[redacted]

[redacted]

[redacted]

[redacted]

Willie George POWELL *v.* STATE of Arkansas

CA CR 90-88 799 S.W.2d 566

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

William R. Simpson, Jr., Public Defender, by: *Omar Greene II*, Deputy Public Defender, for appellant.

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

DONALD L. CORBIN, Chief Judge. Appellant, Willie George Powell, appeals the judgment of conviction entered against him in Pulaski County Circuit Court of criminal attempt to commit breaking or entering. We affirm.

Appellant was charged by felony information filed May 30, 1989, with attempt to commit burglary in violation of Ark. Code Ann. § 5-3-201 (1987). On May 30, 1989, the prosecuting attorney also filed a petition for revocation which stated that on February 26, 1986, appellant was convicted of theft by receiving for which he received eight years probation. The petition to revoke alleged that on May 2, 1989, appellant violated the terms of his probationary sentence by committing criminal attempt to commit burglary. On December 4, 1989, the trial judge, sitting without a jