's proffered instruction on waiver of breach of implied warranties, also discussed in *Carter*. The jury returned a verdict in appellees' favor and this appeal follows.

Appellants do not challenge the sufficiency of the evidence to support the verdict, but argue that the court erred in failing to give their proffered instruction on the issue of waiver of the breach. Appellants argue that there was sufficient evidence of waiver to create an issue of fact for the jury to determine. We agree that waiver of defects is a question of fact to be determined from the circumstances of the case. *Carter* v. *Quick*, *supra*. However, the defense of waiver is an affirmative one that must be specifically pled in one's answer or other responsive pleading. Ark. R. Civ. P. 8(c). Appellants did not plead waiver as a defense to the action or move to amend their answer to include that defense at any time during the course of the trial. When they tendered their instruction on that issue, it was objected to by appellees and refused by the court.

Rule 15(b) of the Arkansas Rules of Civil Procedure provides that, when issues are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been pled. While a party who knowingly acquiesces in the introduction of evidence relating to issues that are outside the pleadings is in no position to oppose a motion to conform, the court will not imply consent merely because evidence relevant to a properly pled issue incidentally tends to establish an unpled one. *Pineview Farms, Inc.* v. *A.O. Smith Harvestore, Inc.*, 298 Ark. 78, 765 S.W.2d 924 (1989). From our review of the record, we have found nothing to indicate that either the parties or the trial judge considered the case as having been tried on the theory of waiver, or to indicate that the evidence on which appellants now rely to establish waiver was not relevant to and directed toward issues that had been properly pled.

Affirmed.

WRIGHT, Acting C.J., and JENNINGS, J., agree.

Theresa Ann TURLEY *v.* STATE of Arkansas

CA CR 89-301 796 S.W.2d 851

Court of Appeals of Arkansas
En Banc
Opinion delivered October 17, 1990

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

Steve Clark, Att'y Gen., by: *Paul L. Cherry*, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. The appellant, Theresa Ann Turley, was found guilty by a jury of theft of property having a value of $2,500 or more, a class B felony, in violation of Ark. Code Ann. § 5-36-103 (Supp. 1989). Upon conviction, appellant was sentenced as an habitual offender to a term of thirty years in prison. For reversal, appellant argues that the trial court erred in refusing to instruct the jury on the lesser degree of theft of property, valued at less than $2,500 but more than $200, which is a class C felony, and in permitting the introduction of hearsay testimony. We find merit in the first issue raised, and reverse and remand.

The victim in this case was Ben Gibson. He testified that on December 15, 1988, numerous items were stolen from him, totalling $4,508 in value. He related on direct examination that he had recovered one of the items, a gold bracelet, and without objection, he testified that he valued it at $2,700, based on what he had paid for it three years ago.

The state also presented the testimony of George Ikard, a pawn shop owner. He told the jury that appellant pawned this gold bracelet on December 16, 1988, in exchange for $283. On cross-examination, Ikard explained that the amount he gave the appellant for the bracelet was sixty percent of what he thought it was worth, and that he could duplicate the piece new for $500. He also stated that $500 represented the wholesale cost, and that one probably could not purchase the bracelet at retail for that amount.

Appellant first argues that, based on Ikard's testimony, the trial court erred in refusing to give the proffered instruction on theft of property having a value of less than $2,500, but more than $200. We agree.

According to Ark. Code Ann. § 5-36-103(b)(1)(A) (Supp. 1989), theft of property is classified as a class B felony if the value of the property is $2,500 or more. Under subsection (b)(2)(A), the offense is a class C felony if the value is greater than $200, but less than $2,500. We have held that where there is the slightest evidence to warrant an instruction on a lesser included offense, it is error to refuse to give it. *Johnson* v. *State*, 28 Ark. App. 256, 773 S.W.2d 450 (1989).

Here, the victim testified that the total value of the items stolen was $4,508, and included in his estimation was the $2,700 value placed on the gold bracelet. Mr. Ikard, however, gave testimony valuing the bracelet at only $500, which, if believed by the jury, would have reduced the total value of the property to less than $2,500. Thus, the evidence was not so conclusive as to demonstrate that only the greater offense could have been committed by the appellant. The jury was entitled to consider Mr. Ikard's testimony; therefore, it was error to refuse an instruction on the lesser degree of theft. Although we hold that the instruction should have been given, the evidence was conflicting, and thus susceptible to more than one interpretation.

Accordingly, we reverse and remand for a new trial.

As her second point on appeal, appellant contends that the trial court erred in allowing the admission of hearsay testimony. The subject of this objection concerns the victim's testimony regarding the use of his stolen credit cards. Mr. Gibson testified that several credit cards were taken from him, which he reported missing to the issuers on December 16, 1988. Gibson testified, over the appellant's objection, that he received monthly statements from the credit card companies showing that four charges were made on December 16th, and one on December 21st, for a total of $275.05. He further stated that he did not make these charges and that he did not authorize anyone to use his credit cards.

Under Ark. R. Evid. 801(c) hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Thus, to determine whether testimony is hearsay, it is necessary to consider the purpose for which it is offered. It is not clear, from the record in the instant case, what the testimony objected to was intended to prove. Furthermore, the hearsay argument is made in general terms without application to specific objections. We, therefore, have concluded that discussion of the hearsay issue in this opinion would not be helpful as the same situation is not likely to arise on retrial. *See Bennett* v. *State*, 302 Ark. 179, 186, 789 S.W.2d 436 (1990); *Hodge* v. *State*, 27 Ark. App. 93, 99, 766 S.W.2d 619 (1989).

Reversed and Remanded.

COOPER, J., concurs.

WRIGHT, Acting C.J., dissents.

JAMES R. COOPER, Judge, concurring. An issue not argued, but which arose in our conference, concerns the proper disposition of a case where a conviction is reversed because the trial court erroneously failed to instruct the jury on a lesser-included offense. The sufficiency of the evidence to support the greater offense of which the appellant was convicted was not challenged on appeal. The only relief requested by the appellant was a new trial. This is the relief granted in the majority opinion.

The dissent maintains that we can and should modify the judgment appealed from in this case and fix punishment in conformity with the permissible sentence for the lesser included offense for which no instruction was given, citing *Hamilton* v. *State*, 262 Ark. 366, 556 S.W.2d 884 (1977); *Richie* v. *State*, 261 Ark. 7, 545 S.W.2d 638 (1977); *Osborne* v. *State*, 237 Ark. 170, 371 S.W.2d 518 (1963); *Bailey* v. *State*, 206 Ark. 121, 173 S.W.2d 1010 (1943); and *Woodall* v. *State*, 200 Ark. 665, 140 S.W.2d 424 (1940) as authority for such a disposition. It should, perhaps, be noted in passing that several of those cases are distinguishable from the situated presented in the case at bar. In *Osborne*, the punishment was reduced, but the attorney general was given seventeen days to file a request for a new trial if desired. 237 Ark. at 172. In both *Ritchie* and *Bailey*, the Supreme Court reversed and remanded unless the attorney general elected that the judgment be modified to impose sentence for the lesser offense. 261 Ark. at 9; 206 Ark. at 132. *Hamilton* is something of an anomoly: although it did result in the disposition urged by the dissent, it did so without citation to authority, *see* 262 Ark. at 375, and it has not been followed. I have found no case since 1977 which reduces punishment rather than remanding for new trial under the circumstances presented by the case at bar. Recent cases that do remand in this situation include *Campbell* v. *State*, 300 Ark. 606, 780 S.W.2d 567 (1989); *Henson* v. *State*, 296 Ark. 472, 757 S.W.2d 560 (1987); *Johnson* v. *State*, 28 Ark. App. 256, 773 S.W.2d 450 (1989); and *Savannah* v. *State*, 7 Ark. App. 161, 645 S.W.2d 694 (1983).

Although I do not dispute that there is some authority for the proposition that we are authorized to modify the judgment and fix a reduced sentence when we reverse solely on the basis of error in failing to instruct the jury on a lesser-included offense, I submit that it is the better practice to reverse and remand for a new trial in such cases.

There is an inherent contradiction between a reversal based on failure to instruct the jury on a lesser included offense, and a disposition which forcloses consideration of that issue by a jury by judicial modification of the sentence. In this sense, the *Bailey* opinion is instructive. In discussing the merits of Bailey's argument, the Supreme Court said"

> It is not a question of whether we believe the defendant; the point is that he had a right to have his story submitted to the jury. That is the purpose of our jury system; and the court denied him this right; and for the failure to submit the issue of voluntary manslaughter to the jury this cause must be reversed.

106 Ark. at 130. Nevertheless, although the *Bailey* Court recognized the importance of allowing a criminal defendant to exercise his right to "have his story submitted to the jury" under our system of law, it ultimately denied Bailey this right by modifying the judgment and setting punishment, rather than remanding for a new trial in which both of those issues would be submitted to the jury. This same contradiction is apparent in *Hamilton*, which cited a case which remanded for a new trial as support for the proposition that it is "the prerogative of the jury to evaluate the conflicting evidence and resolve the issue [of a lesser included offense and its punishment]." *Hamilton*, *supra*, *citing Milburn* v. *State*, 260 Ark. 553, 542 S.W.2d 490 (1976). The *Hamilton* court, however, departed from *Milburn* by modifying the judgment to impose sentence on the lesser included offense without remand.

As noted, Arkansas appellate courts have since 1977 established a practice of reversing and remanding in cases similar to the one at bar. I believe that it would be unwise to depart from that long-standing practice, especially in a case where a new trial is the only remedy requested. The disposition favored by the dissent does promote judicial economy, but it does so, in may view, by discounting the importance of the jury as the arbiter of guilt and punishment under Arkansas law. Adoption of the dissenting viewpoint would mean that the Court's error would cost the appellant his right to "have his story submitted to the jury."

I concur.

ERNIE E. WRIGHT, Acting Chief Judge, dissenting. I concur with the majority opinion holding it was prejudicial error for the trial judge to refuse appellant's request to instruct the jury on the lesser included degree of theft of property.

I respectfully dissent from the majority decision to reverse

and remand the case for a new trial because of the failure to instruct on the lesser included degree of theft.

Here the evidence of theft was overwhelming and reversal for a new trial is not required. The error in failing to give the instruction on the lesser included degree of theft had no bearing upon the jury's determination of guilt or innocence. The error affected only the punishment imposed. In these circumstances the appellate court may modify the judgment appealed from and fix a reduced sentence. The following cases are authority for this procedure. *Hamilton* v. *State*, 262 Ark. 366, 556 S.W.2d 884 (1977); *Richie* v. *State*, 261 Ark. 7, 545 S.W.2d 638 (1977); *Osborne* v. *State*, 237 Ark. 170, 371 S.W.2d 518 (1963); *Bailey* v. *State*, 206 Ark. 121, 173 S.W.2d 1010 (1943); *Woodall* v. *State*, 200 Ark. 665, 140 S.W.2d 424 (1940).

Reversing and remanding the case for a new trial is, in my view, a very inefficient way to deal with the error.

The sentence should simply be modified to a sentence in conformity with the permissible sentence for the lesser included degree of theft, and the case affirmed as modified.

Jessie BOOKER *v.* STATE of Arkansas

CA CR 90-23 796 S.W.2d 854

Court of Appeals of Arkansas
En Banc
Opinion delivered October 24, 1990

Steve Inboden, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with two counts of delivery of a controlled substance, violations of Ark. Code Ann. § 5-64-401 (1987). After

a jury trial he was found guilty of those charges and sentenced to ten years in the Arkansas Department of Correction on count one, and fifteen years on count two. From that decision, comes this appeal.

For reversal, the appellant contends that the trial court erred in denying his motion for a directed verdict, and in refusing to give a requested jury instruction concerning accomplice liability. We affirm.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Roach* v. *State*, 30 Ark. App. 119, 783 S.W.2d 376 (1990). In reviewing the denial of the motion we consider the evidence in the light most favorable to the appellee, considering only the testimony which supports the verdict. *Coley* v. *State*, 302 Ark. 526, 790 S.W.2d 899 (1990). We must affirm if there is any substantial evidence to support the conviction. *Id.*

There was evidence that an investigator with the Arkansas State Police conducted an undercover narcotics investigation. In the course of this investigation, he and a confidential informant went to Marked Tree, Arkansas, on January 17, 1989, to attempt to buy crack cocaine from a suspect named Red Pope. They drove down Jefferson Street, an area where "a lot of drug dealing is done," in search of Red Pope. The appellant came up to the investigator's vehicle. Asked if he had seen Red, the appellant said that he had not, but that he could get them some "rock" if they were looking for something. The appellant then called for another man, who came up to the vehicle and was introduced as "Chill". The appellant and Chill entered the vehicle. Chill asked the investigator what he wanted, and the investigator told him he wanted to buy one or two "rocks," "rock" being a street term for crack cocaine. Chill gave the investigator one rock of crack cocaine, and received $50.00. When the appellant and Chill got out of the vehicle, the appellant asked for money "for setting up the meet with Chill," and the investigator gave him $10.00.

On January 24, 1989, the investigator and the confidential informant again went to Jefferson Street in Marked Tree. The appellant approached their vehicle and asked them what they wanted to purchase. The officer told the appellant he wanted to buy a quarter ounce of rock, and the appellant then entered the vehicle and drove them to a housing project, parking behind a

pickup truck. The appellant told them to follow the pickup truck, which led them to another area of Marked Tree. Chill, the confidential informant, and another man went into an apartment complex. After a few minutes the confidential informant came out and told the investigator to come inside the apartment. At a kitchen table, Chill produced two plastic bags of cocaine and, in two separate transactions, Chill exchanged approximately 5/16 of an ounce of crack cocaine for $500.00. The appellant, the investigator, and the confidential informant then returned to the investigator's vehicle, where the investigator gave the appellant $20.00 for setting up the transaction. The appellant was taken back to Jefferson Street.

Citing *Bowles* v. *State*, 265 Ark. 457, 579 S.W.2d 596 (1979), and *Daigger* v. *State*, 268 Ark. 249, 595 S.W.2d 653 (1980), the appellant contends that the evidence shows only that he introduced the buyers and the sellers and was present when the delivery occurred, and that this evidence is not sufficient to prove that he was an accomplice to the crime of delivery of a controlled substance. We think that the appellant's role in the transaction was more active than he perceives, and we reject his argument.

An accomplice is one who, with the purpose of promoting or facilitating the commission of an offense, solicits, advises, and encourages, or coerces another to commit the offense, or aids or attempts to aid another person in the planning or commission of the offense. Ark. Code Ann. § 5-2-403 (1987). When two or more persons assist one another in the commission of a crime, each is an accomplice and is criminally liable for the conduct of both. *Parker* v. *State*, 265 Ark. 315, 578 S.W.2d 206 (1979). A participant cannot disclaim responsibility because he did not personally take part in every act that went to make up the crime as a whole. *Id.* The crime in the case at bar was delivery, defined as the actual, constructive, or attempted transfer of a controlled substance from one person to another in exchange for money or anything of value, whether or not there is an agency relationship. Ark. Code Ann. 5-64-101(f) (Supp. 1989).

The evidence in *Bowles* v. *State*, *supra*, showed only that Bowles advised Baker, an undercover officer, that he could buy marijuana from a drug dealer named Cash, and gave Baker a note introducing him to Cash. After receiving the note, Cash asked

Bowles if it was safe to do business with Baker, and Bowles assured him that it was. Baker then purchased marijuana from Cash. Baker had no conversation with Bowles between the time he first met Cash and the time he purchased the marijuana. After the purchase, Baker offered Bowles $100.00 for establishing the contact. Bowles declined the money, saying he did it as a favor. The Supreme Court concluded that this evidence merely raised a suspicion that Bowles aided Cash in the transaction, and reversed Bowles's conviction for delivery of a controlled substance. In *Daigger* v. *State*, 268 Ark. 249, 595 S.W.2d 653 (1980), the evidence showed only that police officers tried to buy LSD from David Taylor, could not agree on a price, and that Taylor introduced them to a couple from whom the officers did purchase LSD.

The appellant couches his argument in terms of agency, asserting that *Bowles* and *Daigger*, *supra*, stand for the proposition that one who is acting as an agent of the buyer is, by definition, not an accomplice. However, we think those cases are more properly understood as going to the defendant's intent: does he act with the sole intention of aiding the purchaser, as did the appellant in *Bowles*, or does he instead act with the purpose of aiding the seller in the delivery of a controlled substance?

In the case at bar, the confidential informant testified that Chill supplied the narcotics. However, he also stated that:

> Unfortunately, it isn't always possible to meet [Chill] or know where he is. Other people would see us and knew we had money and inquire as to what we were looking for and take us to where he may be.

We think that there is substantial evidence in the case at bar to show that the appellant was not acting with the sole intention of aiding the purchaser. The evidence shows that the appellant initiated both drug transactions by asking the investigator what he wanted to purchase, and arranged for the prospective purchasers to meet Chill on both occasions. With respect to the January 24 transaction, the appellant led the investigator along a circuitous route which ultimately led to the apartment where the drugs were purchased. Finally, unlike the appellant in *Bowles*, *supra*, who arranged a drug sale as a favor for the purchaser, the appellant in the case at bar had a financial interest in the

transaction: following the January 17 drug sale he asked for and received payment for his efforts, and he was also paid for his services which culminated in the drug deal of January 24. We think it clear that these circumstances extend beyond the mere introduction of buyer and seller which was found insufficient in *Daigger*, *supra*, and that the jury could conclude on this evidence that the appellant was actively aiding Chill in the delivery of a controlled substance by soliciting sales and arranging the contact between buyer and seller which made the sales possible. *See Yent* v. *State*, 9 Ark. App. 356, 660 S.W.2d 178 (1983). We hold that the appellant's convictions are supported by substantial evidence, and that the trial court therefore did not err in denying his motion for a directed verdict.

We do not address the appellant's contention that the trial court erred in refusing to give a requested jury instruction because the requested instruction is not in the record before us. Failure to show that an instruction was offered precludes consideration of this issue on appeal. *See Shockley* v. *State*, 282 Ark. 281, 688 S.W.2d 22 (1984).

Affirmed.

Fred E. DUVALL, et ux *v.* LAWS, SWAIN & MURDOCH, P.A., Ike Allen Laws, Jr., and Revere Corporation

CA 89-484 797 S.W.2d 474

Court of Appeals of Arkansas
En Banc
Opinion delivered October 24, 1990

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

Wright, Lindsey & Jennings, for appellees.

JOHN E. JENNINGS, Judge. In 1982, appellant Fred Duvall was charged with theft in connection with the buying and selling of oil and gas leases. He asked Ike Allen Laws, Jr., the appellee, a Russellville lawyer, to represent him. The two had known each other since grade school.

Laws quoted Duvall a fee of $5,000.00. Duvall paid $2,498.00 but then he was unable to raise the balance. He and Laws entered into an agreement, which later became the subject matter of this lawsuit. Duvall and his wife executed a deed which purported to convey outright the mineral rights to 160 acres of land in Pope County. The deed was dated September 27, 1982 and recited a consideration of $5,000.00. Revenue stamps were purchased reflecting that amount. Also on September 27 Laws sent Duvall the following letter:

> This will acknowledge that you have on this date transferred to our firm certain minerals by mineral deed,

> representing our attorney's fee of Five Thousand Dollars ($5,000.00) to defend Fred E. Duvall in the State of Arkansas v. Fred E. Duvall.
>
> This letter will serve as evidence of our agreement that you may repurchase these minerals at any time within one (1) year from the date of this letter upon payment in full of my said fee.

It is undisputed that the letter was received by Duvall. On October 5, 1982, the law firm sent Duvall an invoice showing a balance of $2,502.00. This was the last bill sent to Duvall.

During the summer of 1983, Duvall located a prospective purchaser for the mineral rights who was apparently willing to pay more than $30,000.00 for them. The transaction did not go through due to title problems. At trial, the testimony was conflicting as to whether Laws cooperated in the attempt to sell the mineral rights to the third party.

In 1987 Laws leased the mineral rights for $12,740.00. On June 28, 1988, Duvall sued Laws, alleging that their 1982 transaction ought to be construed as an equitable mortgage. The chancellor held that the transaction was a deed with an option to purchase and not an equitable mortgage. He nevertheless awarded Duvall judgment for $2,498.00. Duvall appeals the first holding; Laws cross appeals the second. We affirm on direct appeal and reverse on cross appeal.

On direct appeal, Duvall argues that the chancellor applied the wrong burden of proof and that his refusal to hold that the transaction was an equitable mortgage was clearly erroneous. The case is governed by two distinct sets of rules. In equity, a grantor may show that a deed, absolute on its face, was intended only to be security for the payment of a debt and thus was in actuality a mortgage. *Ruth* v. *Lites*, 267 Ark. 752, 590 S.W.2d 322 (1979); *Hill* v. *Day*, 231 Ark. 550, 331 S.W.2d 38 (1960). The burden of proving that the transaction was truly a mortgage rests upon the grantor because there is a presumption that the instrument is what it purports to be. *See Newport* v. *Chandler*, 206 Ark. 974, 178 S.W.2d 240 (1944); *Clerk-McWilliams Coal Co.* v. *Ward*, 185 Ark. 237, 47 S.W.2d 18 (1932); *Wensel* v. *Flatte*, 27 Ark. App. 5, 764 S.W.2d 616 (1989). The burden may

be met only by clear and convincing evidence. *Newport*, *supra*; *Clark-McWilliams Coal Co.*, *supra*; *Nelson* v. *Nelson*, 267 Ark. 353, 590 S.W.2d 293 (1979). When a vendor, at the time of a sale, is indebted to a purchaser, and continues to be indebted after the sale, with the right to call for a reconveyance upon payment of the debt, a deed absolute on its face will be considered in a court of equity as a mortgage. *Ehrlich* v. *Castleberry*, 227 Ark. 426, 299 S.W.2d 38 (1957); *Matthews* v. *Stevens*, 163 Ark. 157, 259 S.W. 736 (1924). On the other hand the parties may enter into a contract for the purchase and sale of land, with a reservation to the vendor of a right to repurchase the property at a fixed price and at a specific time. If such a transaction is security for a debt, then it is a mortgage—otherwise it is a sale. *Carter* v. *Zachary*, 243 Ark. 104, 418 S.W.2d 787 (1967); *Monaghan* v. *Davis*, 16 Ark. App. 258, 700 S.W.2d 375 (1985). The line of demarcation between the two has been said to be "shadowy." *Ehrlich*, *supra*; *Newport*, *supra*. The question whether a deed to realty, absolute on its face, when construed together with a separate agreement or option to repurchase by the grantor amounts to a mortgage or is a conditional sale, depends on the intention of the parties in the light of all attendant circumstances. *Lewis* v. *Miller*, 226 Ark. 560, 291 S.W.2d 255 (1956); *Ehrlich*, *supra*; *Monaghan*, *supra*. In reviewing the chancellor's determination on this issue, we are obliged to give great weight to his opinion. *Ehrlich*, *supra*; *Buffalo Stave & Lumber Co.* v. *Rice*, 187 Ark. 731, 62 S.W.2d 2 (1933).

While it is true that during his testimony, Laws said that Duvall never made any attempt to "pay the balance of the fee," there was also evidence from which the chancellor could have found that Duvall's failure to pay "the balance" for more than six years indicates his awareness that the transaction was an absolute conveyance. In *Newport* v. *Chandler*, 206 Ark. at 981, the court suggested that one test which may be helpful in determining whether a transaction is a mortgage or a conditional sale is to decide whether the grantee has the right to compel the grantor to pay the consideration named in the stipulation for reconveyance. In the case at bar it seems clear that Laws would not have been successful in a suit to compel the payment of "the balance" of his fee. In any event we cannot say that the chancellor's determination that the transaction was not intended

as a mortgage is clearly erroneous.

In contending that the chancellor applied the "wrong burden of proof," Duvall relies upon the principle that an attorney who enters into a business transaction with a client has the burden of proving the fairness and equity of that transaction and the adequacy of the consideration therefor. *Swaim* v. *Martin*, 158 Ark. 469, 251 S.W. 26 (1923); *Thweatt* v. *Freeman*, 73 Ark. 575, 84 S.W. 720 (1905). We agree that the principle is applicable to the case at bar. Once the chancellor found that the grantor had not met his burden of proving by clear and convincing evidence that the transaction was intended as a mortgage, the burden was then upon Laws to establish that he dealt fairly and justly with Fred Duvall. *Blake* v. *Denman*, 218 Ark. 351, 236 S.W.2d 433 (1951). In contending that the trial court applied the wrong burden, appellant relies on two remarks made by the chancellor.

> One of the problems in deciding this case that bothers me is the fact that the defendant is an attorney; [I] want to be very careful that he's not treated improperly one way or the other just because he's a lawyer.
>
> * * *
>
> If I ruled otherwise it would be simply because Mr. Laws is an attorney whom I have never met or seen before as far as I know ever in my life or had any correspondence with him. And I don't think that's right either.

When the two statements are viewed in the context of the court's other remarks, we are not persuaded that they indicate the chancellor was unaware of the burden imposed on Laws by decision such as *Swaim*. It is not an incorrect statement of the law to say that a decision should not be made *solely* on the basis that one of the parties is a lawyer. "There is no absolute incapacity for dealing between client and attorney; and although transactions between them will be carefully scrutinized, yet those which are obviously fair and just will be upheld." *Blake* v. *Denman*, *supra*. In the case at bar there was evidence from which the trial court could find that mineral rights conveyed from Duvall to Laws were essentially without market value at the time of the conveyance. It was therefore not improper for the chancellor to find, as he clearly

did, that the transaction was fair to appellant, viewed from the time of its making.

Finally, if the chancellor was correct in holding that the transaction was an absolute conveyance, we can find no justification for upholding his award of damages to the appellant and that award must be reversed.

Affirmed on direct appeal and reversed on cross appeal.

WRIGHT, Acting C.J., and MAYFIELD J., dissent.

ERNIE E. WRIGHT, Acting Chief Judge, dissenting. In September 1982, appellant and his wife, residents of Pope County, found themselves in a vulnerable position. Appellant was under criminal indictment in Conway County and needed an attorney to defend him. At trial he was acquitted. Appellant's wife had been seriously ill and the couple owed various debts, including a civil judgment in Conway County, hospital bills approximating $90,000.00 and other debts. Appellant was unemployed as he had been caring for his sick wife. Their assets were exhausted except for some mineral interests. Appellant's wife died after the commencement of this suit.

Appellant made an agreement with attorney Ike Laws, Jr. to defend him in the criminal case for a fee of $5,000.00. Appellant could raise only half of the fee at the time of employment. Appellant told Laws he had some mineral interests he wanted to sell and would pay the balance of the fee upon sale of the mineral interests. However, very shortly after half of the fee was paid, Laws called appellant on the phone and suggested appellant deed the mineral interests to him to assure payment of the balance of the agreed fee, and suggested further that appellant's judgment creditors could attach and execute upon the mineral interests and deprive appellant of all benefits in the mineral interests.

In keeping with Laws' recommendation, appellant and his wife on September 27, 1982, executed a deed prepared by Laws conveying to the appellee law firm the mineral rights in 160 acres of land in Pope County. On that date or shortly thereafter Laws sent appellant the letter set out in the majority opinion.

When the letter was written, Laws had already received $2,498.00 on the fee and was owed a balance of $2,502.00.

However, the letter refers to the deed as "representing our attorney's fee of Five Thousand Dollars ($5,000.00)"

On October 5, 1982, some eight days after delivery of the deed to Laws, his office sent a statement to appellant reflecting a total fee of $5,000.00 in the criminal case, credits of $2,498.00 and a balance of $2,502.00 unpaid.

Laws gave testimony at the trial "so far as I'm concerned" the deed for the mineral interests was in settlement of the balance of the fee but that he gave appellant the right to have the minerals reconveyed upon payment of the balance within one year from date. However, during Laws' testimony with reference to a conversation he had with a Mr. Womack who was attempting in July 1983 to purchase for $30,000 the subject mineral interests, together with some 50 acres of additional mineral interests in which appellant and wife had an interest, he stated he told Mr. Womack his office had a deal with appellant and they wanted their name on the draft. In reference to his deposition, Laws admitted to the following at trial:

> Q "You stood to get your fee out of this?" And your answer was?
>
> A I stood to get what he still owed me on my fee.

The statement by appellee Laws was in direct conflict with his testimony at trial that the deed for the mineral interests was in settlement of the balance of the fee. The sale to Womack was never closed.

Appellant sought to employ attorney Ernie Witt to recover the mineral interests at least as early as July 1985. The evidence shows that attorney Cliff Hoofman had sent Laws a letter about appellant's claim for recovery of his mineral interests from Laws and Laws wrote Hoofman a letter in February 1988 in which he stated:

> Dear Cliff: I thought you might be interested in a computer check I ran on judgments against Fred DuVall. With these judgments against him, it is my opinion that he would not be able to keep the minerals he claims, even if he could get them. I thought this may be of some interest to you in determining the manner that you took employment.

The letter was written after Laws had in December 1987 entered into two oil and gas leases for the mineral interests for an up front consideration of $12,700.00. Laws also wrote attorney Hoofman in February 1988 and in referring to appellant, stated: "he had not made any attempt to pay a single penny on our fee since his trial." The statement is in conflict with appellees' contention the mineral deed settled the fee.

Appellant gave the following unrebutted testimony:

> A I went to Ike's office and asked him if I borrowed the money, could I pay him in full and he issued a challenge to me if I could find an attorney to represent me.
>
> Q Was this following the . . . was this still within the one year period?
>
> A Yes, that was within the one year period.
>
> Q What did he say?
>
> A He said, "You just do whatever you think you're big enough to do."

Appellant testified that he had leased the mineral interests in years past for figures from $40.00 to $50.00 per acre and this was not rebutted.

Appellant testified he went to Laws' office promptly after he got the letter concerning his right to have the minerals reconveyed to him and complained that the letter did not show he would only be required to pay $2,500.00, the unpaid part of the fee, to have the minerals reconveyed, and also complained that the letter did not show the agreement was that the $2,500.00 would be paid when he sold the mineral interests. He said Laws' response was:

> He said it was necessary for him to word the letter like that. That that represented the full fee in case the judgment people came out . . . came after me and said that I overpaid him 110 acres of minerals for just $2,500.00.

The chancellor found that the deed from appellant and wife to the appellees for the mineral interests was not a security for the debt, but was an absolute conveyance.

In an effort to show the $2,502.00 balance of the fee was fair

consideration for the mineral interests appellees' witness Dale Braden, a fellow attorney and member of the Russellville Bar, who worked with Arkansas Oil and Gas Co., testified he offered "nothing" for the subject mineral interests in 1982. Of course, this had no significance for establishing the value of the mineral interests. There was no evidence any offer from him was solicited in 1982, and whether he offered "nothing" has no evidentiary value as to the market value. This witness admitted he paid Laws $129.00 per acre for a five-year lease on 80 acres of the mineral interests in 1987.

There are two reasons for reversing. First, when an attorney contracts with his client and litigation arises over the transaction, the attorney has the burden of proving that no advantage has been taken of the client. Appellant alleged that appellees' actions constituted a gross ethical breach of the duties a lawyer owes his client in an ongoing lawyer-client relationship. The reason for the rule is that the relation of attorney and client is one of trust and confidence requiring a high degree of fidelity and good faith. The burden is upon the attorney to prove the fairness and equity of the transaction and the adequacy of the consideration. *Swaim* v. *Martin*, 158 Ark. 469, 251 S.W. 26 (1923). It is apparent from the findings and rulings of the chancellor from the bench that he did not follow this rule. On appeal from chancery court we consider the case *de novo*, and render a judgment here which should have been rendered below, giving due deference to findings of fact by the chancellor. When the evidence as a whole is carefully weighed, it is apparent appellees failed to meet the burden of proving the transaction with appellant was fair and equitable. Appellees completely failed to present evidence of the market value of the mineral interests as of September 1982, the date of the deed. There is substantial evidence the value of the mineral interests greatly exceeded the amount of the balance of the fee. The court failed to make a finding as to the fairness of the transaction in keeping with *Swaim*. There is a total absence of evidence of negotiation between the parties as to the relative value of the minerals with relation to the balance of fee owed, and the testimony of Laws at trial was at variance with his own documentary evidence. His testimony sought to impeach his own documents and prior admissions. In *Bond* v. *Marlin*, 199 Ark. 806, 136 S.W.2d 460 (1940) the Arkansas Supreme Court reversed the

Union Chancery Court which had found against appellants in their suit to recover ownership of mineral interests, the deed for which was taken in the name of appellants' attorney, Marlin. The court upon review of the evidence on appeal held the appellee failed to meet the burden of proof required by *Swaim*. The appellant is entitled to cancellation of the mineral deed to appellees and other relief discussed later in this dissent.

Secondly, it is clear from the evidence appellee Laws continued to consider appellant still owed the unpaid balance on the agreed fee after the receipt of the mineral deed as evidenced by the bill sent to appellant, Laws' letter to attorney Hoofman, and some of Laws' testimony that appellant had not paid the balance of the fee owed. When the evidence is considered in its entirety it is clear the chancellor's finding the mineral deed to Laws was in effect a sale with no equitable security interest attached was clearly against the preponderance of the evidence. From the pronouncements of the chancellor it is clear he attached great significance to the fact that appellant gave testimony that the appellees owned the minerals subject to the letter giving appellant the right to repurchase. There is no dispute that appellees became vested with legal title, but when that is coupled with the right to repurchase for the balance of the fee owed the case comes clearly within the rule set out in *Monaghan* v. *Davis*, 16 Ark. App. 258, 700 S.W.2d 375 (1985). When the deed was delivered to appellees, appellant owed $2,502.00 fee balance. The evidence is abundantly clear, not only from the testimony of appellant, but from evidence flowing from Laws that appellant continued to owe the balance of the fee after delivery of the mineral deed. The letter from Laws to appellant, coupled with the rest of the evidence, nails down the fact that the deed was security for the balance of the fee. It was after litigation was in the offing that Laws' posture about the nature of the transaction changed and in his testimony he sought to change the meaning of the bill for the balance of the fee sent after receipt of the deed and to impeach his prior statements about appellant still owing the balance of the fee. It is undisputed that appellant had the right to reconveyance on payment of the fee balance. The fact the letter purported to limit that right to one year is of no consequence here as the transaction constituted an equitable mortgage that required foreclosure. Thus, the test in *Monaghan* is met. In that

case the court held that a deed coupled with an oral agreement to reconvey on payment of a debt constituted an equitable mortgage that can be disposed of only by foreclosure. In so holding the court said:

> It is a well settled principle of equity jurisprudence in this state that where, at the time of sale, a vendor of land is indebted to the purchaser and continues to be indebted to him after the sale with the right to call for a reconveyance upon payment of the debt, a deed absolute on its face will be construed by a court of equity as a mortgage. . . .
>
> The foreclosure of a mortgage is ordinarily necessary in order to cut off the mortgagor's equity of redemption and to transfer absolute title to the mortgaged property, even in the case of absolute deeds intended as mortgages. 59 C.J.S. *Mortgages* § 486 (1949). *See also Baugh* v. *Taylor*, 184 Ark. 545, 42 S.W.2d 992 (1931), where the court stated:
>
>> The clause in the option contract making time of the essence thereof had the effect, perhaps, of waiving the right of redemption conferred by the statute, but did not dispose of the equity of redemption which antedates any statutory right of redemption. This equity can be disposed of only by foreclosure or a conveyance or by laches.

Clearly the rule in *Monaghan* is not confined to a situation where a loan is made, as the chancellor's pronouncements indicated, but includes other circumstances in which the grantor is indebted to the grantee.

In our *de novo* review on appeal from chancery we treat the pleadings as amended to conform with the proof as to issues tried by the implied consent of the parties, and we do so here. *Brown* v. *Imboden*, 28 Ark. App. 127, 771 S.W.2d 312 (1989); Ark. R. Civ. P. 15(b). In the case before us foreclosure of the equitable mortgage is not necessary as appellees have already received more than the debt and interest.

This case should be reversed and judgment entered in favor of appellant against appellees for $12,700.00 less $2,502.00 and

interest thereon from September 27, 1983. The mineral deed to appellee should be canceled, but appellant's mineral interests should be decreed subject to the rights of the two innocent purchasers of mineral leases who leased from appellees.

MAYFIELD, J., joins in dissent.

Dana SAFLEY *v.* STATE of Arkansas

CA CR 90-14 797 S.W.2d 468

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

Allen & O'Hern Law Firm, by: *Arthur L. Allen*, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant was charged with two counts of possession of a controlled substance with intent to deliver (cocaine and marijuana), but the jury found her guilty of two counts of the lesser offense of possession of a controlled substance. She was sentenced to serve ten years in the Arkansas Department of Correction.

On August 10, 1988, Little Rock Police Department Detective Patti Watson obtained a warrant to search a residence located at 1605 South Pierce Street being occupied by Dana Safley. The affidavit for the warrant stated it was based on "information from a reliable confidential informant" that appellant was in possession of and selling cocaine from this residence. The affidavit also stated:

> [O]n 08-10-88, the same said reliable confidential informant was searched by a Little Rock Police Officer for any concealed money and/or contraband with negative results and at that time the same said reliable confidential informant was supplied with a quantity of money for the purpose of purchasing cocaine from Dana Safley. The same said reliable confidential informant was then observed going to and entering the residence located at 1605 South Pierce Street, Little Rock, Pulaski County, Arkansas. After approximately ten (10) minutes the same said reliable confidential informant was observed leaving the residence and then he/she returned to the affiant and handed the affiant one clear plastic bag containing white powder. The same said reliable confidential informant stated that he/she had purchased the clear plastic bag containing white powder from Dana Safley and Dana Safley had represented the white powder as cocaine. A portion of the white powder was then field tested by the affiant and the field test reacted positive for cocaine.

After the warrant was obtained, Detective Watson and several other officers went to the residence and executed the

warrant. During the search the officers found a brown paper sack containing 3 plastic bags of green vegetable matter; 12 plastic bags containing white powder which later proved to be cocaine; a set of hand-held scales and a box of sandwich bags; a black heart-shaped object containing green vegetable matter; a bottle of inositol powder (a substance the evidence showed is frequently used as a "cutting agent" for cocaine); a sack of drug paraphernalia; and a tray with cigarette papers and green vegetable matter.

Because appellant's third point for reversal challenges the sufficiency of the evidence, we address it first. *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984). In that point, appellant contends the trial court erred in denying her motion for directed verdict because the evidence was insufficient to sustain her conviction. Appellant argues the state presented no evidence to support its argument that she was responsible for the drugs being in the house where they were found.

In reviewing the question of the sufficiency of the evidence in a criminal case, this court views the evidence in the light most favorable to the appellee and affirms the judgment if there is substantial evidence to support the findings of the trier of fact. *Lane* v. *State*, 288 Ark. 175, 702 S.W.2d 806 (1986); *Harris* v. *State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Jones* v. *State*, 269 Ark. 119, 598 S.W.2d 748 (1980). The fact that evidence is circumstantial does not render it insubstantial. *Small* v. *State*, 5 Ark. App. 87, 632 S.W.2d 448 (1982). And in *Osborne* v. *State*, 278 Ark. 45, 643 S.W.2d 251 (1982), the court explained:

> We have said that possession need not be actual, physical possession, but may be constructive, when one controls a substance or has the right to control it. Constructive possession can be implied when the contraband is found in a place immediately and exclusively accessible to the defendant and subject to his control, or to the joint control of the accused and another, but neither actual nor exclusive possession of the contraband is necessary to sustain a charge of possession. . . . However, we have also

> held that joint occupancy of premises alone will not be sufficient to establish possession or joint possession unless there are additional factors from which the jury can infer possession.

278 Ark. at 50 (citations omitted).

Here, there is evidence that appellant had lived in the house; that she moved to Hot Springs sometime between June and August 1988; that on August 9 she came back to Little Rock to gather her clothes and belongings from the house; that she slept in the house; and that she was alone in the house when the police officers arrived. In the bedroom, the officers found marijuana in appellant's purse and also in a bag near an open suitcase containing women's clothing. In the same bedroom the officers found the 12 plastic bags of cocaine, the scales, and the box of sandwich bags in the dresser on top of which were some toiletries and mascara. A bottle of inositol powder was found in appellant's purse. There was also evidence that the confidential informant had purchased cocaine from the appellant on the very day the search warrant was executed. We think these circumstances are enough to permit the jury to find appellant guilty of possession of a controlled substance.

Appellant's first point for reversal is that the trial court erred in denying her motion to suppress the evidence because the evidence was seized upon the authority of a search warrant issued without probable cause to support the informant's reliability and without probable cause to believe appellant was in possession of the items to be seized.

In *Watson* v. *State*, 291 Ark. 358, 724 S.W.2d 478 (1987), the court said:

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

> substantial basis for concluding that probable cause existed.

291 Ark. 363.

The *Gates* "totality of the circumstances" test has been used in Arkansas ever since it was adopted in *Thompson* v. *State*, 280 Ark. 265, 658 S.W.2d 350 (1983). Applying that test here, we think a practical reading of the affidavit upon which the warrant was issued reveals that Detective Watson had reasonable cause to believe that cocaine was being concealed in the residence at 1605 South Pierce Street, being occupied by appellant. The affidavit states that Watson received information from a reliable confidential informant that appellant was in possession of and selling cocaine from the residence. The affidavit establishes the reliability of the confidential informant by stating that the confidential informant had in the past provided information pertaining to narcotics trafficking in the Little Rock area on at least seven occasions which had proved correct. The affidavit details a controlled buy from the appellant at the residence on South Pierce Street and states the Little Rock Police Department had on file three reports stating cocaine was being trafficked from the residence and three reports stating appellant was involved in narcotics trafficking in the Little Rock area. Therefore, we find there was probable cause for the issuance of the search warrant under which the evidence was seized.

Under her first point, the appellant also contends the search warrant was defective because the return of service was not timely filed. Appellant says the warrant was issued and executed on August 10, 1988, but the return of service was not filed until December 15, 1988.

Arkansas Rule of Criminal Procedure 13.4(b) provides:

> An officer who has executed a search warrant . . . shall, as soon as possible and not later than the date specified in the warrant, return the warrant to the issuing judicial officer together with a verified report of the facts and circumstances of execution, including a list of things seized.

At the hearing on the motion to suppress, Detective Watson

testified that when the original return was filled out it was mistakenly stated that the warrant was executed on "8-8 of '88 at 1710 hours," and during preparation of the case file, Detective Stephens noticed the error and made an amended return correcting the date to "8-10 of '88." He testified that all the items contained on the original return are the same as mentioned in the amended return and that the original misdated return was filed on "8-12 of '88." In denying the motion to suppress, the trial judge stated that although the wrong date was put on the return originally, an amended return was filed on which the date was corrected; therefore, we cannot agree that the return was untimely filed. But, even if the return was not timely filed, there is no evidence that it was willful and no evidence that the appellant was prejudiced by the failure to originally file the return with the date of execution correctly stated. Therefore, the court did not err in denying the motion to suppress that was based upon the contention that the return was not timely filed. *See McFarland* v. *State*, 284 Ark. 533, 549, 684 S.W.2d 233 (1985).

Appellant's next argument is that the trial court erred in denying her motion to dismiss the charges because of police misconduct. She contends that after her arrest she was approached by Detective James Stephens, who said if she would become a confidential informant, or provide a confidential informant to work in her behalf, and drugs were recovered in an equal amount as were found in her arrest, the charges against her would be dropped or reduced. She testified that the police subsequently recovered drugs as a result of her assistance; that the drugs recovered were in the quantity as were involved in her arrest; and that the detective failed and refused to drop or reduce the charges or to recommend that the charges be dismissed. Appellant argues she is entitled to the benefit of the bargain on which she relied. The detective, however, denied that appellant's testimony was completely true. It was his testimony that he said he would ask the prosecuting attorney to reduce or dismiss the charges against appellant if she supplied information that led to arrests. He admitted that appellant provided an informant but said he found the informant could not be trusted. And Stephens said that while some drugs were seized as a result of appellant's help, no arrests were made.

In support of her argument appellant cites *Santobello*

v. *New York*, 404 U.S. 257 (1971), but that case is not applicable here. It deals with the failure of the prosecuting attorney's office to keep a "plea bargain" agreement made upon a guilty plea. In the instant case, the trial court denied appellant's motion to dismiss insofar as it was based upon a failure of the detective to carry out his agreement. The court said that the agreement was made upon certain conditions that were not complied with. Although the court said it would leave open the issue of police misconduct, no other evidence in that respect was offered and none is argued. We find no error in the court's refusal to grant appellant's motion to dismiss that was based on appellant's contention that Detective Stephens failed to keep his agreement.

Finally, appellant argues the trial court erred in denying her motion for a new trial alleging that the jury verdict was based upon a compromise and that newly discovered evidence necessitated the granting of a new trial.

At trial, after the jury returned its verdict, defense counsel requested that the jury be polled. During the poll one of the jurors stated the verdict was a "compromise" of the jury. Appellant cites *Rogers* v. *State*, 257 Ark. 13, 513 S.W.2d 908 (1974), and complains because the juror was not questioned as to her definition of "compromise." Appellant contends it is reasonable to believe the juror's statement was the equivalent of stating the verdict had been arrived at by "lot." We do not agree.

In the first place, appellant cannot predicate error upon the failure of the trial court to take action the appellant did not ask it to take. Appellant does not direct us to any place in the record where she asked the trial court to question this juror about the juror's definition of "compromise." Indeed, the juror actually said "this whole thing was a compromised thing, so does that mean if we agreed to the compromise that we agreed to that verdict?" The trial judge answered by stating that each member should state his or her name and say "yes" or "no" as to whether the verdict signed by the foreman and read by the court was the individual juror's verdict. Each of the members of the jury then stated his or her name and said "yes." So, the juror who asked if agreeing to the compromise meant agreeing to the verdict clearly stated that the verdict read by the judge and signed by the foreman of the jury was her own verdict.

Appellant then argues that Ark. Code Ann. § 16-64-119 (1987) provides that if any juror disagrees with the verdict the jury must be returned to the jury room again because, even though the juror here agreed that it was her verdict, sufficient question existed as to require the resequestering of the jury. Appellant cites *Rhodes* v. *State*, 290 Ark. 60, 716 S.W.2d 758 (1986), in support of this argument. In that case, at the conclusion of trial, appellant's counsel requested the jurors be polled. One juror, when asked whether it was his verdict, responded "[i]t is with a question." Upon further questioning by the court the juror responded he "wasn't sure either way"; then stated he "agreed to it after we discussed it"; and after being asked whether he was convinced beyond a reasonable doubt of the appellant's guilt, stated "I'm sure." The court reversed appellant's conviction on the basis that when a juror casts doubt on whether the verdict is his verdict and the court questions the juror until he casts an unequivocal vote, the juror is voting in the courtroom rather than in the jury room.

However, we do not agree that the juror in the instant case was "voting in the courtroom." When the jury was polled each juror save this one stated it was his or her verdict. This one juror, Ms. Tanner, originally responded "no" and then the following exchange took place:

> ANOTHER JUROR: Did you agree with that?
>
> MS. TANNER: Oh, I agree that it was a unanimous thing yeah.
>
> ANOTHER JUROR: That's what they want to know.
>
> MS. TANNER: This jargon is [inaudible].
>
> [THE COURT]: Okay, I'm sorry. It's a —
>
> MS. TANNER: It was a unanimous thing that we turned in. I don't understand why we are having a poll.
>
> [THE COURT]: It's a legal right that is available and the defense attorney requested that each juror individually state whether or not this was their verdict.
>
> MS. TANNER: Okay. Yes.

Thus, it appears that Ms. Tanner had voted for the verdict, that

she agreed it was a unanimous verdict, and merely did not "understand why we are having a poll." We find that the trial court did not err in denying appellant's motion for a new trial as urged by appellant.

Neither do we agree with appellant's contention that there was newly discovered evidence which necessitated the granting of a new trial. On the day after appellant's trial, a sentencing hearing was held at which John Mosley appeared. The appellant had testified that Mosley was renting the house where the drugs were found and that she had been living with him. She said she put the phone and electric bill in her name because he owed her money. She testified she moved out in July and was not living there in August when the house was searched but admitted she had not moved her things out when the officers came to search the house, and that she was also there that day. Mosley testified on the motion for new trial, that he knew appellant had a trial "yesterday"; That he was in town; that appellant and her attorney had asked him to come to court; and that he had refused. However, the record does not show that Mr. Mosley was subpoenaed for trial even though appellant knew that his testimony could be helpful. Therefore, appellant cannot very well claim that Mosley's testimony was "newly discovered" evidence. The decision of whether to grant a new trial is left to the sound discretion of the trial judge; his decision will not be disturbed absent abuse of that discretion; and newly discovered evidence is one of the least favored grounds for a new trial. *Vasquez* v. *State*, 287 Ark. 468, 701 S.W.2d 357 (1985). We find no error in the denial of a new trial.

Affirmed.

COOPER and ROGERS, JJ., agree.

COMMUNITY DIALYSIS CENTERS, INC. *v.* Shyman P. MEHTA

CA 89-359 797 S.W.2d 480

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

Ramsey, Cox, Bridgforth, Gilbert, Harrelson & Starling, by: *E. Harley Cox, Jr.*, for appellant.

Bridges, Young, Matthews, Holmes & Drake, by: *Terry F. Wynne*, for appellee.

JUDITH ROGERS, Judge. The appellant, Community Dialysis Centers, Inc., is a corporation which operates hemo-dialysis facilities in several states, including one in Pine Bluff, Arkansas. Appellee, Dr. Shyman P. Mehta, is a certified nephrologist. Beginning in January of 1988, appellant leased a building in which to house its facility from appellee for an eight year term, and appellee began serving as the medical director at the center at that time. After a year, appellee informed appellant that he was terminating his relationship as medical director as of March of 1989. Thereafter, appellant filed suit against appellee asserting that appellee had breached an oral agreement for him to act as medical director throughout the term of the eight-year lease, and that appellee had tortiously interfered with its contractual relationships with its employees.

Appellee subsequently filed a motion to dismiss both claims for relief pursuant to Rule 12 of the Arkansas Rules of Civil Procedure. By his motion, appellee contended that appellant's first claim concerning the breach of an alleged oral contract for personal services was barred by the statute of frauds. Appellee also asserted that appellant had not stated a cause of action with regard to interfering with its contractual relationships. By order of June 1, 1989, the trial court dismissed appellant's first claim, but found that a valid cause of action was stated as to the second.

Appellant has appealed from this order dismissing the breach of contract claim, contending that its allegation of estoppel or detrimental reliance was sufficient to prevent the application of the statute of frauds. Thus, the appellant argues that a question of fact was presented such that the summary dismissal of its claim was in error. In an unpublished *per curiam* of April 4, 1990, we considered that the order of dismissal was not an appealable order under Ark. R. Civ. P. 54(b) in that the trial court had ruled that a valid cause of action had been stated on the second, remaining claim. Pursuant to Rule 54(b), an order in which fewer than all claims are adjudicated is not an appealable order unless the trial court expressly directs the entry of a final judgment to the claims disposed of and expressly determines that there is no just reason for delay. No such determination was made by the trial court here. We, however, remanded to the trial court to settle the record based on appellee's representation that the appellant had taken a voluntary non-suit on the remaining claim. The order spoken of by appellee was not contained in the record.

Pursuant to our directive, the record has been supplemented to include an order, dated August 7, 1989, approving the voluntary dismissal, without prejudice, of appellant's second claim. After further research, we, nevertheless, are compelled to dismiss the appeal for lack of a final order. It is a settled rule of law that whether a final order exists is a jurisdictional question which the appellate court has the duty and right to raise in order to avoid piecemeal litigation. *Hall* v. *Lunsford*, 292 Ark. 655, 732 S.W.2d 141 (1987).

In the case of *Ratzlaff* v. *Franz Foods of Ark.*, 255 Ark. 373, 500 S.W.2d 379 (1973), the supreme court addressed the issue of whether a party can convert an adverse ruling on a partial

summary judgment into a final, appealable order by taking a non-suit on claims still pending before the trial court. The supreme court determined that, in the interest of promoting the policy against piecemeal appeals, a party could not effect a final order in this manner. The court, quoting from *Woodruff* v. *State*, 7 Ark. 333 (1846), observed:

> It is not in the power of a party to single out a single issue, even by the most solemn contract of record, and submit it to the consideration of the supreme court, so as to elicit the opinion of the supreme court upon the law or the fact of that particular issue. Such a judgment would not be final, as not embracing all the issues in the case, and consequently it could not become the subject of an appeal or writ of error. The real object of the parties was to take the opinion of the supreme court upon the questions of law arising upon the demurrer to the second plea, but in order to receive the benefit of that decision it became absolutely necessary that the circuit court should pass upon all the issues joined.

Ratzlaff at 375, 500 S.W.2d at 380. *See also Yell* v. *Outlaw*, 14 Ark. 621 (1854). We are of the opinion that the same reasoning applies here. The trial court determined that a valid cause of action was stated as to the second claim, and appellant may not hold this claim in abeyance by taking a non-suit while seeking review of the question decided against it, thereby circumventing the policy against piecemeal appeals.

Since we do not regard the order appealed from as being final, we dismiss the appeal.

Dismissed.

WRIGHT, Acting C.J., and MAYFIELD, J., agree.

Dean Howard SULLIVAN *v.* STATE of Arkansas

CA CR 90-1 798 S.W.2d 110

Court of Appeals of Arkansas
En Banc
Opinion delivered October 31, 1990

William R. Simpson, Jr., Public Defender, by: *Llewellyn J. Marczuk*, Deputy Public Defender, for appellant.

Steve Clark, Att'y Gen., by: *Paul L. Cherry*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Dean Howard Sullivan appeals from his conviction at a non-jury trial of the crimes of burglary and theft of property of a value in excess of $2500.00, for which he was sentenced to concurrent eight-year terms in the Arkansas Department of Correction. He contends that the trial court erred in denying him the right to cross-examine a witness concerning an alleged agreement to testify on behalf of the State;

that the evidence was insufficient to sustain a finding that the stolen property was of a value of at least $2500.00; and that the evidence was insufficient to sustain the finding of guilt because he was convicted on the uncorroborated testimony of accomplices. We affirm.

Where the sufficiency of the evidence is challenged on appeal of a criminal conviction, our rule requires a review of that issue prior to consideration of asserted trial error. This rule is based on double jeopardy considerations, which would preclude a second trial where a conviction is reversed for insufficient evidence. In such cases, this court views the evidence, and all permissible inferences to be drawn therefrom, in the light most favorable to the State, and will affirm if there is any substantial evidence to support the findings of the factfinder. *Harris* v. *State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without having to resort to speculation or conjecture. *Booth* v. *State*, 26 Ark. App. 115, 761 S.W.2d 607 (1989). Hearsay admitted without objection may constitute substantial evidence. *Clemmons* v. *State*, 303 Ark. 265, 795 S.W.2d 927 (1990); *Bishop* v. *State*, 294 Ark. 303, 742 S.W.2d 911 (1988). The fact that evidence is circumstantial does not render it insubstantial. *Sweat* v. *State*, 25 Ark. App. 60, 752 S.W.2d 49 (1988).

When viewed in this light, the evidence indicates that, on January 27, 1989, the home of Maria Stewart was burglarized. The victim testified that a mink coat, VCR, shirt, and fruit were stolen, and that the total value of these items was $2,600.00 to $2,700.00. She further testified that she had purchased the mink coat in 1979 or the early 1980's for $2,200.00 and the VCR in 1987 for $279.00. The victim testified that she found the current price on "coats of that type" to be "anywhere from $3,000.00 to $5,000.00." The victim's coat was later recovered but it was damaged to such an extent that it could not be repaired or restored. There was no evidence as to the value of the shirt, and the victim testified that the fruit was not worth more than two or three dollars.

Donald Wade testified that, on the night of the burglary, he was going to the Boys' Club when he saw Bryan McKnight,

Kenneth Martin, and appellant coming out from behind the club, which was next to the victim's home. Wade stated that he saw McKnight and appellant enter the house and that, when they came out, McKnight was carrying a coat and a VCR. He testified that they all then went to Shannon Handley's house. Shannon Handley testified that that night Donald Wade, Kenneth Martin, Bryan McKnight, appellant's brother, and appellant came to his house. He stated that McKnight was carrying a fur coat and appellant was carrying a VCR. Handley testified that all of them, including appellant, stated that they had broken into a house. He further testified that appellant left his house carrying the VCR.

Prior to trial, appellant gave the police a statement, in his own handwriting, as follows:

> On January 27, 1989, I was with Bryan McKnight when he broke into a house on Stevenson Street. Bryan first went back of the house and returned with a VCR. He then went to another room and got a fur coat and shirt. I don't know who got the strawberries. When we left the house I carried the VCR over to Shannon's house and set it down on the table. That was the last time I seen it. Bryan McKnight threw [the] fur coat and shirt outside.

Appellant's sufficiency argument is two-fold. First, he argues that the evidence is not sufficient to sustain a finding that the stolen property was of a value of at least $2,500.00. We disagree.

Theft of property is a class B felony if the property stolen is worth $2,500.00 or more. Ark. Code Ann. § 5-36-103 (Supp. 1987). Arkansas Code Annotated § 5-36-101(11)(A) (Supp. 1987) defines value as follows: (i) the market value of property or services at the time or place of the offense; or (ii) if the market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense. It is well settled that an owner of property is competent to testify as to the value of his own property. *Smith* v. *State*, 300 Ark. 330, 778 S.W.2d 947 (1989). *Cannon* v. *State*, 265 Ark. 270, 578 S.W.2d 20 (1979); *Phillips* v. *Graves*, 219 Ark. 806, 245 S.W.2d 394 (1952). In *Moore* v. *State*, 299 Ark. 532, 773 S.W.2d 834 (1989), the supreme court recognized that there is a point at which the testimony of the property owner as to value does not constitute substantial evidence of the value of the property at the

time of the theft. This case does not present such a situation.

Here, the victim testified, without objection, that the cumulative value of her property was between $2,600.00 and $2,700.00. She stated, without objection, that the value of the VCR was $279.00. She further testified without objection as to what she had paid for the coat, how long she had had it, and the cost of a new coat similar to, though not "exactly" like, the one stolen — all factors that could have been considered by the factfinder in determining the market value of the coat. There was no evidence as to the value of the shirt. From our review of all the evidence before the trial court, we cannot conclude that the finding that the cumulative value of the stolen property was at least $2,500.00 is not supported by substantial evidence. *See Stewart* v. *State*, 302 Ark. 35, 786 S.W.2d 827 (1990); *Watson* v. *State*, 271 Ark. 661, 609 S.W.2d 673 (Ark. App. 1980). To hold otherwise, this court would have to make a finding that the victim's testimony as to the cumulative value of her property that was stolen was not credible, and that is not our function.

Second, appellant argues that the evidence was insufficient to find him guilty of burglary and theft of property because such findings were based solely on accomplice testimony. We cannot agree.

We agree with appellant that a conviction for a felony cannot be had on the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense. Ark. Code Ann. § 16-89-111 (1987). Ordinarily the question of whether one is an accomplice is a mixed question of fact and law to be submitted to and determined by the factfinder. *Lee* v. *State*, 27 Ark. App. 198, 770 S.W.2d 148 (1989); *Woodward* v. *State*, 16 Ark. App. 18, 696 S.W.2d 759 (1985).

Here, both Handley and Wade denied any participation in the burglary, stating only what they had observed others doing that night. Even according to appellant's argument, the only evidence possibly linking Wade to the crime was Handley's statement that Wade was one of the people who came over to his house and that they all said that they had broken into a house. The only evidence possibly connecting Handley to the crime was the fact that he informed the police of where the coat had been

discarded. From our review of the record, we cannot conclude that either of these witnesses should be held to be an accomplice as a matter of law or that a finding that neither was an accomplice to the crime is not supported by substantial evidence. Furthermore, appellant's own written statement given to the police and introduced into evidence, at the very least, connected appellant with the offenses.

Appellant also contends that the trial court erred in denying him his right to cross-examine a witness concerning an agreement to testify on behalf of the State. On cross-examination, Handley was questioned about any "deal" that he might have made with the prosecuting attorney in return for his agreement to testify. The trial court sustained the State's objection, and appellant's counsel then stated for the record that Handley would answer that he had agreed to appear and testify in exchange for a favorable disposition on another charge pending against him.

We agree that evidence of guarantees of immunity or promises of leniency or other considerations given to a prospective witness are proper subjects of cross-examination, and the denial of that right may violate constitutional guarantees of confrontation. *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986); *Klimas* v. *State*, 259 Ark. 301, 534 S.W.2d 202 (1976); *Guinn* v. *State*, 27 Ark. App. 260, 771 S.W.2d 290 (1989). However, the fact that it might have been error to deny the right to cross-examine on that subject does not necessarily mandate reversal. The denial of the right of cross-examination on such issues, like any other trial error, is subject to being found harmless under the circumstances of the particular case. *Delaware* v. *Van Arsdall*, *supra*; *Klimas* v. *State*, *supra*; *Guinn* v. *State*, *supra*. In *Delaware* v. *Van Arsdall*, the Supreme Court of the United States stated:

> 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 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.

Here, Handley's testimony was, for the most part, cumulative of the testimony of other witnesses. Wade testified that he saw appellant go into the house with McKnight and that when they came out McKnight was carrying a fur coat and a VCR. Wade further corroborated Handley's testimony that all of them then went to Handley's house. In his handwritten statement, which was read into evidence, appellant admitted that he was with McKnight when he broke into the house and that he carried the VCR to Handley's house. We also note that this case was a bench trial and that the judge, while preventing any interrogation regarding the details of any agreement between the witness and the prosecuting attorney, indicated that he understood the credibility issue. From our review of the record, it appears that the evidence of guilt, which includes appellant's own admissions, was overwhelming. When all of the facts are considered, we cannot conclude that the error was more than harmless.

Affirmed.

WRIGHT, Acting C.J., and COOPER and ROGERS, JJ., dissent.

ERNIE E. WRIGHT, Acting Chief Judge, dissenting. This sixteen-year-old first offender was involved with some other youths in the burglary of a home and theft of property valued at $2,500.00 or more from the home. Appellant was sentenced to concurrent eight-year terms on each of the two convictions. I concur with the prevailing opinion stemming from an equally divided court with the exception of the disposition on appeal as to the degree of theft.

In my view the conviction of theft of property of a value of $2,500.00 or more is not supported by substantial evidence, although the evidence does support a conviction of theft of property of the value of more than $200.00 but less than $2,500.00, a Class C felony.

The theft occurred in January 1989. The only evidence of value was the testimony of the owner. She testified to the total value of the items stolen, which included a ten-year-old, three-quarter length mink coat, a VCR, and a quart of strawberries. However, she failed to provide a reasonable basis for the total

value. When she was questioned as to values by item, she testified the fur coat she purchased in 1979 or 1980 had a value of $2,200.00, the amount of the original purchase price. She assigned a value of $279.00 for the VCR based on the purchase price some two years prior to the theft. She did not state a value for the quart of berries but when asked the question, "[w]e are not talking about anything over $2.00 or $3.00?" her answer was "[n]o." Although there was no evidence of anything else having been stolen, she stated, "[t]he police said later that a shirt was missing from my son's bedroom." She offered no testimony as to the value of the shirt and there is no substantial evidence appellant or his accomplices took the shirt. The owner testified she had priced some new coats of the same type and the prices for them ranged from $3,000.00 to $5,000.00. There was no evidence the market value of the ten-year-old coat could not be ascertained; and there was no evidence of what the cost would be to replace the coat with a similar ten-year-old coat.

As the VCR had been purchased for $279.00 fairly recently prior to the theft that would be substantial evidence of its market value. However, the cost of $2,200.00 for the fur coat purchased some ten years prior to the theft would not be substantial evidence of its market value. In *Moore* v. *State*, 299 Ark. 532, 773 S.W.2d 834 (1989), our supreme court reversed for insufficiency of the evidence. In *Moore*, the owner of a stolen car testified she paid $3,600.00 for the car in 1985 and that it was still worth what she paid for it. We know that the time at which she purchased the car would be some four years prior to the decision on appeal and would have been a lesser time prior to the alleged offense. The court said: "[w]e cannot, however, find sufficient evidence that the value of the car was in excess of $2,500." *See also*, *Cannon* v. *State*, 265 Ark. 270, 578 S.W.2d 20 (1979) and *Rogers* v. *State*, 248 Ark. 696, 453 S.W.2d 393 (1970).

I would reduce the conviction for theft of property of the value of $2,500.00 or more to a theft of property having a value of more than $200.00 but less than $2,500.00, a Class C felony, and reduce the sentence to three years on the theft charge.

COOPER, J., joins in this dissent.

JUDITH ROGERS, Judge, dissenting. The majority cites *Moore* v. *State*, 299 Ark. 532, 773 S.W.2d 834 (1989), for the

proposition that the supreme court recognized that there is a point at which the testimony of the property owner as to value does not constitute substantial evidence. They then go on to state "this case does not present such a situation". I respectfully disagree.

In the *Moore* case, the supreme court reversed a class B felony conviction based on the theft of a 1980 oldsmobile 98 car. There, the owner testified that she had paid $3,600 for the used car in 1985, which was three years prior to the trial date. The court stated, "We do not question the propriety of admitting Ms. Newsome's testimony as to her opinion of the car's value, despite the remoteness in time of her purchase, absent objection to that testimony." The court held, however, that even without objection, the evidence was insufficient to sustain the verdict.

The majority makes much of the fact that there was no objection challenging the competency of the owner's value testimony in this case. However, as in *Moore*, the question does not involve the propriety of admitting the evidence, but rather the issue is whether the testimony constitutes substantial evidence that the value of property was $2,500 or more.

Here, the victim testified that she had purchased the fur coat for $2,200 as early as 1979 or as late as 1982, approximately ten years before the coat was stolen. The trial court obviously did not accept the testimony of the purchase price as representing the market value of the fur coat, for if it did, the cumulative value of the property stolen would not amount to $2,500. The court then must have considered the victim's testimony purporting to be the "replacement value" of the property. In this regard the victim testified that she did not find any coats exactly like hers, but that the current prices of coats of the same type could be purchased new from anywhere between $3,000 and $5,000. I fail to see how this evidence can sustain a class B theft conviction.

Surely, a fungible item, like used clothing, possessing no unique characteristics, is not inherently more valuable after ten years of use. Consequently, the replacement value of an old, used fur coat cannot be determined by comparison with the purchase price of a brand new coat, which, incidentally, inflates the value of the stolen property in this case. It is the owner's present interest in the property that the law seeks to protect, *Hughes* v. *State*, 3 Ark. App. 275, 625 S.W.2d 547 (1981); the replacement cost in this

instance is simply not reflective of market value. Furthermore, the statute provides that "*If* the market value cannot be ascertained, the cost of replacing the property within a reasonable time after the offense" can constitute evidence of market value. Ark. Code Ann. § 5-36-101(11)(A)(ii) (Supp. 1989). Here, there is no indication from the record that the market value could not be ascertained. In *Moore, supra*, the court reiterated that it was the state's duty to establish the market value of stolen property, and that this obligation was just as important as its duty to establish the identity of the thief. In my view, the state did not carry its burden based on the evidence presented. Experience and knowledge can only be applied to evidence adduced. *Cannon* v. *State*, 265 Ark. 271, 578 S.W.2d 20 (1979). This is such a case where the owner's testimony does not constitute substantial evidence that the value of the property was at least worth $2,500.

COOPER, J., joins in this dissent.

Edmond R. BURK and Lou Ann Burk *v.*
Robert HEFLEY and Joanne Hefley, Husband and Wife
and Thomas D. Hankins and Jimmie L. Hankins

CA 90-71 798 S.W.2d 109

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

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

Karen B. Walker, for appellees Robert and Joanne Hefley.

JOHN E. JENNINGS, Judge. In April 1987, the appellants, Edmond and Lou Anne Burk, bought a house and acreage in Newton County from the appellees, Robert and Joanne Hefley for $75,000. The deed described the land as containing "19.65 acres, more or less." When the property was surveyed, the Burks found it actually contained only 12 acres. They filed this suit to abate the purchase price for gross mistake. The chancellor found for the Hefleys. On appeal, the Burks contend that his decision was clearly erroneous. We affirm.

The applicable general rules are not in dispute. Where land is sold "in gross" or where the legal description is qualified by the words "more or less," the buyer takes the risk of the quantity, in the absence of fraud. *Glover* v. *Bullard*, 170 Ark. 58, 278 S.W.2d 645 (1926); *Harris* v. *Milloway*, 9 Ark. App. 350, 660 S.W.2d 174 (1983). But where the difference between the actual and estimated quantity is so great as to warrant the conclusion that the parties would not have contracted had the truth been known, the buyer is entitled to an abatement of the

purchase price. *See Williams* v. *Black Lumber Co.*, 275 Ark. 144, 628 S.W.2d 13 (1982); *Glover, supra.* Finally, the law does not look solely to the quantity of the shortage but also to all other relevant facts and circumstances. *Birch-Brook, Inc.* v. *Ragland*, 253 Ark. 161, 485 S.W.2d 225 (1972); *Hays*, v. *Hays*, 190 Ark. 751, 81 S.W.2d 926 (1935).

Appellants argue that a deficiency of almost 39% requires a conclusion that the parties "would not have contracted had the truth been known," and therefore there should be an abatement of the price. If we assume that this contention has merit, the chancellor's decision must still be affirmed because of an absence of proof of damages. In *Edwards* v. *Johnson*, 227 Ark. 345, 298 S.W.2d 336 (1957), the seller described the land as containing thirteen acres, although it actually contained only four. There was a house on the tract. In denying relief to the buyer the court said:

> [E]ven if it could be said that a cause of action has been shown to exist, the requisite proof of the appellants' loss is lacking. More is involved than a simple computation of the proportionate damage resulting from a deficiency of nine acres. The dwelling house upon this small parcel of ground unquestionably enhanced its value. There is nothing to indicate that the parties dealt in terms of a fixed price per acre without reference to the improvements. In these circumstances the purchaser's loss is equitably determined by first deducting the value of the improvements from the purchase price and then calculating the damage attributable to the shortage of acreage. Sutherland on Damages (4th Ed.), §590; *Lichtenthaler* v. *Clow*, 109 Ore. 381, 220 P. 567 (1923).

The same rule was applied in *Karlich* v. *Copelin*, 265 Ark. 787, 280 S.W.2d 943 (1979), where the land was allegedly represented as six acres, but contained only 3.5 acres.

In the case at bar, the property the appellants bought included a house of some 3,000 square feet and a work shop. Mr. Burk testified that the house was "probably worth what he paid for it." He also testified that an appraisal he had obtained on the house valued it at $109,000.00 "in town." The appraisal apparently did not include the acreage.

In view of this evidence, we cannot say the chancellor's denial of relief was clearly wrong. A legal wrong without resulting damage will not support a compensatory judgment.

Affirmed.

WRIGHT, Acting C.J., and CRACRAFT, J., agree.

M & S OIL PROPERTIES *v.* HALLIBURTON COMPANY

CA 90-34 798 S.W.2d 116

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

Henry C. Kinslow, for appellant.

Kinard, Crane & Butler, P.A., by: *Steve R. Crane*, for appellee.

JOHN E. JENNINGS, Judge. The primary issue presented is whether a circuit court has the power to set aside an execution sale when execution is levied to enforce a judgment of that court. We hold that the circuit court has such power. Although other

arguments are raised we find no merit in them and therefore affirm.

On January 22, 1987, Halliburton Company, the appellee, obtained a judgment for $195,000.00 against Owen Drilling Company, Inc. and E.H. Owen, individually. Execution was subsequently levied on a number of oil leases owned by the defendants. There were oil wells on at least some of the lands leased.

On May 10, 1988, thirty-three of the leases were sold at sheriff's sale for $1,634.00 to an attorney acting as agent for the appellant, M & S Oil Properties. It appears that this same attorney had represented members of the Owen family in related litigation.

Halliburton moved to set aside the execution sale and, after a hearing, the circuit court found that on the date of sale the fair market value of the assets sold was in excess of $145,000.00. The court also found other irregularities connected with the sale and set the sale aside.

Appellant contends that the circuit court has no authority to set aside an execution sale made to enforce its own judgment. We disagree.

Very early on the Arkansas Supreme Court held that a common law court possessed the power to set aside an execution sale made pursuant to its own process. *State Bank* v. *Noland*, 13 Ark. 299 (1853). In *Bird* v. *Kitchens*, 215 Ark. 609, 221 S.W.2d 795 (1949), the supreme court quoted with approval the rule from 21 Am. Jur. Execution § 517 (1939) that, generally, relief from execution should be sought in the court from which the execution was issued. The court in *Bird* said that the circuit court had "ample power to determine whether the [execution] sale should have been vacated. . . ." 215 Ark. at 614. In *Hoffman* v. *Morrison*, 232 Miss. 322, 98 So. 2d 771 (1957), a case from Mississippi, a state which like Arkansas maintains separate courts of law and equity, the Supreme Court of Mississippi decided the issue presented here. That court held that courts of law have the power to set aside execution sales made under the authority of the law court's judgment:

The general rule is that it is inherent power in a court to

> control and regulate its process. When justice and fair honest dealing demand, it may quash the process itself, or may set aside a sale under it.

Hoffman, 98 So. 2d at 773, quoting *Hopton* v. *Swan*, 50 Miss. 545 (1874).

We hold that the circuit court had authority to set aside an execution sale made pursuant to its own judgment.

Appellant also contends that the court erred in finding that the sale price was inadequate and that the sale was tainted, and in not finding in its favor on the issues of waiver, estoppel, and laches. The decision on each of these matters was one of fact. On review, we do not set aside the trial court's findings unless they are clearly against a preponderance of the evidence. Ark. R. Civ. P. 52(a). Because the record evidences a reasonable basis for each of the circuit judge's findings of fact, we cannot say that they are clearly against a preponderance of the evidence.

Affirmed.

WRIGHT, Acting C.J., and CRACRAFT, J., agree.

DEATH AND PERMANENT TOTAL DISABILITY FUND
v. TYSON FOODS, INC.

CA 90-37 798 S.W.2d 120

Court of Appeals of Arkansas
En Banc
Opinion delivered October 31, 1990

David L. Pake, for appellant.

Bassett Law Firm, by: *W.W. Bassett, Jr.*, and *Angela M. Doss*, for appellee.

JUDITH ROGERS, Judge. The appellant, Death and Permanent Total Disability Trust Fund, appeals from an adverse decision of the Workers' Compensation Commission, which held that the appellee, Tyson Foods, Inc., may, in calculating its statutory maximum liability of $50,000, receive credit for the lump sum payment made to the surviving spouses upon remarriage. The sole issue on appeal is whether as a matter of law the Commission erred in its finding. We find no error and affirm.

The facts in this case are undisputed. Dwight Robbins and Ronnie Dees died as a result of injuries they sustained in a motor vehicle accident which occurred during the course and scope of their employment. Their cases were consolidated since both claims arose from substantially the same factual background and each presented the same issue of law. The appellee paid all appropriate compensation benefits to the deceaseds' surviving spouses. On December 8, 1980, and July 14, 1982, the surviving spouses remarried. As a result of these subsequent marriages, the appellee paid each of the surviving spouses a lump sum equal to 104 weeks of compensation. Mr. Robbins had two minor children, and upon payment of the lump sum to his widow, the appellee began paying the minor children increased weekly benefits. The appellee filed this claim contending that it had paid the dependents in each case the total sum of $50,000, and that any additional benefits were the appellant's responsibility. The appel-

lant contended below, and now on appeal, that the lump sum payments to the surviving spouses could not be credited against the employer's maximum liability of $50,000. We disagree.

Arkansas Statutes Annotated § 81-1310(c)(2) (Repl. 1976), now codified at Ark. Code Ann. § 11-9-502 (1987), is one of the applicable statutes in question as the date of death was August 27, 1979. This statute provides, in pertinent part, as follows:

> The first Fifty Thousand Dollars ($50,000) of weekly benefits for death or permanent total disability shall be paid by the employer or his insurance carrier in the manner provided in this Act [§§ 81-1301-81-1349]. An employee or dependent of an employee who receives a total of Fifty Thousand Dollars ($50,000) in weekly benefits shall be eligible to continue to draw benefits at the rates prescribed in this Act but all such benefits in excess of Fifty Thousand Dollars ($50,000) shall be payable from the Death and Permanent Total Disability Bank Fund.

The other statutory provision relevant to a determination of this case is found at Ark. Stat. Ann. § 81-1315(d) (Repl. 1976), now codified at Ark. Code Ann. § 11-9-527 (1987), which states:

> In the event the widow remarries before full and complete payment to her of the benefits provided in Subsection (c), there shall be paid to her a lump sum equal to compensation for one hundred four (104) weeks, subject to the limitation set out in Section 10 [§ 81-1310] of this Act.

These statutes were the result of Initiated Act 4 of 1948 and Act 221 of 1973. The universal policy of courts is to construe compensation measures in a manner reasonably calculated to effectuate the legislative intent (*or, as in the case of an initiated amendment*, to carry out the presumptive intention of those who framed the measure and the people who adopted it) (emphasis ours). *See*, *Docker* v. *Thomas*, 229 Ark. 984, 320 S.W.2d 257 (1959); *Lion Oil Co.* v. *Reeves*, 221 Ark. 7, 254 S.W.2d 450 (1952).[1] In interpreting statutes we look to the

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[1] For cases applying this standard in a legislative context, *see*: *Death and Permanent Total Disability Trust Fund* v. *Hempstead County and Public Employee Claims*

language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, contemporaneous legislative history or other appropriate matters that throw light on the matter. *See*, *Hanford Produce Co.* v. *Clemons*, 242 Ark. 240, 412 S.W.2d 828 (1976).

Here, the Commission concluded that the lump sum payments made to the surviving spouses upon remarriage were death benefits, and as such, the employer should be given credit for death benefits paid. The Commission, recognizing the importance of the purpose behind the statutory maximum amount, stated:

> The legislature enacted the monetary limitation in order to set a sum certain on the amount of death and total disability benefits paid by an employer. Once that limit is reached additional payments are to be made by the Bank Fund. The entire purpose of the statutory maximum would be circumvented if this Commission were to interpret the statute to mean that the employer was not entitled to credit for the lump sum death benefits paid to a surviving spouse upon remarriage. . . . There is simply no logical basis for a distinction between those benefits paid a surviving spouse following an employee's death and those benefits paid in a lump sum simply because the surviving spouse chooses to remarry . . . Since the legislature obviously intended to impose a maximum limit upon death and total disability benefits paid by a particular employer, it would be contrary to that legislative intent to prohibit the employer from receiving credit for lump sum payments made to the surviving spouses upon remarriage. Thus, in order to effectuate the purpose of the statute as passed by the General Assembly, we find that an employer is entitled to receive credit for the lump sum payment made to a surviving spouse upon remarriage.

On October 3, 1990, a majority of this court in *Death and Permanent Total Disability Trust Fund* v. *Hempstead County*

Division, 32 Ark. App. 36, 796 S.W.2d 351 (1990); *Holt* v. *City of Maumelle*, 302 Ark. 51, 786 S.W.2d 851 (1990); *Williams* v. *City of Pine Bluff*, 284 Ark. 551, 683 S.W.2d 923 (1985).

and Public Employee Claims Division, 32 Ark. App. 36, 796 S.W.2d 351 (1990), affirmed the Commission's decision which held that it was proper to allow the employer to credit the payment of permanent total disability and death benefits towards its maximum liability of $50,000. In that case, we considered the legislative intent behind Ark. Stat. Ann § 81-1310(c)(2) (Repl. 1976), in holding that the legislature's purpose was to place an overall limit on the weekly benefits paid by the employer or his carrier. In the instant case, the Commission recognized that it was applying the legislative intent behind two statutes, Ark. Stat. Ann. §§ 81-1310(c)(2) (Repl. 1976) and 81-1315(d) (Repl. 1976), as opposed to the one statute, Ark. Stat. Ann. § 81-1310(c)(2) (Repl. 1976), considered in *Hempstead County, supra*. The Commission noted that the entire purpose of the statutory maximum would be circumvented if the statutes were interpreted to mean that the employer was not entitled to credit the lump sum death benefit paid to a spouse upon remarriage. We agree.

The appellant places great reliance upon *Ashby* v. *Arkansas Vinegar Co. and Am. Mfg. Mut. Ins. Co.*, 22 Ark. App. 167, 737 S.W.2d 177 (1987), affirmed at 294 Ark. 412, 743 S.W.2d 798 (1988), in arguing that an employer is not entitled to receive credit for a widow's lump sum payment against its statutory liability. In *Ashby*, neither this court nor the supreme court addressed the issue of whether an employer should be given credit for the widow's lump sum payment for the purpose of calculating its maximum liability. The question in *Ashby* centered upon the *timing* of the payment of benefits to minor dependents once the widow has received the lump sum payment. Here, the issue under consideration is the *apportionment* of the payment of benefits between two sources and the liability of each.[2]

Since the legislature imposed a maximum limit upon death and total disability benefits paid by an employer, it would be contrary to its underlying intent to prohibit the employer from

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[2] We note that subsection (c)(2) which addresses the employer's $50,000 liability was not discussed or considered by the *Ashby* court. Although the dissent quotes extensively from this court's opinion in *Ashby*, we point out that our supreme court decided *Ashby* without resorting to that rationale. The quoted passage cited by the dissent appears to be *dicta* and, therefore, is not dispositive of the issue under consideration.

receiving a credit for the lump sum payment made to a surviving spouse upon remarriage. As the Commission stated, "there is simply no logical basis for a distinction between those benefits paid a surviving spouse following an employee's death and those benefits paid in a lump sum simply because the surviving spouse chooses to remarry."

After a careful consideration of the record in this case, we affirm the decision of the Commission in holding, as a matter of law, that the employer is entitled to credit toward its maximum statutory liability, the lump sum payment made to the surviving spouses upon their remarriage.

Affirmed.

MAYFIELD, J., concurs.

WRIGHT, Acting C.J., COOPER and CRACRAFT, JJ., dissent.

MELVIN MAYFIELD, Judge, concurring. I concur with the result reached in the majority opinion, but the reasoning in that opinion, considered with the reasoning in the two dissenting opinions in this case, compels me to suggest the need for a consistent rationale in our approach to the liability of the Death and Permanent Total Disability Trust Fund (sometimes referred to as the "Bank" Fund).

I start with the fact that this appeal grows out of the death of Dwight Robbins who died on August 27, 1979, as the result of injuries sustained in a motor vehicle accident which occurred in the course and scope of his employment with Tyson Foods, Inc. The employer accepted the death as compensable and paid the appropriate medical and funeral expenses in accordance with the Arkansas Workers' Compensation Law. Mr. Robbins was survived by a widow and two minor children. Tyson paid death benefits to these survivors until approximately December 8, 1980, at which time the widow remarried. She was then paid a lump sum equal to 104 weeks of compensation; thereafter, maximum weekly benefits were paid for the benefit of the two children. When the total payments to the widow and children reached $50,000.00, Tyson requested that the appellant Fund assume liability for the payments to the minor children. The Fund's refusal resulted in the presentation of this matter to the Commission.

As the law judge noted in his opinion, the law in effect on the date of Mr. Robbins' fatal injuries, August 27, 1979, is controlling in this case. We are primarily concerned with two sections of the Worker's Compensation Law. Because the Arkansas Code Annotated (1987) does not set out all of the pertinent statutory provisions that were in force on August 27, 1979, the applicable provisions of the Arkansas Statutes Annotated will be cited in this discussion.

On August 27, 1979, Ark. Stat. Ann. § 81-1310(c)(2) (Repl. 1976) provided as follows:

> The first Fifty Thousand Dollars ($50,000) of weekly benefits for death or permanent total disability shall be paid by the employer or his insurance carrier in the manner provided in this Act [§§ 81-1301—81-1349]. An employee or dependent of an employee who receives a total of Fifty Thousand Dollars ($50,000) in weekly benefits shall be eligible to continue to draw benefits at the rates prescribed in this Act but all such benefits in excess of Fifty Thousand Dollars ($50,000) shall be payable from the Death and Permanent Total Disability Bank Fund.

Also, on August 27, 1979, Ark. Stat. Ann. § 81-1315(d) (Repl. 1976) provided as follows:

> In the event the widow remarries before full and complete payment to her of the benefits provided in Subsection (c), there shall be paid to her a lump sum equal to compensation for one hundred and four (104) weeks, subject to the limitation set out in Section 10 [§ 81-1310] of this Act.

The full Commission held that Tyson is entitled to take credit for the lump sum payment made to Robbins' widow in calculating its statutory maximum liability of $50,000.00. Before discussing the basis of my agreement with the result of this court's majority opinion affirming the full Commission's decision, I want to look at the reasoning of Judge Wright's dissenting opinion.

That dissent points out that the widow's lump-sum payment upon remarriage was part of Initiated Act No. 4 of 1948. At that time the payment was equal to compensation for 52 weeks. *See*

Ark. Stat. Ann. § 81-1315(d) (1960). Initiated Act 4 of 1948 reenacted and amended the original Workmen's Compensation Law which was passed by the General Assembly in 1939 as Act 319. The passage of the original act was authorized by Amendment 26 to the Arkansas Constitution adopted at the general election held November 8, 1938. *Young* v. *G. L. Tarlton Contractor, Inc.,* 204 Ark. 283, 162 S.W.2d 477 (1942). *See also* the Compiler's Note to Ark. Stat. Ann. § 81-1301 (Repl. 1960). This 1960 replacement volume of Arkansas Statutes Annotated gives us a good picture of the workers' compensation act as adopted in 1948 and allows us to see how subsequent amendments fit into the 1948 act. Therefore, looking at Ark. Stat. Ann. § 81-1310 (Repl. 1960), we see that section 10 of the 1948 act was divided into two parts: "(a) Disability" and "(b) Death." Under (a) it was provided that compensation to an injured employee for disability would "in no case" exceed $12,500.00 in addition to the benefits allowed under section 11 (§ 81-1311) which provided for medical and hospital bills. Under (b) it was also provided that compensation "payable to the dependents for the death of an employee" would "in no case" exceed $12,500.00. (The information provided by the compiler, following the text of Ark. Stat. Ann. § 81-1310 (Repl. 1960) shows that the $12,500.00 in both paragraphs (a) and (b) came from Initiated Act No. 1 of 1956 which increased the former $8,000.00 limit.)

Initiated Act No. 1 of 1968 eliminated the maximum benefit provision for both permanent total disability and death benefits. The 1968 act accomplished this by raising the maximum benefits for the disability payments provided under paragraph (a) and for the death benefits under paragraph (b) to $19,500.00; however, the 1968 act also added paragraph (c) which provided that the $19,500.00 maximum would not apply in cases of permanent total disability or death. *See* Ark. Stat. Ann. § 81-1310(c) (Supp. 1969). Later, a limitation on the total amount of those benefits was made by Act 221 of 1973. That act amended Ark. Stat. Ann. § 81-1310(c) by adding to the provisions of paragraph (c) a new provision which stated that the first $50,000.00 of weekly benefits for death or permanent total disability "shall be paid by the employer or his insurance carrier" and that all such benefits in excess thereof shall be paid by the Death and Permanent Total Disability Fund. *See* Ark. Stat. Ann. § 81-1310(c)(2) (Repl.

1976). This is one of the two provisions of the Worker's Compensation Law which were quoted above and identified as the two sections of the law in force on August 27, 1979, with which this case is concerned.

Against the background set out above, the Commission stated in its opinion that "the entire purpose of the statutory maximum [for death or permanent total disability] would be circumvented if this Commission were to interpret the statute to mean that the employer was not entitled to credit for the lump sum death benefits paid to a surviving spouse upon remarriage." Against the same background, Judge Wright's dissenting opinion reaches a different result by stating that since the widow's lump-sum benefit provision was part of Initiated Act No. 4 of 1948, but was not mentioned when the employer's maximum liability for death or permanent total disability benefits was limited by Act 221 of 1973, it must be assumed that the 1973 act was not intended to affect the widow's lump-sum provision. At first blush, both views appear reasonable, but upon closer examination, taking the entire picture into consideration, I think the result reached by the majority opinion is correct.

Neither the majority nor the dissenting opinions of this court are in disagreement with the Commission's opinion as to the purpose of the provision limiting the maximum payment by the employer for death or permanent total disability. Judge Wright's dissent, however, looks at paragraph (c)(2) of section 10 (Ark. Stat. Ann. § 81-1310(c)(2) (Repl. 1976)), and states that it limits the employer's liability "only" as to weekly benefits. That dissent then states, in the last paragraph, that the widow's lump-sum payment is not a weekly benefit, citing *Ashby* v. *Arkansas Vinegar Co.*, 22 Ark. App. 167, 737 S.W.2d 177 (1987), as authority.

In the first place, I think the dissent stopped short when it concluded that Ark. Stat. Ann. § 81-1310(c)(2) (Repl. 1976) "places a maximum amount of 'weekly benefits' for death and permanent total disability for which an employer or his insurance carrier is liable." What actually happened, as a matter of historical fact, is that Act 221 of 1973 amended paragraph (c) of section 10 of the worker's compensation act by breaking it into two subdivisions: (1) which provided the total compensation

prescribed in subsection (a) of section 10 shall not apply in cases of permanent total disability or death, and (2) which provided for a $50,000.00 maximum to be paid by the employer or his carrier for death or permanent total disability benefits. However, as pointed out above, long before paragraph (c) was added to section 10 by Initiated Act No. 1 of 1968, section 10 had only two paragraphs: (a) which contained a provision limiting the *total amount* to be paid for disability benefits, and (b) which contained a provision limiting the *total amount* to be paid for death benefits. Then, when Initiated Act 1 of 1968 eliminated the total amount to be paid for *permanent total* disability or death benefits, Act 221 of 1973 was enacted which placed a limit upon the *total amount* for which the employer or his carrier would be liable for (1) *permanent total* disability or (2) death benefits. Thus, Judge Wright's dissent in stating that Ark. Stat. Ann. § 81-1310(c)(2) (Repl. 1976) limits liability for "the maximum amount of 'weekly benefits' for total and permanent total disability" fails to discuss the *purpose* of the limitation which is to limit the maximum amount to be paid by the employer for those named benefits. The term "weekly benefits" describes the *amount* and *manner* in which the designated benefits are to be paid, but the issue presented in this case requires us to determine the *purpose* for limiting the employer's liability as to the total amount of those weekly benefits.

In the second place, I think the reliance by both dissenting opinions upon *Ashby, supra*, is misplaced. As the majority opinion points out, *Ashby* did not address the issue of whether an employer should be given credit for the widow's lump-sum payment for the purpose of calculating its maximum liability. In regard to weekly benefits, our *Ashby* opinion held:

> Upon remarriage, those payments terminate, and upon termination of those payments the minor beneficiaries' increased benefits should become due and payable immediately.

22 Ark. App. at 170. The Arkansas Supreme Court affirmed our decision in *Ashby, see Arkansas Vinegar Co.* v. *Ashby*, 294 Ark. 412, 743 S.W.2d 798 (1988), using a different rationale. However, under the reasoning of either court, the *Ashby* decision does not negate the rationale of the majority opinion in this case which

in essence holds that the widow's lump-sum payment is a death benefit for which the employer should be given credit for the purpose of calculating its maximum liability under Ark. Stat. Ann. § 81-1310(c)(2) (Repl. 1976).

Thus, I concur with the result reached by the majority opinion. I do not agree, however, with the majority opinion insofar as it indicates approval of the opinion in *Death & Permanent Total Disability Trust Fund* v. *Hempstead County*, 32 Ark. App. 36, 796 S.W.2d 351 (1990), which stated:

> We believe this language makes it clear that the intent of the legislature in passing Act 221 of 1973, was to place an overall limit on the weekly benefits payable by the employer or his carrier to $50,000, whether the benefits were for death or permanent total disability or both.

See 32 Ark. App. at 39. As I have tried to explain in this opinion, the purpose of Act 221 of 1973 was to limit the employer's maximum liability in two different situations: (1) as to the *total amount* of the weekly payments for permanent total disability, and (2) as to the *total amount* of the weekly payments for death, but I find nothing to indicate that the legislature intended to allow the employer to add together the amounts paid on both the permanent total disability and the death benefits in calculating his maximum amount of liability. Moreover, as explained in my dissent in the *Hempstead County* Case, I believe the language in Ark. Stat. Ann. § 81-1310(c)(2) (Repl. 1976), clearly shows that the majority opinion in that case reached the wrong result.

I concur in affirming the decision of the Commission.

ERNIE E. WRIGHT, Acting Chief Judge, dissenting. I believe the prevailing opinion incorrectly applies Ark. Stat. Ann. § 81-1310(c)(2) (Repl. 1976). The statute, set out in the prevailing opinion, places a maximum amount of "weekly benefits" for death and permanent total disability for which an employer or his insurance carrier is liable but makes no provision for the inclusion of any other benefits in computing the maximum amount for which the employer or his carrier is liable.

We point out the widow's lump sum benefit upon remarriage was part of the 1948 Initiated Act establishing the Workers' Compensation Law. The section of the statute fixing the maxi-

mum employer liability for such weekly benefits was brought into the Workers' Compensation Law by Act 221 of 1973. It is significant that the 1973 act creating the maximum liability for the specific "weekly benefits" made no mention of the widow's lump sum benefit which was already a part of the law.

In the drafting of the 1973 act if it had been intended for the lump sum extra benefit allowed the widow upon remarriage to be included in the maximum figure for which the employer would be responsible that could have been included in the measure upon which the people voted. There is no ambiguity in the statute as to the type of benefits included in the maximum benefits for which the employer or his carrier is liable. The statute expressly includes only the "weekly" death and total permanent disability benefits. The appellate court has no authority to legislate or to construe a statute to mean other than what it says when the statute is plain and unambiguous as here. *Weston* v. *State*, 258 Ark. 707, 528 S.W.2d 412 (1975). We should not by implication read into the 1968 amendment a provision not included. *Martin* v. *Hickey*, 232 Ark. 121, 334 S.W.2d 667 (1960).

Under the Ark. Code Ann. § 11-9-527 (1987) a widow dependent upon her spouse is entitled to weekly benefits until death or remarriage. Upon her remarriage the weekly benefits terminate. Subsection (d) provides a special lump sum benefit for a widow upon remarriage and the amount is equal to 104 weeks of the compensation to which she was entitled before marriage. The lump sum is not a weekly benefit. In *Ashby* v. *Arkansas Vinegar Co.*, 22 Ark. App. 167, 737 S.W.2d 177 (1987), this court said:

> The act clearly provides that the widow is to be paid weekly benefits until her remarriage. Worthy of note is the fact that the legislature did not state, as it easily could have, that upon remarriage a widow is to receive 104 weeks of compensation in a lump sum. Instead, the act provides that she is to receive a sum "equal to" 104 times the weekly benefits she had been receiving. There is nothing to indicate an intention that this payment be anything other than an additional benefit to compensate the widow for the loss of future weekly benefits occasioned by her remarriage, and we conclude that the reference to 104 weeks contained in § 81-1315(d) was merely intended to serve as

a basis by which to determine the amount of the sum to be paid to her.

The case should be reversed and remanded.

COOPER, J., joins in this dissent.

GEORGE K. CRACRAFT, Judge, dissenting. My point of departure with the prevailing opinion is its effort to resolve the issue by seeking to determine legislative intent in the enactment, and its strained effort to distinguish the supreme court's decision in *Arkansas Vinegar Co.* v. *Ashby*, 294 Ark. 412, 743 S.W.2d 798 (1988).

In my opinion, the language in Ark. Stat. Ann. § 81-1310(c)(2) (1976), then in effect, is as clear and unambiguous as the legislators possibly could have made it, and the words need only to be given their ordinary meaning. It provides in clear and unequivocal language that the first $50,000.00 of "weekly benefits" for death or permanent total disability shall be paid by the carrier, and the employee who receives $50,000.00 in "weekly benefits" shall be eligible for continued benefits from the Death and Permanent Total Disability Trust Fund. It does not provide for the shift in liability to occur when the employer has paid $50,000.00 in "death benefits" or "benefits payable because of death," as the Commission and majority now read it. It used the words "weekly benefits for death."

What then are "weekly benefits for death"? In the supreme court's opinion in *Ashby, supra*, it was held that the language of the provision for lump-sum payment for widows on remarriage was so clear and unequivocal as to require no judicial interpretation:

> The statute provides that in the event the widow remarries "there shall be paid to her a lump sum equal to compensation for 104 weeks." The statute further provides that upon the cessation of compensation to any person the remaining persons are entitled to compensation at the rate "which the persons would have received if they had been the only persons entitled to compensation at the time of the decedent's death." The two sections are harmonious and the plain and ordinary meaning of the words is that the

> widow will receive a final payment in a a "lump sum." There is no provision in the statute, if we are to give the words their ordinary and accepted meaning, which would lead to any conclusion except that the lump sum payment is in lieu of continuing payments to the widow. *Clearly the widow is no longer entitled to receive weekly benefits.* Therefore, upon the remarriage of the widow the remaining dependents are entitled to compensation in the amount they would have received had they been the only persons entitled to benefits upon the death of their father.

Ashby, 294 Ark. at 415-416, 743 S.W.2d at 799-800 (emphasis added).

The majority's attempt to distinguish *Ashby* is, in my judgment, wholly without substance. If the lump sum provision provided for widows on remarriage is not a "weekly benefit" for one purpose, in what manner and by what sound reasoning can we now say that it is a "weekly benefit" for some other purpose? If the legislature had intended that the $50,000.00 cap on employee's liability be computed on some basis other than weekly benefits, I credit it with the intelligence and ability to have said so. However, it did not, but chose to compute the $50,000.00 limit of liability on the basis of "weekly benefits for death." The lump sum payment to a widow on remarriage has been judicially declared to be something other than a weekly benefit for death. I would reverse.

COOPER, J., joins in this dissent.

Randall L. LUKEHART *v.* STATE of Arkansas

CA CR 89-336 798 S.W.2d 117

Court of Appeals of Arkansas
Division II
Opinion delivered October 31, 1990

Holman and Pearson, by: *William M. Pearson*, for appellant.

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

JUDITH ROGERS, Judge. The appellant, Randall L. Lukehart, appeals his conviction of driving while intoxicated, third offense, for which he was sentenced to ninety days in jail,

fined $2,000, and his driver's license was suspended for a period of two and a half years. For reversal, appellant contends that the trial court erred in denying his motion to dismiss in which he alleged a speedy trial violation. We sustain appellant's contention, and reverse and dismiss.

The record discloses the following sequence of events. Appellant was arrested for driving while intoxicated on November 25, 1987, and was released after posting bail. Thereafter, on January 14, 1988, appellant was charged by information in the Johnson County Circuit Court with DWI, fourth offense, a felony under Ark. Code Ann. § 5-65-111(b)(3) (1987). Pursuant to the filing of the information, appellant was again arrested and released on bail. On June 24, 1988, an amended information was filed in the circuit court.

On August 3, 1988, a misdemeanor charge (DWI, third offense) was filed in the Clarksville Municipal Court, based on the same conduct for which appellant was initially arrested and for which the felony charged was still pending in circuit court. By order of October 31, 1988, the circuit court dismissed the felony information upon the state's motion to nolle prosse. In this motion, the state requested dismissal "because the disposition of the Defendant's prior offenses have reduced this charge from a felony to a misdemeanor and this case has been refiled in the Municipal Court of Johnson County." Appellant's case proceeded to trial in the municipal court on December 21, 1988, where he was convicted as charged. Appellant appealed his conviction to the Johnson County Circuit Court by notice of appeal dated December 29, 1988.

On May 23, 1989, appellant filed a motion to dismiss asserting that he had been denied a speedy trial in the municipal court. After a hearing held on May 26th, the circuit court denied appellant's motion. On August 11, 1989, appellant was tried in the circuit court and convicted by a jury of DWI, third offense. This appeal follows.

Appellant argues that he was denied a speedy trial in that he was arrested on November 25, 1987, and was not brought to trial in the municipal court until December 21, 1988. We agree.

The seminal case addressing the sixth amendment right

to a speedy trial is the United States Supreme Court decision of *Barker* v. *Wingo*, 407 U.S. 514 (1972). Citing *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967), the court reiterated that the right to a speedy trial is "fundamental" and is imposed on the states by the Due Process Clause of the Fourteenth Amendment to the Constitution. In analyzing this right, the court noted its amorphous quality stating that it is "impossible to determine with precision when the right has been denied." *Id.* at 521. Thus, the court articulated four factors upon which to evaluate this right, and determined that an assessment of this issue involves a balancing of these factors on a case by case basis in which the conduct of both the prosecution and the defendant are to be weighed. The factors as outlined by the Supreme Court are: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. The court stated that a defendant has no duty to bring himself to trial, but rather that the state is charged with that duty, as well as the obligation of ensuring that the trial comports with due process.

The appellate courts of Arkansas have recognized the decision in *Barker* v. *Wingo* beginning with *Avants* v. *State*, 257 Ark. 22, 513 S.W.2d 805 (1974). *See e.g. Novak*, v. *State*, 294 Ark. 120, 741 S.W.2d 243 (1987). Additionally, the right to a speedy trial is embodied in Rules 28.1, 28.2 and 28.3 of the Arkansas Rules of Criminal Procedure. In *Stephens* v. *State*, 295 Ark. 541, 750 S.W.2d 52 (1988), the supreme court applied the *Barker* approach in a municipal court setting, which is the situation in the case at bar.

■ Turning to the facts of this case in reference to the factors set out in *Barker*, appellant was not tried in the municipal court until thirteen months after his initial arrest. The length of delay is the triggering mechanism which provokes inquiry into this matter. In *Barker*, *supra*, the court noted that the delay that can be tolerated may vary depending on the seriousness of the offense. *Barker*, *supra* at 531. Here, the appellant was charged with DWI, initially fourth, and then later third offense. A thirteen month delay for this type of prosecution certainly triggers the speedy trial issue. *See Stephens* v. *State*, *supra.* Therefore, the burden is on the state to show good cause for the untimely delay in trial. *Chandler* v. *State*, 284 Ark. 560, 683 S.W.2d 928 (1985).

The state submits that the period from January 14, 1988, when appellant was first charged in circuit court, to August 3, 1988, when the charge was refiled in municipal court is an excludable period for good cause. We fail to see, however, that this can be considered a delay for good cause. The delay here was apparently caused by the transfer of charges from the circuit to municipal court because the charge was reduced from a felony to a misdemeanor. The record plainly suggests that the reason for the reduction in charges, and thus the delay, was occasioned by the disposition of another DWI offense involving appellant, after which the felony charge in circuit court could no longer be sustained. The charge and the court in which charges are filed are decisions made by the prosecution. In this instance, the felony charge in circuit court was filed in anticipation of and was dependent on the outcome of a previous DWI charge. Appellant was awaiting trial from the date of his arrest no matter where the charges were filed, and we note that from August 3rd to October 31, 1988, charges were pending against appellant in both courts. Under these peculiar circumstances, the resulting delay in trial should not be attributed to the appellant.

Appellant raised the speedy trial issue in the motion to dismiss in the circuit court. In this motion, it was stated that the speedy trial issue had been asserted in the municipal court. The trial court promptly heard the matter several months prior to trial. As in *Stephens* v. *State*, *supra*, we cannot say that appellant waived this right or that it was asserted in an untimely manner. In terms of prejudice due to the delay, although no affirmative demonstration of prejudice is necessary, *see Novak* v. *State*, *supra*, it has been considered prejudicial for the state to deliberately delay trial in order to gain an advantage or hinder the defense of the accused. *Stephens* v. *State*, *supra*.

Based on the record before us and the analysis provided in *Barker* v. *Wingo*, *supra*, we conclude that appellant was denied the right to a speedy trial.[1] Accordingly, we reverse and dismiss. Dismissal is a severe penalty for failure to bring an accused to

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[1] The Rules of Criminal Procedure would require a similar result, although we acknowledge that the supreme court has not determined that the rules are applicable to proceedings in municipal court.

timely trial; however, it is the only available remedy. *State* v. *Tipton*, 300 Ark. 211, 779 S.W.2d 138 (1989).

Reversed and dismissed.

WRIGHT, Acting C.J. and CRACRAFT, J., agree.

Charles R. WESLEY *v.* MONTEREY CONSTRUCTION COMPANY

CA 89-495 801 S.W.2d 49

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

Mays and Crutcher, P.A., by: *David O. Bowden*, for appellant.

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

GEORGE K. CRACRAFT, Judge. Charles R. Wesley appeals from an order of the Arkansas Workers' Compensation Commission dismissing his claim for benefits. He contends that the Commission erred in finding that, pursuant to Ark. Code Ann. § 11-9-805 (1987), it lacked jurisdiction to hear his claim. We find sufficient merit in appellant's argument to warrant reversal and remand.

It was stipulated that, on January 6, 1987, appellant sustained a compensable injury to his shoulder in the scope of his employment with appellee. Appellant's claim for benefits was settled on April 23, 1987, by joint petition, which provided for final settlement of all claims arising out of appellant's injury

occurring "on or about January 6, 1987." On December 14, 1987, appellant filed a claim for benefits for a work-related injury to his neck that allegedly occurred on January 5, 1987. There was no mention of this incident in the joint petition or by the administrative law judge when he approved the petition.

Appellee controverted this second claim, contending that, pursuant to the joint petition and Ark. Code Ann. § 11-9-805 (1987), the Commission lacked jurisdiction. Appellant contended that, at the time that he entered into the joint petition, he was unaware of the nature and extent of the injury to his neck, and that the settlement agreement pertained only to his shoulder injury of January 6. The Commission found that it was without jurisdiction to hear appellant's claim for benefits regarding an allegedly separate injury occurring on January 5. Adopting the opinion of the administrative law judge, the Commission made the following findings and conclusions:

> There were two claims filed in this series of events although the second one was not filed until after the first claim had been concluded by Joint Petition. The transcript of that hearing appears as Respondent's Exhibit 5 by reference and contains the original Joint Petition document. Paragraph number 4 of that Joint Petition is set forth as follows, to wit:
>
> > "It is expressly understood by the parties that the respondents make this offer of settlement solely as an offer of compromise of a disputed claim in order to avoid further controversy. It is further expressly understood and agreed by the parties hereto that if this Joint Petition be approved by the Commission, claimant will have no other claim against Monterey Construction Company, Inc. or Wausau Insurance Companies under the Arkansas Workers' Compensation Act of any nature including temporary and permanent disability benefits, medical expenses, nursing services, rehabilitation benefits, attorney's fees, penalties or otherwise. Claimant further understands if this Joint Petition is approved, the Arkansas Workers' Compensation Commission loses jurisdiction over this claim."

> The claimant did testify that he thought the Joint Petition only concerned the injury that he sustained to his shoulder. However, the document itself and supporting material indicate settlement of *any and all* Workers' Compensation claims between the parties. That Joint Petition was approved April 23, 1987, and stands to control the liabilities and obligations between these parties. If the Joint Petition were intended to only cover one portion of a set of circumstances, then the Joint Petition must set forth so on its face in clear and unambiguous language. [Emphasis added.]

While the rule relied upon by the Commission may be a general principle in other areas of the law, it has no application to the settlement of a workers' compensation claim. Such compromise settlements are governed exclusively by Ark. Code Ann. § 11-9-805(a) and (b) (1987), which read as follows:

> (a) Upon petition filed by the employer or carrier and the injured employee, requesting that a final settlement be had between the parties, the commission shall hear the petition and take such testimony and make such investigations as may be necessary to determine whether a final settlement should be had.
>
> (b) If the commission decides it is for the best interest of the claimant that a final award be made, it may order an award that shall be final as to the rights of all parties to the petition. Thereafter the commission shall not have jurisdiction over any claim for the *same injury or any results arising from it.* [Emphasis added.]

This section does not authorize a general release discharging an employer from "any and all" liability. It provides only that, upon approval of a joint petition, the Commission loses jurisdiction "over any claim for the same injury or any results arising from it." We therefore conclude that, absent a finding that the two claims arose from a single injury, it was error for the Commission to decline jurisdiction pursuant to Ark. Code Ann. § 11-9-805.

Reversed and remanded.

COOPER and MAYFIELD, JJ., agree.

Danny BALDRIDGE *v.* STATE of Arkansas

CA CR 89-245 798 S.W.2d 127

Court of Appeals of Arkansas
Division II
Opinion delivered November 7, 1990
[Supplemental Opinion on Denial of Rehearing
December 26, 1990.]

Chet Dunlap, for appellant.

Steve Clark, Att'y Gen., *John D. Harris*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. In this criminal case the appellant was convicted by a Craighead County jury for the rape of his eleven-year-old nephew. He was sentenced to thirty years in the Arkansas Department of Correction. From that decision comes this appeal.

The sole issue on appeal concerns an evidentiary ruling. During the first day of trial the judge granted the appellant's motion in limine to exclude testimony of three young girls about other crimes, wrongs, or acts allegedly committed by the appellant. On the second day of trial the court reversed that ruling and allowed the State to call one of the girls as a witness in its case in chief. The appellant's eleven-year-old niece testified about sexual advances the appellant allegedly made toward her when she was seven or eight years old. The trial court ruled the testimony admissible under case law as an exception to Ark. R. Evid. 404(b), and that the probative value of the testimony outweighed its prejudicial effect, but the court did give a cautionary instruction to the jury.

The appellant argues that this testimony is irrelevant to the material issue in the case, whether or not he raped his nephew; furthermore, he contends that the testimony's prejudicial effect outweighs its probative value. We disagree with the appellant's arguments and affirm.

Arkansas Rule of Evidence 404(b) permits the introduction of testimony of other criminal activity when the testimony is "independently relevant to the main issue—relevant in the sense of tending to prove some material point in the case rather than merely tending to prove that the defendant is a criminal." *White* v. *State*, 290 Ark. 130, 717 S.W.2d 784 (1986). In incest and child abuse cases character evidence which would ordinarily be inadmissible under Rule 404(b) is admissible when it is helpful to show a proclivity toward a specific act with a person or class of persons with whom the accused has an intimate relationship. *Free* v. *State*, 293 Ark. 65, 732 S.W.2d 452 (1987). The Arkansas Supreme Court has recognized the rule that proof

of prior incestuous acts with the same person is admissible to show the relation and intimacy of the parties, their disposition and their antecedent conduct toward each other and to corroborate the testimony of the accused. *Free, supra.* The court has also said that such evidence may help prove the depraved sexual instinct of the accused. *Free, supra*, citing *Collins* v. *State*, 11 Ark. App. 282, 669 S.W.2d 505 (1984).

In the case at bar, however, the issue involves the admissibility of testimony concerning prior sexual acts between the appellant and an individual other than the victim in the present rape case. In the context of incest and child abuse cases, the question of the admissibility of evidence of prior offenses between different individuals must be determined on a case-by-case basis. Proper admission of this testimony requires a fact-intensive inquiry conducted by the trial court, keeping in mind the purpose of Rule 404(b), the rationale behind case law which has allowed the admission of such testimony, and the considerations required by Rule 403. This approach is preferable to a rigid, mechanistic rule which would automatically exclude such evidence regardless of its relevancy, its purpose, or its probative value.

The Arkansas Supreme Court has held that it is for the trial court to determine whether the evidence is genuinely relevant to some independent issue in the case, as opposed to proving only that the appellant is a bad man. *Sweatt* v. *State*, 251 Ark. 650, 473 S.W.2d 913 (1971). If independent relevancy is established the trial court must then consider the evidence in light of Ark. R. Evid. 403 which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

If the trial court determines that the evidence is independently relevant under Rule 404(b), and is properly admissible under Rule 403, the evidence may be admitted with a proper cautionary instruction given by the court. *Young* v. *State*, 296 Ark. 394, 757 S.W.2d 544 (1988).

In the case before us, the appellant argues that his niece's testimony relating prior sexual advances he made to her is irrelevant to the issue of whether or not he raped his nephew. The trial court found that the niece's testimony was probative evidence of the appellant's proclivity toward an unnatural sex act and was independently relevant to show opportunity, plan, or motive.

The appellant's proclivity toward unnatural sex acts was a material issue in the case because the appellant claimed that the alleged acts with his nephew suggested that he was a homosexual and that he has never had such a tendency in his life. The niece's testimony reflects directly on the rape charge and on the appellant's unnatural sexual instinct. The appellant attempts to draw a distinction between the incestuous acts with a niece and nephew based on gender, but this ignores the salient fact that both of the incidents involved preadolescent children who were related to the appellant. Opportunity was also a material issue in the case because the appellant testified that, although his nephew often stayed overnight with him and his family, he could not recall ever being alone with him. The niece testified to three occasions when the appellant made sexual advances toward her while she was visiting the appellant's home: in one instance the family was sitting in the living room watching television; on another occasion the appellant woke her up early one morning while everyone else was asleep; and on another occasion the appellant took her to the store with him and his son. From the record it is clear that her testimony is relevant to the issue of opportunity and possibly plan or motive. The cases cited by the appellee and trial court in support of the admissibility of the evidence are distinguishable based on the facts and, even assuming that the appellant is correct with regard to the application of these cases as they relate to the admissibility of the evidence for the purpose of showing his proclivity toward an unnatural sex act, we would not reverse because the testimony was properly admissible to show opportunity. *See McDaniel* v. *State*, 291 Ark. 596, 726 S.W.2d 679 (1987). Furthermore, we are of the opinion that any prejudice against the appellant was outweighed by the probative value of the testimony and the evidence was properly admitted in light of its limited purpose and the cautionary instruction given by the trial court. We affirm.

Affirmed.

CRACRAFT and MAYFIELD, JJ., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
DECEMBER 26, 1990

802 S.W.2d 147

Chet Dunlap, for petitioner.

Ron Fields, Att'y Gen., by: *John D. Harris*, Asst. Att'y Gen., for respondent.

JAMES R. COOPER, Judge. In his petition for rehearing the appellant contends that we made an error of fact which justifies a rehearing because we erroneously stated in our opinion that "during the first day of trial the judge granted the appellant's motion in limine to exclude testimony of three young girls about other crimes, wrongs or acts allegedly committed by the appellant. On the second day of trial the court reversed that ruling and allowed the State to call one of the girls as a witness in its case in chief."

The appellant correctly points out that our opinion contains a misstatement of fact: the motion in limine was not granted on the first day of trial, as we stated, but was instead granted approximately two months beforehand. However, this misstatement of fact does not warrant rehearing because it was inconsequential to our analysis or to the outcome of the case. Our opinion

did not turn on the time at which the circuit judge granted the motion and reversed his ruling.

The appellant claimed at trial that he was not prepared to defend against this testimony and argued that the evidence was inadmissible based on its prejudicial content. Because the appellant failed to move for a continuance at trial and because the appellant addressed the admissibility of the evidence in his brief, we viewed his argument as going to the admissibility of the evidence and we proceeded with our analysis accordingly.

The remedy for the appellant's lack of preparedness would not have been the exclusion of the evidence at the trial; rather, it would have been more time to prepare his defense. Therefore, he should have made a timely request for a continuance at trial. Arkansas courts have the discretion to grant continuances in criminal cases upon a showing of good cause. A.R.Cr.P. Rule 27.3. The motion for a continuance may be oral, *See Walls* v. *State*, 8 Ark. App. 315, 652 S.W.2d 37 (1983), and may be made during the trial. *See Hart* v. *State*, 301 Ark. 200, 783 S.W.2d 40 (1990); *Holbird* v. *State*, 299 Ark. 245, 771 S.W.2d 775, (1989). The appellant did not move for a continuance at trial. His argument on appeal that he relied on the trial judge's earlier ruling was undeveloped in his brief and unsupported by citation to authority. Most significantly, any error which may have occurred was waived by the appellant's failure to move for a continuance. *See Decker* v. *State*, 255 Ark. 138, 455 S.W.2d 612 (1973). Therefore, rehearing is not warranted and the appellant's petition is denied.

Petition denied.

STATE FARM FIRE & CASUALTY CO. *v.* Betty AMOS

CA 90-60 798 S.W.2d 440

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

Boswell, Tucker & Brewster, by: *Clark S. Brewster*, for appellant.

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

JAMES R. COOPER, Judge. On Judge 24, 1986, the appellee, Betty Amos, was a passenger in a pickup truck driven by her son, Leslie Amos. Leslie had borrowed the truck, from his boss, Earl Scyrkels. Gary Dale Shadwick, who was legally drunk and uninsured, ran a stop sign and crashed into Scyrkels' truck, injuring the appellee. Because Shadwick had no insurance, Scyrkels' insurance company paid Ms. Amos the $50,000.00 bodily injury limits of its policy on the truck. Ms. Amos filed this

suit against the appellant, State Farm Fire and Casualty Company, seeking to stack damages pursuant to a policy on Leslie Amos' Toyota, which had bodily injury limits for uninsured motorist coverage of $25,000.00.

The appellant moved for summary judgment prior to trial and also moved for a directed verdict at the close of the appellee's case. Both motions were denied, and the case was submitted to the jury, which was instructed that the first $50,000.00 of any verdict it might award had already been paid to the appellee, so that its verdict would affect the appellant only in an amount exceeding that sum by up to $25,000.00. The jury returned a verdict of $2,700.00 for the appellee. The appellee later moved for a new trial on the basis that the award was insufficient, and the trial judge granted the motion. From that decision, comes this appeal.

For reversal, the appellant contends that the trial judge erred in denying its motions for summary judgment and directed verdict. We note that the denial of a motion for summary judgment is ordinarily not reviewable on appeal even after final judgment is entered, *see Henslee* v. *Kennedy*, 262 Ark. 198, 555 S.W.2d 937 (1977), and we therefore address only the appellant's contention that the trial court erred in refusing to direct a verdict in its favor.

The crucial issue in the case at bar is whether the State Farm insurance policy provided the appellee benefits in addition to the primary coverage provided by Mr. Scyrkel's policy. In its motion for a directed verdict, the appellant contended that it did not, based on the following language in the State Farm policy:

> If the insured sustains bodily injury while occupying a vehicle not owned by you, your spouse, or any relative, this coverage applies:
>
> (a) as excess to any uninsured motorist vehicle coverage which applies to the vehicle as primary coverage, but
>
> (b) only in the amount by which it exceeds the primary coverage.

In its motion, the appellant argued that there was no contractual liability because the $25,000.00 State Farm coverage did not exceed the $50,000.00 primary coverage. The appellee

argued that the above-quoted language was ambiguous and that the ambiguity should be resolved in favor of the insured by allowing the uninsured motorist provisions in the two policies to be "stacked," i.e., allowing the appellee to recover the full amount of the State Farm coverage in addition to the full amount of the primary coverage. The trial court specifically found that no extrinsic evidence was required to interpret the policy and concluded that the above-quoted anti-stacking provision was ambiguous. The appellant's directed verdict motion was denied, and the trial court allowed the case to proceed to the jury.

In cases such as the case at bar, where the meaning of the language of a written contract does not depend on disputed extrinsic evidence, the construction and legal effect of the contract are questions of law. *Duvall* v. *Massachusetts Indemnity and Life Ins. Co.,* 295 Ark. 412, 748 S.W.2d 650 (1988). In order to be ambiguous, a term in an insurance policy must be susceptible to more than one equally reasonable construction. *Watts* v. *Life Ins. Co.,* 30 Ark. App. 39, 782 S.W.2d 47 (1990). We hold that the language of the State Farm policy unambiguously precluded any contractual liability to the appellee under the circumstances of the case at bar, and that the trial court erred in denying the appellant's motion for a directed verdict.

The anti-stacking provision in the State Farm policy provided that, under the circumstances presented here, the uninsured motorist insurance coverage would apply as excess to any primary coverage, but only in the amount by which it exceeds the primary coverage. The clarity of the language employed compares favorably with the "other insurance" clause at issue in *Pinkus* v. *Southern Farm Bureau Casualty Insurance Co.,* 292 F. Supp. 141 (1968), which provided:

> PARAGRAPH 5. OTHER INSURANCE. With respect to bodily injury to an Insured while occupying an automobile not owned by a Named Insured under this endorsement, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to each occupant, and this insurance shall apply only in the amount by which the applicable limit of liability of this endorsement exceeds the sum of the applicable limits of liability of all other such insurance.

The *Pinkus* court addressed a dispute quite similar to that which is before us here. There, the plaintiffs sought coverage from the defendant as the secondary insurer on three "Uninsured Motorist Coverage" policies on three vehicles owned by plaintiffs. The policies provided uninsured motorist protection within limits of liability of $10,000.00 for each person and $20,000.00 for each accident. The plaintiffs were involved in an accident while passengers in a vehicle owned by a third party, and insured by Travelers Insurance Company, which provided primary coverage including an uninsured motorist endorsement, with identical limits to those provided by the defendant. Travelers paid the policy limits, and plaintiffs sought to stack the coverage provided by defendant. The court found the policy language to be unambiguous and concluded that the provision did not allow stacking under the circumstances of that case because the defendant insurer's policies contained limits of liability which did not exceed the limits of liability in the Traveler's policy.

The same logic applies here. The only reasonable construction which can be given to the language of the State Farm policy is that coverage applies only to the extent that it exceeds the primary coverage. The State Farm coverage of $25,000.00 does not exceed the primary coverage of $50,000.00 in any amount. Therefore, the trial court erred in denying the appellant's motion for a directed verdict. Accordingly, we reverse the trial court's order granting a new trial, and the case is dismissed.

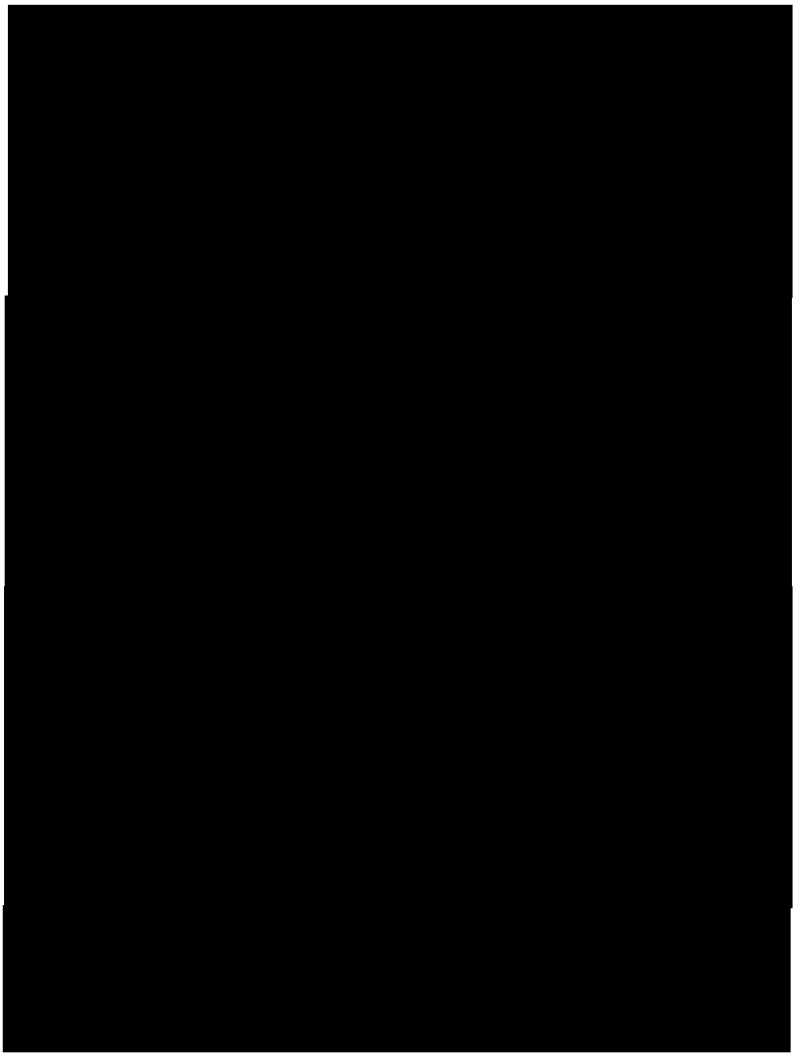
Reversed and dismissed.

MAYFIELD and ROGERS, JJ., agree.

Edith CURRY *v.* FRANKLIN ELECTRIC, et al.

CA 89-440 798 S.W.2d 130

Court of Appeals of Arkansas
Division II
Opinion delivered November 7, 1990
[Rehearing denied December 5, 1990.]



Zan Davis, for appellant.

Frederick S. "Rick" Spencer, for amicus curiae Arkansas Trial Lawyers' Association.

Friday, Eldredge & Clark, by: *H. Charles Gschwend, Jr.*, for appellee Liberty Mutual Insurance Company.

Barber, McCaskill, Amsler, Jones & Hale, P.A., by: *Michael L. Alexander* and *R. Kenny McCulloch*, for appellee/cross-appellant Fireman's Fund Insurance company.

Wright, Lindsey & Jennings, for amicus curiae Arkansas State Chamber of Commerce and Associated Industries of Arkansas, Inc.

JUDITH ROGERS, Judge. This appeal is from a decision rendered by the Arkansas Workers' Compensation Commission. The parties involved in these proceedings are as follows: Edith Curry, the appellant; Franklin Electric, appellee; Fireman's Fund Insurance Company (hereinafter "Fireman's Fund"), appellee and cross-appellant; Liberty Mutual Insurance Company (hereinafter "Liberty Mutual"), cross-appellee; Arkansas Trial Lawyers' Association (hereinafter "ATLA"), and Arkansas State Chamber of Commerce and Associated Industries of Arkansas, Inc. (hereinafter "Chamber of Commerce and AIA"), amicus curiae.

On appeal, the appellant finds error in the Commission's decision denying her claim for permanent and total disability benefits. For its cross-appeal, Fireman's Fund contends that the Commission's decision which found an aggravation of a prior

injury, as opposed to a recurrence, is not supported by substantial evidence. Liberty Mutual argues that since Fireman's Fund accepted, as compensable, the subsequent periods of disability, it should be estopped from arguing that a recurrence of the prior injury occurred. ATLA raises two issues in its amicus brief regarding the supremacy and due process clauses of the United States Constitution, as well as a violation of Article 4, section 2 of the Arkansas Constitution prohibiting judicial legislation. The Chamber of Commerce and AIA agree with the Commission's decision denying permanent and total disability benefits.

The record reveals that on March 2, 1978, the appellant, Edith Curry, sustained a compensable back injury while in the employ of Franklin Electric. Liberty Mutual, the insurance carrier for Franklin Electric, paid temporary total disability benefits, medical expenses, and permanent partial disability benefits in an amount equal to 22.5 percent to the body as a whole. In May 1983, the appellant sustained a second episode of pain which necessitated her absence from work for approximately four months. Fireman's Fund, the current insurance carrier for Franklin Electric, commenced the payment of temporary total disability benefits from June 6, 1983, until October 26, 1983. The appellant returned to work and continued in that capacity until September 4, 1985, at which time Fireman's Fund reinstated temporary total disability benefits until the appellant again returned to work on November 4, 1985. The appellant continued working until February 16, 1986, when disability benefits were recommenced and paid until October 20, 1987. The appellant received her first social security benefit check in November 1988.

In proceedings held before an administrative law judge, it was determined that the appellant sustained an aggravation of the 1978 compensable injury, and thus, Fireman's Fund was responsible for the payment of disability benefits beyond October 20, 1987. The law judge also held that the appellant was permanently and totally disabled as a result of her employment at Franklin Electric. The full Commission affirmed the finding with regard to Fireman's Fund, but reversed the award of permanent and total disability benefits. From that decision, comes this appeal.

We will address the issue on cross-appeal first. Fireman's

Fund argues that the appellant's 1983 and 1985 periods of temporary disability were the result of a recurrence of the 1978 injury, and therefore, Liberty Mutual is responsible for the payment of benefits due the appellant. The Commission disagreed, finding that the subsequent periods of disability were aggravations of the prior injury, thus holding Fireman's Fund liable. We agree.

The rule applicable to second injuries provides that:

> If the second injury takes the form merely of a *recurrence* of the first, and if the second incident does not contribute even slightly to the *causation* of the disabling condition, the insurer on the risk at the time of the original injury remains liable. . . On the other hand, if the second incident *contributes independently to the injury*, the second insurer is solely liable, even if the injury would have been less severe in the absence of the prior condition, and even if the prior injury contributed to the major part of the final condition. This is consistent with the general principle of the compensability *of the aggravation of a pre-existing condition.*

Bearden Lumber Co. v. *Bond*, 7 Ark. App. 65, 73, 644 S.W.2d 321, 325 (1983) (emphasis in original). *See also Pinkston* v. *General Tire & Rubber Co.*, 30 Ark. App. 46, 782 S.W.2d 375 (1990); *McDonald Equip. Co.* v. *Turner*, 26 Ark. App. 264, 766 S.W.2d 936 (1989); *Prier Brass* v. *Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1988); *Elk Roofing Co.* v. *Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987); *Aetna Ins. Co.* v. *Dunlap*, 16 Ark. App. 51, 696 S.W.2d 771 (1985).

As the Commission noted, the most persuasive medical evidence bearing on the recurrence/aggravation issue is the deposition testimony of the appellant's treating physician, Dr. John Lohstoeter. Although Dr. Lohstoeter used the words aggravation and recurrence interchangeably, he was never specifically asked which characterization should apply to the appellant's recent back problems. Dr. Lohstoeter stated that the appellant's visits started to become farther spaced apart and that he returned the appellant to work with restrictions that she was to do no pushing, pulling or lifting of a heavy nature. Dr. Lohstoeter opined that the appellant could experience future problems if she

performed activities involving twisting, bending, swiveling, and similar motions that placed stress on the back. In addition, the appellant testified that she was "doing great" after the 1978 injury, but became incapacitated after the 1983 and 1985 injuries.

The Commission found that the second and third incidents arose *after* the appellant was assigned to a more difficult task in 1983. The Commission determined that the rotating and swiveling movements involved in the new job caused the 1983 disability. After the 1983 occurrence, the appellant was afforded a swivel stool to aid her in her new position. Shortly thereafter, the appellant did not have the use of the stool. The Commission found that the rotating movements, without the aid of a stool, caused the 1985 disability. In its analysis, the Commission concluded that because the subsequent incidents contributed independently to the appellant's present condition, Fireman's Fund was responsible for the payment of compensation benefits. When we view the evidence in the light most favorable to the Commission's findings and give the testimony its strongest probative force in favor of the Commission's action, we find substantial evidence to support this aspect of the Commission's decision.

On direct appeal, the appellant argues that the Commission erred in denying her permanent and total disability benefits, specifically wage loss, based on her receipt of social security benefits due to her age. We agree with the appellant that the Commission erred in this regard. This portion of the Commission's opinion cannot be reconciled with the decision in *M. M. Cohn Co.* v. *Haile*, 267 Ark. 734, 589 S.W.2d 600 (1979). In *Haile*, the court stated:

> *Neither Ark. Stat. Ann. § 81-1310(c)(2) (Supp. 1979)*, which states exceptions to cases in which compensation will be paid, *nor any other section we have found makes an exception excluding compensation to persons who are eligible for or are drawing social security benefits*. Apparently no such exception exists in Arkansas or elsewhere. *See*, Larson, *supra*, § 57.61, n. 25.

The Workers' Compensation Act is a creature of statute, *see, Savage* v. *General Industries*, 23 Ark. App. 188, 745

S.W.2d 644 (1988), and since the decision in *Haile, supra*, the General Assembly has had the opportunity to enact legislation addressing this issue. As noted by the appellant in her brief, the legislature considered, but failed to pass, Senate Bill 405. Subsection 4 of that bill, if adopted, would have placed a limit on workers' compensation benefits to injured workers drawing or entitled to draw social security benefits. Furthermore, in 1986, the legislature made extensive amendments restricting the receipt of wage loss disability benefits. *See*, Act 10 of 1986, now codified at Ark. Code Ann. § 11-9-522 (1987). Nowhere in these amendments is there a reference to the prohibition of workers' compensation benefits when a claimant is receiving or is entitled to receive social security benefits. It is clear from a reading of the decision in *Haile, supra*, and the subsequent legislative attempts to address this issue, that, at this time, we have no specific statutory authority providing for the total exclusion of workers' compensation benefits when a claimant is eligible for or is drawing social security benefits. Therefore, the law as rendered in *Haile, supra*, remains unaffected and the Commission's decision to the contrary is in error. By this opinion, we do not mean to imply that the receipt of social security benefits could not be a factor in wage loss determinations. We state only that such benefits may not act as an absolute bar in the calculation of wage loss disability benefits.

The Commission made no finding with regard to the appellant's ability to work, but simply based its decision upon the appellant's receipt of social security benefits.[1] We, therefore, reverse and remand for the Commission to consider the appropriate factors in determining wage loss disability. Those factors include the workers' age, education, work experience, medical evidence and other matters reasonably calculated to affect the workers' future earning power. Other factors are motivation to return to work, post-injury earnings, credibility, demeanor, and a multiplicity of factors. . . *City of Fayetteville* v. *Guess*, 10 Ark.

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[1] In *Meyers* v. *Walsh*, 12 A.D.2d 371, 211 N.Y.S.2d 590 (1961), the court stated: "*The fact that claimant ceased work and elected to receive social security benefits is not decisive of his right to compensation nor does such action, of itself, justify the finding that the claimant had removed himself from the labor market.* Recipients of social security are permitted to work within certain monetary limitations."

App. 313, 663 S.W.2d 946 (1984).

Although we found the amicus brief filed by ATLA interesting and enlightening, we need not address those arguments as they are being raised for the first time on appeal. We adhere to the well established rule that grounds for relief cannot be asserted for the first time on appeal and that this rule applies to appeals from the Workers' Compensation Commission. *Hill* v. *White-Rodgers*, 10 Ark. App. 402, 665 S.W.2d 292 (1984).

Last, Liberty Mutual argues that Fireman's Fund should be estopped from claiming the appellant suffered a recurrence as opposed to an aggravation of the 1978 injury. Liberty Mutual supports its position by pointing to the fact that Fireman's Fund accepted the subsequent periods of disability as compensable, therefore, they cannot now be heard to complain. In its opinion, the Commission made no finding regarding Liberty Mutual's estoppel argument since they held Fireman's Fund liable for the payment of compensation benefits. Because we found substantial evidence to hold Fireman's Fund liable for the appellant's aggravation of a prior compensable injury, further discussion of this issue is unnecessary.

After a careful and thorough consideration of the record in the instant case, we affirm the Commission's finding that the appellant suffered an aggravation of her prior injury, thus Fireman's Fund is liable for the payment of benefits. We reverse the Commission's decision with regard to the denial of permanent and total disability benefits and remand to the Commission for consideration of wage loss factors in computing the amount of disability benefits.

Affirmed in part, reversed and remanded in part.

WRIGHT, Acting C.J., agrees.

JENNINGS, J., concurs.

JOHN E. JENNINGS, Judge, concurring. I concur separately only to register my view that it is inappropriate for *amicus curiae* to urge as grounds for reversal issues not raised by the parties either at the Commission level or here on appeal.

Leon W. SMITH *v.* Nancy Karen SMITH

CA 90-73 798 S.W.2d 443

Court of Appeals of Arkansas
Division I
Opinion delivered November 7, 1990

Williams, Schrantz & Wood, P.A., by: *R. Douglas Schrantz*, for appellant.

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

JUDITH ROGERS, Judge. Leon Smith appeals from a divorce decree and judgment for appellee, Nancy Smith. Appellant argues that the chancellor erred in awarding judgment to appellee in the amount of $22,230.00 for her contributions during the marriage toward the increase in value of appellant's non-marital property. We affirm.

The parties were married on August 29, 1986, and appellee filed for divorce on November 15, 1988. At trial, appellee testified that she is employed as a teacher in the Rogers Public School District and works part-time in a department store. She stated that, when she and appellant were married, they lived in his home with their children from previous marriages. She testified that she received child support from her ex-husband; this money was used for the living expenses of everyone in the household, including appellant and his children. She stated that, in 1986 and 1987, she deposited a total of $50,000.00 in wages into a joint account she shared with appellant; this money was also used for family expenses. Appellee testified that monthly payments of $429.00 toward appellant's debt on his house and $48.53 for the debt on appellant's lot were made during the marriage; appellant owned these pieces of property when they married.

At the time of her marriage to appellant, appellee owned a

one-half interest in a house, a 1983 Oldsmobile, and a house full of furnishings. Appellee testified that her 1983 Oldsmobile was sold during the marriage and the proceeds were applied toward the purchase of cars for appellant's son and appellee's daughter. Appellee stated that appellant owned a Nissan sportscar at the time of their marriage. This car was later sold, and the proceeds were also used for the purchase of the children's vehicles. She stated that the parties bought a 1988 Oldsmobile, and at the time of trial, it had an outstanding debt of approximately $4,000.00. Appellee testified that all of the furnishings from her house were sold; the money was deposited into the joint account and was spent on the family's living expenses. She stated that, when she and appellant separated, she took her clothing, a day bed, a bedroom suite purchased during the marriage, and the 1988 Oldsmobile. she stated that she is now living in an apartment with very little furniture.

Appellee testified that appellant owns a fifty-percent interest in Lighting, Inc., and fifty-percent interest in a TCBY franchise (Shawanda, Inc.). Appellant acquired these assets prior to the marriage. Appellee, however, stated that, during the marriage, she contributed to the increase in value of the TCBY franchise by regularly working in the stores for no salary:

> Q . . . . Did you have any contribution to the TCBY businesses?
>
> A Yes, sir, I did. I worked in the stores. My children and his children and he and I all were active participants. The first year of our marriage, we spent three or four nights a week going and checking on the businesses, and we had business meetings. I ran the counter.
>
> Q Do you mean selling yogurt?
>
> A Yes, sir.
>
> Q Where?
>
> A At the Rogers store, the Bentonville store, and the Springdale store, and had waited on customers in the Fayetteville store. And we cleaned the Fayetteville store at midnight one night.
>
> Q You say you'd do this approximately three times a week?

A We visited the yogurt stores the first year of our marriage three or four times a week.

Q And how much time would be, would be involved in each visit?

A Oh, a total time of two or three hours.

Q And when you say you worked in 'em, other than working the counter what did you do?

A We cleaned 'em. We worked 'em. We went in to check to see that the people working there were managing correctly, serving right, charging the right amount.

Q You say, we. Who's we?

A Mr. Smith and myself, the children.

. . . .

Q Would all six of you go down there every time?

A No. Mostly just Mr. Smith and myself.

Q You and Mr. Smith. Were you compensated in any amount for the work that you performed?

A No, sir.

Appellee also stated that, before her house was sold, she made one-half of the mortgage payments thereon from the joint account she shared with appellant. That home was sold before she separated from appellant and the proceeds from the sale were put into certificates of deposit in her and her children's names.

Appellant testified that, at the time of the parties' marriage, his stock in Shawanda, Inc., was worth $5,000.00 to $6,000.00 and that, at the time of trial, his equity was worth $40,000.00. He also stated that the parties made payments on appellee's house for at least a year after they were married and contributed to its upkeep from marital funds.

At the conclusion of the hearing, the chancellor stated:

Basically, Ark. Code Ann. § 9-12-315 gives seven items which the Court can take into consideration in determining that there should be an unequal division of the property,

those being the length of the marriage; age, health and station in life of the parties; occupation of the parties; amount and source of income, vocational skills, employability; in state[1] liabilities of each party; opportunity for further acquisition of assets and income; . . . contribution of the party in acquiring property during the marriage; and Federal income tax consequences. Looking at the evidence presented as a whole, the Court does not find that there's anything which justifies other than an equal division of the property, as will be set forth here.

. . . There is insufficient evidence to determine any significant contribution by the defendant toward the plaintiff's one-half interest in the residence which was sold and the defendant is awarded no share of proceeds of that residence.

. . . .

The Court finds that during the marriage, however, there were payments made from the joint assets towards certain items which remain the property of the defendant. The items which were specifically introduced in evidence were house payments on the home which the defendant, is only in the defendant's name, an automobile and the Bella Vista lot. Evidence would be that the total payments on there were nine hundred seventy-seven dollars and fifty cents per month. The Court finds that the plaintiff is entitled to the value of one-half of those payments made for property which defendant retains, and the Court's calculation is eleven thousand seven hundred and thirty dollars and forty-eight cents as plaintiff's value. Now, since those are major items which the defendant will retain, the defendant shall pay that amount to the plaintiff. . . .

. . . [T]he Court finds that the original Shawanda stock was an asset of Mr. Smith before the marriage and, as to the value of that stock prior to the marriage, that value is non-marital property. The Court finds, however, that Mrs.

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[1] This is set forth in Ark. Code Ann. § 9-12-315 (a)(1)(A)(vii) (Supp. 1989) as the "[e]state, liabilities, and needs of each party . . . ."

> Smith is entitled to a portion of the increased value of that property because of her participation directly in the business and because of her participation at home during the time when that value occurred. . . . It was Mr. Smith's testimony that the current net value of that business venture is forty thousand dollars, and at the time they were married it was worth five thousand dollars. That would show a gross increase of thirty-five thousand dollars. There was also testimony that there was one store in existence prior to the marriage and one store which was set up after the marriage. So, the Court would pro-rate that and shows an increase of roughly seven thousand dollars per store. The three stores that were set up during the marriage will show an increase in value of twenty-one thousand dollars, and the Court finds that Mrs. Smith is entitled to one-half of that figure of ten thousand five hundred dollars, as her share of the increase in value.

The chancellor entered a decree granting divorce to appellee on September 27, 1989. In that decree, the chancellor made the following findings:

> 3. The Court finds that there are not sufficient facts to provide for an unequal division of property.
>
> 4. The Court makes the following findings regarding property division, property rights, and award of money:
>
> (a) The Defendant shall retain his residence, personal property, and household goods owned by the Defendant prior to the marriage.
>
> (b) The Plaintiff shall retain the proceeds from the sale of her home owned prior to the marriage of the parties.
>
> (c) The Plaintiff shall be entitled to the sum of $11,730.48 for contributions made to the marriage for payments on debts of the Defendant's property which is nonmarital property.
>
> (d) The Defendant shall retain title to the 1988 Chevrolet Beretta.
>
> (e) The Plaintiff shall retain title to the 1988 Oldsmobile and shall assume the debt on said vehicle.

> (f) The Defendant shall retain as nonmarital property all stock owned in Lighting, Inc.
>
> (g) The antenuptial agreement entered into between the parties prior to the marriage is declared void for failure to comply with the provisions of Arkansas Code Annotated Section 9-11-301. The Plaintiff contributed services and time to the TCBY franchises, which were owned by Shawanda, Inc., during the course of the marriage. The Defendant is one-half owner of the stock in Shawanda, Inc. The Plaintiff is entitled to the sum of $10,500.00 for the increase in value of Defendant's interest in Shawanda, Inc. during the marriage.

In paragraph 3 above, the chancellor did not refer to marital property, but the parties have interpreted that paragraph as providing for the division of their marital property. The holding that the antenuptial agreement is void is not at issue on appeal.

In his first point, appellant argues that the chancellor, after finding that appellee was not entitled to an unequal division of marital property, in essence, did make an unequal division of marital assets without stating his reasons therefor. We do not agree. The monetary award to appellee represents a portion of the increase in value of appellant's non-marital property based upon appellee's contributions thereto. Under Ark. Code Ann. § 9-12-315(b)(5) (Supp. 1989), the increase in value of property acquired prior to marriage is specifically excepted from the definition of marital property. The proper disposition of such nonmarital property upon divorce is set forth in Ark. Code Ann. § 9-12-315(a)(2) (Supp. 1989) as follows:

> All other [nonmarital] property shall be returned to the party who owned it prior to the marriage unless the court shall make some other division that the court deems equitable taking into consideration those factors enumerated in subdivision (a)(1), in which event the court must state in writing its basis and reasons for not returning the property to the party who owned it at the time of the marriage.

Although this code section provides that the increase in value of property acquired prior to the marriage remains that

party's sole and separate property, the chancellor may make some other division that he deems equitable. *Yockey* v. *Yockey*, 25 Ark. App. 321, 324, 758 S.W.2d 421, 422 (1988). The chancellor must take into consideration those factors listed in Ark. Code Ann. § 9-12-315(a)(1)(A) (Supp. 1989) and state his reasons for such division in writing. *Id.* These factors are:

> (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.

Although this increase in value is not marital property, it is certainly appropriate to recognize a spouse's contributions toward that increase in value when making a property division. The chancellor's findings that the circumstances warrant such a division will not be reversed on appeal if they are not clearly erroneous. *See Franklin* v. *Franklin*, 25 Ark. App. 287, 294, 758 S.W.2d 7, 10 (1988). The overriding purpose of the property division statute is to enable the court to make a division that is fair and equitable under the circumstances. *Yockey*, 25 Ark. App. at 324, 758 S.W.2d at 422. We find no improper award to appellee of marital property and deny appellant's first point on appeal.

In his second point, appellant argues that the chancellor erred in failing to make a specific finding, using the factors enumerated in Ark. Code Ann. § 9-12-315(a)(1)(A), for his basis

for awarding appellee one-half of the increase in value of appellant's interest in Shawanda, Inc. We disagree. In the decree, the chancellor specifically stated that appellee had contributed services and time to the TCBY franchise owned by Shawanda, Inc., during the course of the marriage. This finding is fully supported by appellee's testimony, quoted above, about her work during the marriage for the TCBY franchise. The chancellor also made extensive findings of fact from the bench about appellee's contributions. We therefore reject appellant's second point.

In his third point, appellant argues that appellee failed to establish the amounts of the increase in value of his stock in Shawanda, Inc., and of appellee's contributions toward that increase. At trial, however, appellant testified that his interest in Shawanda, Inc., was worth $5,000.00 to $6,000.00 at the time of the marriage and that, if he had an arm's-length buyer for the stores, he would probably realize a profit of $40,000.00. This testimony would, in fact, support a larger award to appellee than she was actually given. We cannot tell, from the record presented, exactly how the chancellor did the mathematical calculations to arrive at this award. Nevertheless, we cannot say that the chancellor's findings on this issue are clearly erroneous.

For his fourth point, appellant argues that the chancellor erred in awarding appellee the total amount of her contributions from marital funds toward appellant's debts on his non-marital property and that there is no evidence that these amounts necessarily correspond to the increases in value of appellant's non-marital property which occurred during the marriage. Appellee points out that she presented evidence that, during their marriage, monthly payments of $429.00 on appellant's house, $500.00 payments on the Beretta, and $48.53 payments on appellant's lot were made from marital funds. Although these amounts do not represent the actual increase in value of appellant's non-marital property, no evidence of these increases in value was presented. It was appellant's duty to bring up a record demonstrating error, *Hamilton* v. *Jeffrey Stone Co.,* 25 Ark. App. 75A, 75B, 754 S.W.2d 850, 851 (1988) (supplemental opinion denying rehearing), and he failed to do so.

Appellant also contends that marital funds were used to pay the debt on appellee's house that was sold during their marriage.

As the chancellor stated, however, appellant failed to introduce sufficient evidence of the amount contributed for this purpose.

Appellee also points out that the chancellor was balancing the equities and no doubt considered other factors, such as her sale of a significant amount of her personal property upon her marriage to appellant for use in the family's living expenses. These other factors, while not listed in the decree, were discussed by the chancellor at trial. The chancellor is given broad powers under Ark. Code Ann. § 9-12-315 (Supp. 1989) to distribute all property in divorce, non-marital as well as marital, to achieve an equitable division. *Williford* v. *Williford*, 280 Ark. 71, 76, 655 S.W.2d 398, 401 (1983). In the written decree, the chancellor specifically stated that he based this award upon appellee's contributions to the marriage. We hold that this finding adequately complies with the requirements of Ark. Code Ann. § 9-12-315 (Supp. 1989).

Affirmed.

WRIGHT, Acting C.J., and COOPER, J., agree.

Troy F. LAMBERT *v.*
James I. QUINN and Deborah Quinn, His Wife

CA 89-509 798 S.W.2d 448

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

William L. Owen, for appellant.

O. Joseph Boeckmann, for appellee.

GEORGE K. CRACRAFT, Judge. Troy Lambert appeals from a decree of the chancery court reforming a deed executed to him by appellees James and Deborah Quinn on finding that the description in the deed was the result of a mutual mistake of the parties. Appellant contends that there could be no mutual mistake, as a matter of law, and that the finding of mutual mistake is not supported by clear and convincing evidence. We find no error and affirm.

James Quinn's father, Garvis Quinn, owned a 1.4 acre tract of land in Cross County, on which he lived with his wife, Ruby Quinn. He subsequently purchased an adjoining tract containing 1.5 acres. A 1.08 acre parcel of that tract was transferred to Jerry Harris on an installment contract with a lien retained by Quinn. Quinn retained the remaining .42 acre of the second tract and he had his wife used it as a yard and a garden. Garvis Quinn died in 1986 and, by his will, left Ruby Quinn the 1.4 acre home site by a metes and bounds description of the original 1.4 acres, but did not include the adjoining .42 acre parcel. All the residue of his estate was left to his son, appellee James Quinn, who resided in Idaho.

Ruby Quinn continued to occupy the home and the .42 acre tract adjacent to it, and in February 1987 constructed a swimming pool and other improvements on the .42 acre tract. She also erected a wooden fence along the line separating it from the tract that was sold to Harris. Harris subsequently defaulted in his payments and reconveyed his interest in the 1.08 acres to James Quinn, as residual beneficiary under the will of Garvis Quinn. James Quinn then employed Opal McDermott, a real estate agent, to sell all of his Arkansas property, mistakenly believing that the only land he owned was that which had been reconveyed to him by Harris.

In August 1987, James and Deborah Quinn executed a deed to appellant containing a metes and bounds description that did not exclude the .42 acre tract retained by Garvis Quinn in his deed to Harris. Ruby Quinn's son moved a house trailer on the property and they continued to occupy it and make exclusive use of the swimming pool.

After appellant served notice on Ruby Quinn to vacate the .42 acre tract of land in February 1988, appellees filed this action for reformation of appellant's deed on grounds of mutual mistake. In the decree, the chancellor found that the parties had been mutually mistaken and that the deed did not reflect the agreement of the parties. The decree ordered that the deed be reformed so as to omit the .42 acre tract occupied by Ruby Quinn. This appeal followed.

Reformation is an equitable remedy which is available when the parties have reached a complete agreement but, through mutual mistake, the terms of their agreement are not correctly reflected in the written instrument purporting to evidence that agreement. *Delone* v. *United States Fidelity & Guaranty Co.*, 17 Ark. App. 229, 707 S.W.2d 329 (1986). Mutual mistake must be shown by clear and decisive evidence that, at the time the agreement was reduced to writing, both parties intended their written agreement to say one thing and, by mistake, it expressed something different. There must be a mistake by both parties, by reason of which both of them have done what neither intended; each must have labored under the same misconception in respect to the terms of the written instrument. *Yeargen* v. *Bank of Montgomery County*, 268 Ark. 752, 595 S.W.2d 704 (Ark. App. 1980). Although a finding of mutual mistake must be supported by clear and convincing proof, the proof need not be undisputed. *Falls* v. *Utley*, 281 Ark. 481, 665 S.W.2d 862 (1984). Whether mutual mistake warranting reformation occurred is a question of fact. *Turner* v. *Pennington*, 7 Ark. App. 205, 646 S.W.2d 28 (1983). Although we review chancery cases *de novo* on the record, the test on review of this case is not whether we are convinced that there is clear and convincing evidence to support the trial judge's findings, but whether we can say that the trial judge's findings were clearly erroneous. *Akin* v. *First Nat'l Bank*, 25 Ark. App. 341, 758 S.W.2d 14 (1988); *Freeman* v. *Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987).

Appellant first argues that, as a matter of law, there could be no mutual mistake because James Quinn admitted that he did not read the deed before he signed it. Appellant relies on the generally accepted rule that one is bound to know the contents of a document signed by him, and if he has had the opportunity to

read an instrument before he signs it, he cannot escape its obligations by asserting that he signed it without reading it. *Stone* v. *Prescott School Dist.*, 119 Ark. 553, 178 S.W. 399 (1915). This is a rule of general application where unilateral mistake is asserted, but it has no application to a plea for relief in equity due to mutual mistake. In reformation cases, the issue is not what the document actually says, or what one party intended it to say, but whether the document truly expresses the agreement made by both parties at the time. When a description in a deed embraces lands which the seller did not intend to sell and the buyer did not intend to buy, its inclusion in the deed is the result of mutual mistake of the parties and may be corrected in chancery. *Glover* v. *Bullard*, 170 Ark. 58, 278 S.W. 645 (1926). Therefore, we do not agree that there could be no mutual mistake as a matter of law.

We also conclude that the chancellor's finding that James Quinn proved that a mutual mistake occurred was not clearly erroneous. Ruby Quinn testified that she had considered the .42 acre tract to be part of the curtilage of the home devised to her by Garvis Quinn. The property line between the original home site and the 1.5 acre tract ran within a few feet of the house. After they purchased it, they fenced .42 acres of it in with their home place and planted gardens and fruit trees on it. Two of the three outbuildings were located at least partially on that tract. She said, "If anyone would look, they would know that it goes with the house . . . ." She constructed a swimming pool on the .42 acre tract at a cost in excess of $10,000.00 and swam in and maintained it during the summer that appellant purchased the Harris tract. She was unaware that the metes and bounds description by which her husband's will devised the home to her did not include this area.

James Quinn verified that, before his father's death, there was a fence between the .42 acre tract and the Harris property. The will did not devise the Harris land to him, but the residuary clause did give to him the right to collect the installments under the contract on which it was sold. After Harris became unable to make the payments, the land was reconveyed to Quinn as residual beneficiary. James Quinn testified that, when he instructed McDermott to sell all the land he owned in Arkansas, he was not aware that the legal title to the .42 acre tract was vested in him and he intended to sell only the Harris tract. He stated that he had

no intention to sell lands that he did not know that he owned.

Shannon Hix testified that he had surveyed the lands for Garvis Quinn at the time he purchased the 1.5 acre tract. He surveyed it again at the time Quinn sold the 1.08 acre tract to Harris. He testified that after the swimming pool was constructed and the fence in place, he went back at the request of Ruby Quinn to make a perculation test on the .42 acre tract. While he was there appellant came up to him and handed him what he recognized as his survey of the 1.08 acre tract conveyed by Garvis Quinn to Harris. Hix testified that appellant asked him to point out the lines of the survey on the ground, which he did. He stated that appellant appeared satisfied with the line and commented only that the fence ran within a foot of his line.

Opal McDermott testified that she was employed by James Quinn to sell all the property he owned in Cross County. She denied that he instructed her to sell only the tract formerly owned by Harris. She checked the deed records and found that James Quinn owned 1.5 acres and obtained the proper description of the property. She stated initially that, although she knew that she was offering 1.5 acres for sale, she did not know that part of it was being used by Ruby Quinn as a yard and thought that the swimming pool was on Ruby Quinn's property. At another time she testified that, at the time of closing, she regarded the pool as lying on the property being sold. The attorney preparing the transfer papers stated that he had no contract with James Quinn and received all of his instructions from McDermott.

Appellant testified that he had not labored under a mistake as to the extent of the land being sold to him and that he intended to purchase the entire 1.5 acre tract including the house, swimming pool, and the trailer located on it. The chancellor found appellant's testimony to be unworthy of belief and expressly found from appellant's actions that he too was mistaken as to the boundaries of the land being purchased by him. The court stated:

> The actions of Troy Lambert belie his statements at trial. The swimming pool was constructed in February, 1987. He purchased the 1.08 acre tract the following August. The pool was obvious to anyone who looked at the property. Mr Lambert made absolutely no mention of the pool during his negotiations to purchase the property nor

with anyone connected with the loan closing. He made no objection from August, 1987 to March, 1988, to Mrs. Quinn's physical possession of the .42 acre tract on which the pool is located. Mr. Lambert had ample opportunity to mention his alleged ownership because he had several conversations with Mrs. Quinn during this period of time. The most damaging testimony to Mr. Lambert's position is that of county surveyor Shannon Nix. Mr. Lambert talked with Mr. Nix regarding the location of the boundary and the location of a fence along the boundary. Mr. Lambert allowed Mrs. Quinn's son to move a mobile home onto the .42 acre tract. As stated, Mr. Lambert's actions belie the position he has now adopted in this action. If the Court were to accept Mr. Lambert's version, it would have to find that he purchased land on which an expensive swimming pool was located and that he made no effort whatsoever to use the pool, being content to watch others use it daily. This Court can certainly resort to its common sense—it is not human nature to react in this fashion. The purchase price of the land demonstrates that it did not include the pool. Mr. Lambert is simply not a credible witness and the Court so finds. The evidence is abundantly clear that he too was mistaken as to the boundaries of the property described in the deed. To rule otherwise, would be to enforce an agreement that was never made. Mr. Lambert received exactly what he paid for and that was a parcel of land containing 1.08 acres. He is entitled to nothing more.

Nor do we find merit in appellant's argument that the deed could not be reformed because of the knowledge on the part of the real estate agent that the deed calls described 1.5 acres. This argument was decided adversely to the appellant in *Black* v. *Been*, 230 Ark. 526, 323 S.W.2d 545 (1959). There, the court stated that the issue was whether the parties to the contract labored under a mutual mistake, and that such a mistake can exist where the buyer and seller had not dealt directly with each other. In any case, the issue is whether the writing fails to reflect the parties' true understanding without regard to what an agent or scrivener thought was intended. *See Kohn* v. *Pearson*, 282 Ark. 418, 670 S.W.2d 795 (1984); *Akin* v. *First Nat'l. Bank, supra.*

From our *de novo* review of the record, we cannot

conclude that the chancellor's finding that clear and convincing evidence established that a mutual mistake had occurred warranting reformation of the deed is clearly erroneous.

Affirmed.

MAYFIELD and COOPER, JJ., agree.

Michael Steven LOONEY *v.* STATE of Arkansas

CA CR 90-37 798 S.W.2d 452

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

Zachary P. Muncy, for appellant.

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

Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Michael Steven Looney appeals from his conviction of two counts of delivery of a controlled substance. He was sentenced on October 10, 1989, to consecutive seven-year terms in the Arkansas Department of Correction and fined $24,000.00.

Appellant contends that the trial court erred by failing to address him personally and advise him of his rights concerning a motion for a new trial based on the ground that his counsel was ineffective, as now required by Ark. R. Crim. P. 36.4. The record discloses that he was not so advised. He goes on to argue for the first time on appeal that his counsel was, in fact, ineffective for failing to properly investigate appellant's mental condition prior to trial; failing to subpoena certain witnesses; and failing to move for a directed verdict.

We find merit in appellant's contention that the trial court erred in not advising him of his right to raise the issue of ineffective assistance of counsel and the manner in which it must be raised. We do not agree, however, that that error warrants reversal of his conviction, but we do remand the case to the trial court for compliance with the provisions of Ark. R. Crim. P. 36.4.

Prior to the adoption of the amendment to Rule 36.4, the proper method for preserving for direct appeal the issue of ineffective assistance of counsel was by motion for a new trial. If, however, the issue was not properly preserved for appeal, it could be raised in a motion for post-conviction relief under Ark. R. Crim. P. 37, then in effect. In either case, an evidentiary hearing on the issue was required in order to "better equip" the appellate court to review the sufficiency of the representation. *Knappenberger* v. *State*, 278 Ark. 382, 647 S.W.2d 417 (1983); *Hilliard* v. *State*, 259 Ark. 81, 531 S.W.2d 643 (1976).

Amended Ark. R. Crim. P. 36.4 became effective July 1, 1989, the same time that the provisions for post-conviction relief under Rule 37 were abolished, and was in effect when appellant was sentenced. Rule 36.4 now provides that, following the conviction and sentencing, the trial judge must address the defendant personally and advise him: (1) that if he wishes to assert that his attorney was ineffective, he must file a motion for a

new trial within thirty days; and (2) if such a motion is filed, and if it asserts facts sufficient to raise an issue concerning ineffective assistance of counsel, the motion must be heard. The defendant is given thirty days after the ruling on the motion in which to appeal. *In the Matter of the Abolishment of Rule 37. and the Revision of Rule 36. of the Arkansas Rules of Criminal Procedure*, 299 Ark. 573, 770 S.W.2d 148 (1989).[1]

The purpose of Rule 37 was to provide a procedural method by which one's constitutionally guaranteed right to effective assistance of counsel could be protected. The only manner in which that right can now be protected in our state courts is by the procedure provided in Rule 36.4. Because appellant was not notified of the manner in which to assert the denial of that right, and did not assert it, the case must be remanded to the trial court where his claim of ineffective assistance may be asserted and disposed of in the manner required by Rule 36.4. As we conclude that the issue of ineffective assistance of counsel has not been properly preserved, we do not address appellant's particular complaints on their merits.

Remanded for further proceedings consistent with this opinion.

COOPER and MAYFIELD, JJ., agree.

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[1] We note that the supreme court subsequently abolished that part of Ark. R. Crim. P. 36.4 with which we are concerned here and readopted a modified version of Ark. R. Crim. P. 37, effective January 1, 1991. *See In the Matter of the Reinstatement of Rule 37 of the Arkansas Rules of Criminal Procedure, as Revised, and the Amendment of Rule 26.1 and Rule 36.4 of the Arkansas Rules of Criminal Procedure*, 303 Ark. 746, 797 S.W.2d 485 (1990).

Roy G. WOOTEN *v.* STATE of Arkansas

CA CR 90-89 799 S.W.2d 555

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

J.F. Atkinson, Jr., for appellant.

Steve Clark, Att'y Gen., by: *Olan W. Reeves*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Judge. Roy G. Wooten initially was charged by information with the offense of aggravated assault and attempted capital murder. On September 13, 1989, he entered a plea of nolo contendere to a reduced charge of attempted battery in the first degree. The plea bargaining agreement called for a sentence of ten years, with three years suspended. After conducting a hearing to determine that the plea had been voluntarily entered, the trial court accepted the plea. On

September 23, 1989, the order of commitment was signed by the trial court.

While in the Sebastian Detention Center awaiting transportation to the Arkansas Department of Correction, appellant filed papers which the trial court treated as a motion to vacate his plea. He subsequently was transported to the department of correction. New counsel was appointed for appellant, and a hearing was held on the motion on November 21, 1989, after which the trial court entered an order denying the request to withdraw the plea. Appellant appeals from that order.

Appellant contends that the trial court should have vacated his plea pursuant to Ark. R. Crim. P. 26.1 because the plea was involuntary and was entered without knowledge of the nature of the charge. We cannot agree.

Rule 26.1(a) provides that a criminal defendant may withdraw his plea of guilty or nolo contendere upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a "manifest injustice." However, a motion to withdraw a plea pursuant to Rule 26.1 must be made and acted on before sentence is placed into execution. Once a valid sentence has been put into execution, the trial judge is without jurisdiction to vacate it. A sentence is placed into execution when the court issues a commitment order. *Redding* v. *State*, 293 Ark. 411, 738 S.W.2d 410 (1987).

In this case, the sentence had been imposed, the commitment order issued, and the appellant transported to the department of correction before the motion was acted on. As the trial court was without jurisdiction to set aside the sentence, we do not address the issues raised on appeal.

Affirmed.

COOPER, and MAYFIELD, JJ., agree.

Roger WOODS *v.* BEST WESTERN, Employer; Liberty Mutual Insurance, Insurance Carrier

CA 90-101 799 S.W.2d 565

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

McDaniel & Wells, P.A., by: *John Barttelt*, for appellant.

Penix, Penix & Lusby, for appellee.

JAMES R. COOPER, Judge. The appellant in this worker's compensation case sustained a compensable back injury in 1987 while employed by the appellee. The appellee acknowledged that the appellant's injury was compensable and paid temporary total disability benefits and medical bills, but controverted the appellant's claims for permanent partial disability and wage loss benefits. On May 24, 1989, a hearing was held before an administrative law judge (ALJ) wherein the ALJ found that the appellant sustained a five percent anatomical rating to the body as a whole and a ten percent wage loss disability. The appellee appealed to the full Commission and the Commission reversed the ALJ's decision. From the Commission's decision, comes this appeal.

On appeal, the appellant raises two points for reversal. He contends that there is no substantial evidence to support the Commission's finding that no objective physical criteria exists to justify the ALJ's award of permanent partial disability and wage loss benefits. He also contends there is no substantial evidence to support the denial of wage loss benefits. We do not reach the merits of the issues raised in this case because we have concluded that it must be remanded.

In its opinion the Commission characterizes the issue as follows: "The issue on appeal before this Commission is whether the Administrative Law Judge erred in finding that the claimant had a permanent physical impairment equal to five percent to the body as a whole based upon the statements made by Dr. Tonymon." This is an erroneous assessment of the issues before the Commission. When a determination of an ALJ is appealed to the Commission, the Commission does not sit as an appellate court to review the ALJ's findings; instead, the Commission makes a *de novo* determination of the facts. *See Johnson* v. *Hux*, 28 Ark. 187, 772 S.W.2d 362 (1989). It is the Commission's duty to make findings in accordance with the preponderance of the evidence; and it is not its function to determine whether there is substantial evidence to support the findings of the ALJ. *Id.* Although the Commission's order recites that it made its decision after a *de novo* review of the entire record, it is apparent that the decision was not based on such a review. Not only does the Commission fail to make a *de novo* determination on the issue of permanent partial disability, it also fails to consider the record as a whole. The Commission based its findings on the testimony of only one witness. It failed to consider and weigh the other evidence in an attempt to determine the preponderance of the evidence. *See* Ark. Code Ann. § 11-9-704 (c)(2) (1987).

From our review of the record the Commission failed to view the evidence *de novo* and make its findings based on the record as a whole. We therefore remand this case to the Commission for proceedings not inconsistent with this opinion.

Reversed and remanded.

CRACRAFT and MAYFIELD, JJ., agree.

Dolphus Ray WOOTEN *v.* STATE of Arkansas

CA CR 90-99 799 S.W.2d 560

Court of Appeals of Arkansas
Division I
Opinion delivered November 21, 1990

William R. Simpson, Jr., Public Defender,and *Judy Rudd*, Deputy Public Defender, by: *Thomas B. Devine III*, Deputy Public Defender, for appellant.

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

JOHN E. JENNINGS, Judge. Dolphus Ray Wooten was charged with attempted aggravated robbery and aggravated assault. A jury trial was waived. The circuit court granted a directed verdict on the attempted robbery charge, but found Wooten guilty of aggravated assault and sentenced him to five years imprisonment.

The sole issue on appeal is whether the evidence is sufficient

to support the conviction. We hold that it is not, and we modify the decision of the circuit court.

In determining the sufficiency of the evidence we are obliged to consider it in the light most favorable to the appellee, *Booth* v. *State*, 26 Ark. App. 115, 761 S.W.2d 607 (1989), and affirm if there is substantial evidence to support the verdict. Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another, without resorting to speculation or conjecture. *Neble* v. *State*, 26 Ark. App. 163, 762 S.W.2d 393 (1988). The substantiality of the evidence is a question of law. *Fuller* v. *Johnson*, 301 Ark. 14, 781 S.W.2d 463 (1989).

The relevant facts are relatively simple. On June 21, 1989, Jim Puckett, a North Little Rock police officer, received a report that there was a man with a gun outside the Jackpot store on West Broadway. The officer testified that as he pulled into the parking lot he saw Wooten. He testified that Wooten reached into his right pants pocket and started backing away. Officer Puckett got out of his car with his own pistol drawn and ordered Wooten several times to stop and get on the ground. Wooten continued to back away and appeared to Officer Puckett to be trying to pull something out of his pocket that was stuck. The officer testified that when Wooten had backed up behind a parked car he pulled his hand out of his pocket, and the officer saw that he was holding a small handgun. Puckett testified that Wooten dropped to his knees behind the car, and that he "could see him lifting his head up slightly as if to try to locate my position." When a backup officer arrived Wooten finally dropped to the ground as ordered. The officers approached him and handcuffed him. When they rolled him over they found a .25 caliber pistol underneath his leg. The pistol had a bullet in the chamber and five in the clip.

On cross-examination the officer testified that Wooten had not pointed the gun at him. He admitted that his arrest report stated that Wooten had pulled the gun out as he was lying on the ground but testified that the arrest report was incorrect.

Arkansas Code Annotated Section 5-13-204(a) (1987) defines aggravated assault:

> A person commits aggravated assault if, under cir-

> cumstances manifesting extreme indifference to the value of human life, he purposely engages in conduct that creates a substantial danger of death or serious physical injury to another person.

In examining cases dealing with assault, we recognize at the outset that whether certain conduct is sufficient to constitute a given category of assault must be determined in reference to the language of the statute under which the defendant is charged. *See Anderson* v. *State*, 77 Ark. 37, 90 S.W. 846 (1905). Early Arkansas cases recognize that the pointing of a pistol at another could constitute an assault. *See Sullivan* v. *State*, 131 Ark. 107, 198 S.W. 518 (1917); *Wells* v. *State*, 108 Ark. 312, 157 S.W. 389 (1913); *Keefer* v. *State*, 19 Ark. 190 (1857). Conversely, the drawing of a pistol without "presenting" or pointing it at another has been held not to constitute an assault. *See Lawson* v. *State*, 30 Ala. 14 (1857); *Warren v. State*, 33 Tex. 517 (1870). *See also Odom* v. *State*, 396 So.2d 1080 (Ala. Crim. App. 1981) ("Even as to an assault, however, the fact that the muzzle of the pistol was not presented or pointed in the direction of the officer is worthy of serious consideration.")

In *Dodd* v. *State*, 189 Ark. 944, 75 S.W.2d 799 (1934), holding that the evidence was insufficient to support a conviction of "assault to rob," the supreme court said, "[i]t is difficult in practice to draw the precise line which separates violence menaced from violence begun to be executed."

In *Johnson* v. *State*, 132 Ark. 128, 200 S.W. 982 (1918), the defendant was at home when a constable arrived with an arrest warrant. The defendant came to the door, opened it a few inches, and tried to draw his pistol. The officer grabbed the pistol, the two men struggled, and the defendant exclaimed "God damn you, I'll die before I turn it aloose." The defendant was finally disarmed and while being taken into town declared that he "would kill the officer if it was the last thing he ever did." In affirming the conviction for assault with intent to kill the supreme court said:

> The question presented is whether a mere drawing of a pistol with intent to use it, but without actually presenting it in the attitude of firing constitutes an assault. There is a conflict in the authorities on this question, but we are of the opinion that the better rule is that the act of drawing of

> the pistol, *if accompanied by threats evidencing an intention to use it on the person threatened*, constitutes an assault.

132 Ark. at 130 (Citations omitted, emphasis added.) *Johnson* was cited with approval for this proposition in *Fair* v. *State*, 241 Ark. 819, 410 S.W.2d 604 (1967).

Our aggravated assault statute, Ark. Code Ann. § 5-13-204, has been described as "unique." *See Holloway* v. *State*, 18 Ark. App. 136, 711 S.W.2d 484 (1986) (overruled on other grounds in *Doby* v. *State*, 290 Ark. 408, 720 S.W.2d 694 (1986)). It is not based upon the use of a deadly weapon or the creation of fear, but requires the creation of "a substantial danger of death or serious physical injury to another person." *Holloway*, 18 Ark. App. at 140. When we view the evidence in the light most favorable to the state, it is clear that Wooten backed up until he was behind a car while refusing to comply with the officer's direction to lie on the ground, and then pulled the pistol out of his pocket. He also peered over the top of the car as if to locate the officer's position. It is equally clear, however, that Wooten never pointed the pistol in the officer's direction or expressly threatened the officer. He eventually complied with the order to lie on the ground.

On these facts we cannot say that the conviction for aggravated assault is supported by substantial evidence. The evidence is, however, amply sufficient to sustain a conviction for assault in the third degree. Ark. Code Ann. § 5-13-207 (1987) provides, "[a] person commits assault in the third degree if he purposely creates apprehension of imminent physical injury in another person." Assault in the third degree is a lesser included offense of aggravated assault. *See Holloway* v.*State*, *supra*. We therefore modify the judgment of the circuit court to reflect a conviction for assault in the third degree and remand to that court for sentencing. *Hughes* v. *State*, 3 Ark. App. 275, 625 S.W.2d 547 (1981).

Affirmed as modified and remanded.

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

Henry N. MEANS III *v.* NELLE GERTRUDE BERGER TRUST, Twin City Bank of North Little Rock, Arkansas, Trustee

CA 90-28 799 S.W.2d 556

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

Kay L. Matthews, for appellant.

John B. Thurman, for appellee.

MELVIN MAYFIELD, Judge. This case was commenced by appellant, an attorney, to recover attorney's fees pursuant to a contingency contract with Nelle G. Berger. The case was submitted to the circuit judge upon the pleadings and a stipulation of facts. The stipulation states that in 1988 an *inter vivos* trust was established by Nelle Gertrude Berger, who thereafter died on December 22, 1988. According to a copy of the trust agreement, which is attached to appellant's complaint, Ms. Berger was the "settlor" of the trust into which virtually all of her assets were transferred. Prior to establishing the trust, Ms. Berger had retained the legal services of appellant to recover in excess of $50,000.00 alleged to be due from a third party as a result of a real estate transaction. Ms. Berger and appellant had agreed to a contingency fee of 35% of any net recovery.

Also, according to the stipulation, about two weeks after the trust was established the appellant wrote Ms. Berger a letter advising that a settlement had been reached for the recovery of $50,568.77 from the third party. His letter also noted that his fee was to be 35% but stated: "Since the case was not filed, I have

elected to reduce my fee to 25% of the net recovery, even though most of the work has been completed on your case." Shortly thereafter, the appellant wrote to the trustee and remitted appellant's own trust account check for $37,926.58, which represented the recovery less 25% for his fee. The trustee deposited the proceeds into the trust, Ms. Berger thereafter expired, and in May of 1989 (after Ms. Berger's death), the appellant commenced this action against the trust to recover the difference between a 25% fee and a 35% fee. The trustee denied any indebtedness, affirmatively pleaded accord and satisfaction, and alleged that appellant had, on his own motion, agreed to accept $12,642.19 in full settlement and satisfaction. Paragraph 5 of the parties' stipulation reads as follows:

> That the plaintiff voluntarily reduced his fee for services rendered under the said employment contract; that at the time plaintiff was paid for his service rendered, there was no dispute between the plaintiff and Mrs. Berger, nor the Trust, as to the amount of his fee, and plaintiff was paid the exact amount for his fee that he had requested from Mrs. Berger.

Another paragraph of the stipulation provides that a former neighbor and friend of decedent would testify to the facts set out in her affidavit which was attached to a motion for summary judgment filed by the appellant but not granted by the court. The affidavit essentially asserted that the appellant's fee reduction was simply a humanitarian attempt to help Ms. Berger's trust funds last during her lifetime.

After taking the matter under submission, the circuit judge found that appellant freely and voluntarily reduced his fee, that this reduced amount had been paid and accepted, and that the contract was completed and fully executed. The court, therefore, denied appellant's claim for relief; this appeal followed.

Appellant argues that the trial court erred in enforcing the modification of the contract because a subsequent agreement that modifies or changes an existing agreement must be supported by additional consideration. *Feldman* v. *Fox*, 112 Ark. 223, 164 S.W. 766 (1914); *Sorrells* v. *Bailey Cattle Company*, 268 Ark. 800, 595 S.W.2d 950 (Ark. App. 1980); and *Crookham & Vessels, Inc.* v. *Larry Moyer Trucking, Inc.*, 16 Ark. App. 214,

699 S.W.2d 414 (1985), are cited in support of this argument. Appellant also argues that a waiver must be supported by consideration, citing *United States ex rel. Gillioz* v. *John Kerns Construction Co.*, 50 F. Supp. 692 (E.D. Ark. 1943), rev'd 140 F.2d 792 (8th Cir. 1944) (holding the waiver was, in fact, supported by consideration). The appellant cites *Williams* v. *Davis*, 9 Ark. App. 323, 659 S.W.2d 514 (1983), for the proposition that a compromise and settlement is contractual in nature and to have legal validity must possess the essential elements of any other contract, and refers us to 1 C.J.S. *Accord and Satisfaction* § 2 (1985), which states that an accord and satisfaction "arises where parties, by a subsequent agreement, have satisfied the former one, and the latter agreement has been executed." Therefore, the appellant concludes that his acceptance of a lesser fee than was agreed to—after having fully completed his agreement—was not legally binding without additional consideration, and should not be binding since the death of Ms. Berger eliminated the humanitarian motivation upon which the fee reduction was made.

However, the appellee (trustee of the fund) cites *Miller* v. *Brown*, 222 Ark. 236, 258 S.W.2d 237 (1953), where the Arkansas Supreme Court held that an agreement by a creditor to accept a smaller sum in satisfaction of a debt for a larger sum, which was carried into execution by receipt of the money and the execution of a written, signed, acknowledged, and recorded release deed, was a valid and irrevocable act. The appellee also points out that Miller held the motivation of the creditor to be immaterial:

> Whether Mr. Evans who was without children, was motivated to accept in settlement a smaller amount than was legally due, by reason of his friendship for appellees, their many kindnesses, a sense of fairness, or a feeling that a 10% interest rate was exorbitant, we do not know, but the fact remains that he had a perfect right to make a settlement if mentally competent and not unduly influenced or overreached.

222 Ark. at 239-40, 258 S.W.2d at 239.

The appellant's reply brief attempts to distinguish the *Miller* case by pointing out that there is no deed in the case at bar

and that *Miller* relied upon *Gordon* v. *Moore*, 44 Ark. 349 (1884), which stated:

> We conclude, therefore, than [sic] an agreement by a creditor to accept a smaller sum in satisfaction of a debt, carried into execution by receipt of the money, and the execution of *a formal and postive* [sic] *instrument of release*, with all other acts essential to an absolute relinquishment of his right, is a valid and irrevocable act.

44 Ark. at 355 (emphasis added). Thus, the appellant contends that the *Miller* case does not support the trial court's decision in the present case. We note, however, that the court in *Miller*, after the above quote from *Gordon*, added "See, also, *Dreyfus* v. *Roberts*, 75 Ark. 354, 87 S.W. 641, 69 L.R.A. 823."

In *Dreyfus*, decided in 1905, the appellant's collection agency accepted $200.00 in payment of a judgment for $1,621.00, plus interest, and the collection agency sent the debtor a receipt which is set out in the opinion as follows:

> Dear Sir: We have your communication with enclosure as stated [which was the $200 check], and you may consider this a receipt and satisfaction in full of the account of S.G. Dreyfus & Company v. yourself for $1,621. We will immediately have judgment satisfied, as per your request. Very truly yours.

The collection agency failed to have the judgment satisfied as promised, and Dreyfus caused execution to issue on the judgment. The trial court enjoined Dreyfus from selling property it had levied upon and held the judgment had been satisfied. In affirming the trial court, the Arkansas Supreme Court began its opinion with a discussion of the decision in *Pinnel's Case*, 5 Coke 117a (1602), where Lord Coke, speaking for the Court of Common Pleas, said that the payment of a lesser sum in satisfaction of a greater amount due is not a satisfaction; "but the gift of a horse, hawk, robe, etc., in satisfaction is good." Actually, the payment in the case was held to be a good satisfaction because it was paid before it was due, and our supreme court in *Dreyfus* pointed out that Lord Coke's statement that acceptance of a lesser sum is not valid satisfaction of the whole debt due was *obiter dictum* "but this dictum of this great lawyer and jurist

established the doctrine at common law."

The opinion in *Dreyfus* also points out that the rule in *Pinnel's Case* has been criticized both in England and the United States. The opinion refers to the 1884 English case of *Foakes* v. *Beer*, 9 Appeal Cases, Law Reports, 605, where it was suggested that it would be an improvement if a release on payment of a lesser sum were held to be binding "though not under seal." Our supreme court then stated: "Thus it is seen that after three hundred years' experience in England the highest court of the realm says the law would be improved by not following Lord Coke's *dictum* in the Pinnel Case." After noting the American decisions and their willingness to limit the rule in *Pinnel's Case*, and in some cases to "completely cut away" from it, the opinion in *Dreyfus* traced the Arkansas decisions and concluded as follows:

> It is therefore held that when an agreement is fully executed to discharge a debt by the paymtnt [sic] of a smaller sum, and such discharge is evidenced, as it usually is, in practical business affairs, by a written receipt for the lesser sum in full satisfaction of the greater sum, it is "a valid and irrevocable act."

75 Ark. at 364-65, 87 S.W. at 644.

The *Dreyfus* case was cited in *Hamiter* v. *State National Bank*, 106 Ark. 157, 153 S.W. 94 (1913), where the court said:

> Again it is contended by counsel for appellants that the case of *Dreyfus* v. *Roberts*, 75 Ark. 354, is authority for the reversal of the judgment. There the court held that when an agreement to discharge a debt by the payment of a smaller sum is fully executed, and such discharge is evidenced by a written receipt for a lesser sum in full satisfaction of a greater, it is a binding release. Here the case is different. The allegations of the answer show that the original note given by appellants to appellee was not surrendered or delivered at the time the renewal note was executed, and the agreement in question was made, but it still remains in the hands of the appellee; therefore, the agreement in the present case was not fully executed, and the allegations of the answer do not bring it within the reasoning of that case.

106 Ark. at 160, 153 S.W. at 95. *Dreyfus* was also cited in *Little Rock Packing Co.* v. *Massachusetts Bonding & Insurance Co.*, 262 F.2d 327 (8th Cir. 1959), where the court, after discussing the holding in *Dreyfus*, said: "The Arkansas court has adhered to this position," citing *Miller* v. *Brown, supra*, in support of the statement. *See* 362 F.2d at 330.

We think the decisions discussed above make it clear that the letter in this case, written to Ms. Berger by the appellant, and the deposit in her trust fund of the proceeds of the check appellant sent to the trustee effected a final, binding, and valid settlement of the attorney's fee agreement between appellant and Ms. Berger. The *Feldman, Sorrells*, and *Crookham* cases, *supra*, cited by appellant, are cases where there was a modification or change in an existing contract. Thus, those cases correctly held there had to be new or additional consideration to support the new or additional agreement. However, in *Dreyfus* the question was whether the payment and acceptance of a lesser sum in full satisfaction for a greater amount which is due for a contract already performed will constitute a valid and binding settlement of the amount due. *Dreyfus* said the answer is "yes," if there is a "written receipt" for the lesser sum paid. (The last paragraph of the opinion left the question open as to the effect of a parol release.)

While the appellant places emphasis upon language in *Miller* v. *Brown, supra*, which referred to the execution of a "formal and positive instrument of release," that language was taken from *Gordon* v. *Moore* and simply described the release in that case. The *Miller* v. *Brown* opinion concluded by pointing out that "we are dealing here with a written, signed, acknowledged, and recorded release, which clearly distinguishes it from the *Cavaness* case, where no release whatever was given." *Miller* v. *Brown*, 222 Ark. at 240, 258 S.W.2d at 239. Again, this language simply described the release in that case. Also, the opinions in the *Gordon* and *Miller* cases were both trying to distinguish those cases from *Cavaness* v. *Ross*, 33 Ark. 572 (1878), where there was no receipt of any kind. In addition, the opinion in *Miller* said to "see also" *Dreyfus*, and in *Dreyfus* the receipt found sufficient to evidence the payment of a smaller sum in full satisfaction of a greater sum was simply a letter written by the collection agency to the debtor; and as we have already noted, the Eight Circuit Court

of Appeals in *Little Rock Packing Co.* v. *Massachusetts Bonding & Insurance Co., supra*, thought that *Miller v. Brown* adhered to the decision in *Dreyfus*.

It is, of course, the general rule that part payment of a liquidated debt is not sufficient consideration for the creditor's agreement that the debt is fully satisfied. 1 Williston, *A Treatise on the Law of Contracts* § 120 (3d ed. 1957). It is recognized, however, that "the application of the law of consideration to attempted discharge of liquidated claims has not infrequently been criticized by courts and law writers; and in a few jurisdictions the law has been changed by decision, or statute." *Id.* at 502-4. One case decision cited by Williston is *Rye* v. *Phillips*, 203 Minn. 567, 282 N.W. 459 (1938), where the court said the general rule "is one of the relics of antique law which should have been discarded long ago." The court also said:

> There is more than one ground of logic and good law upon which this old and indefensible rule may be discarded. There is no reason why a person should be prevented from making an executed gift of incorporeal as well as corporeal property. Why should a receipt in full for the entire debt not be taken in a proper case as sufficient evidence of an executed gift of the unpaid portion of the debt? Again, where there is proof, or on adequate evidence a finding, that a completed legal act such on a waiver has set a matter at rest, why is it necessary to search for any consideration?

203 Minn. at 570, 282 N.W. at 460. This case was followed in *Winter Wolff & Co.* v. *Co-op Lead & Chemical Co.*, 261 Minn. 199, 111 N.W.2d 461 (1961) and *Butch Levy Plumbing and Heating, Inc.* v. *Sallblad*, 267 Minn. 283, 126 N.W.2d 380 (1964).

Thus, Arkansas is not alone in its view of the law applicable to the issue in this case, and we are satisfied that view is supported by good and valid reasons. The trial court's judgment in this case is affirmed.

CRACRAFT and COOPER, JJ., agree.

Delmas SPICER *v.* STATE of Arkansas

CA CR 89-244 799 S.W.2d 562

Court of Appeals of Arkansas
Division I
Opinion delivered November 21, 1990

Robert E. Irwin, for appellant.

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

JUDITH ROGERS, Judge. The appellant, Delmas Spicer, was found guilty by a jury of DWI, first offense, and speeding, but was acquitted of driving left of center. He was given a sentence of one day in jail, fined $500 plus costs, ordered to attend an alcohol education program, and his driver's license was suspended for ninety days. As his sole point on appeal, appellant contends that the trial court erred in denying his motion *in limine* in which he sought to exclude evidence of his refusal to submit to a breathalyzer test. We find no error and affirm.

Appellant was initially charged by citation in the Yell County Municipal Court with DWI, first offense, violation of the implied consent law, speeding, driving left of center, resisting arrest and drinking in public. There, he was adjudged guilty of DWI, speeding and driving left of center, but the charges of resisting arrest and drinking in public were dismissed. For reasons not fully explained in the record, the transcript of the municipal court proceedings does not reflect the disposition of the

implied consent violation.[1] On appeal in the circuit court, only the charges of DWI, speeding and driving left of center were pursued.

Prior to trial, appellant moved *in limine* to prohibit the prosecution from offering any evidence of his refusal to submit to a breathalyzer test. The trial court denied the motion, and at trial the arresting officer was allowed to testify that he advised appellant of his rights, including the provisions of the implied consent law,[2] and that appellant declined to take the test.

On appeal, appellant argues that evidence of his refusal, as proof of another crime, is inadmissible under Rule 404(b) of the Arkansas Rules of Evidence, and further, does not meet the two-pronged test for admissibility set out in *Price* v. *State*, 268 Ark. 535, 597 S.W.2d 598 (1980). Rule 404(b) provides:

> Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In *Price, supra*, which is relied upon by appellant, it was held that evidence of other crimes is admissible if (1) it has independent relevance, and (2) its relevance is not substantially outweighed by the danger of unfair prejudice. As to the first requirement, independent relevance, this means that the evidence must be relevant in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal. *Carter* v. *State*, 295 Ark. 218, 748 S.W.2d 127 (1987). The question here then focuses on whether the evidence of the refusal to take a chemical test is independently relevant on the issue of intoxication, and if so, whether its probative value substantially outweighs any prejudicial effect.

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[1] On appeal, appellant asserts that he was acquitted of this charge, while the state takes the position that appellant was found guilty, but that it was the practice of the municipal judge for it to be merged with the DWI conviction. We can express no opinion one way or the other because the record is decidedly unclear; however, resolving this question is unnecessary for the purposes of this appeal.

[2] Ark. Code Ann. §§ 5-65-202, -205 (Supp. 1989).

We have not yet been called upon to assess the relevancy of this particular evidence, although we have addressed the admissibility of similar evidence in other contexts. *See, e.g. Weaver* v. *City of Ft. Smith*, 29 Ark. App. 129, 777 S.W.2d 867 (1989) (admission into evidence of appellant's refusal to submit to a chemical test does not violate the fifth amendment right against self-incrimination); *Whaley* v. *State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984) (the failure to advise appellant of his right to an independent test does not preclude the admission of his refusal to submit to a test); *Hice* v. *State*, 11 Ark. App. 184, 668 S.W.2d 552 (1984) (error found in the exclusion of evidence that the officer refused to administer a breath test, as being relevant on the issue of the officer's credibility).

We first point out that some states have specific statutory provisions either allowing or barring evidence of an accused's refusal to submit to a chemical test. In those states without such legislation, there is a split of authority as to whether this evidence is admissible. *See generally* Annot. 26 A.L.R.4th 1112 (1983). In Arkansas, there is no specific statutory authority governing the admissibility of this evidence, although Ark. Code Ann. § 5-65-206(b) (Supp. 1989) does provide that "[t]he foregoing provisions [relative to evidence of blood alcohol content] shall not be construed as limiting the introduction of any other relevant evidence bearing upon the question whether or not the defendant was intoxicated."

It appears that a majority of courts in states without statutory authority have concluded that evidence of the refusal to take a chemical test is probative on the issue of intoxication, as showing a consciousness of guilt. As observed by the Supreme Court of Alabama in *Hill* v. *State*, 366 So. 2d 318 (Ala. 1979), the better reasoned decisions hold that refusal to take a chemical test for intoxication may indicate the defendant's fear of the results of the test and his consciousness of guilt. In deciding that this evidence was relevant, and thus admissible, the Alabama Court relied on the Ohio decision of *City of Westerville* v. *Cunningham*, 15 Ohio St. 2d 121, 239 N.E.2d 40 (1968), where it was stated:

> Where a defendant is being accused of intoxication and is not intoxicated, the taking of a reasonably reliable chemi-

> cal test for intoxication should establish that he is not intoxicated. On the other hand, if he is intoxicated, the taking of such a test will probably establish that he is intoxicated. Thus, if he is not intoxicated, such a test will provide evidence for him; but, if he is intoxicated, the test will provide evidence against him. Thus, it is reasonable to infer that a refusal to take such a test indicates the defendant's fear of the results of the test and his consciousness of guilt, especially where he is asked his reason for such refusal and he gives no reason which would indicate that his refusal had no relation to such consciousness of guilt.

Id., 239 N.E.2d at 41.

The court in *Hill, supra*, however, also concluded that if the defendant has some other explanation for the refusal, the explanation can be considered by the jury in determining whether the evidence is to be construed as consciousness of guilt. In this regard, the court maintained:

> We feel, however, that such evidence is probative and should be presented to the jury for their consideration rather than excluding it altogether. Any circumstances tending to show the refusal was conditioned upon factors other than consciousness of guilt may properly be considered by the jury in determining the weight to attach to the refusal. Therefore, the evidence of Hill's refusal to submit to a chemical test for intoxication was relevant and properly admitted. Whether his refusal was due to the desire for consultation with his physician or attorney or to the fear of bodily harm, rather than consciousness of guilt, was best determined by the jury.

Id., 366 So. 2d at 321.

In light of these authorities, we now hold that evidence of the refusal to submit to a chemical test can properly be admitted as circumstantial evidence showing a consciousness of guilt. As such, this evidence possesses independent relevance bearing on the issue of intoxication, and was not being offered merely to show that the accused is a bad person, or a criminal. Although evidence of other crimes always has some for potential

prejudice, *Price* v. *State, supra*, we cannot say that the probative value of this evidence is substantially outweighed by an unfair prejudice. These are issues which the trial judge has wide discretion in deciding, and he will not be reversed on appeal unless he has abused his discretion. *Id.* Once admitted, the weight of this evidence is a question to be resolved by the trier of fact, which may also consider the circumstances surrounding the refusal and any explanation given for declining to take the test. In this case, we discern no abuse of discretion in the admission of this evidence, and accordingly, we affirm.

AFFIRMED.

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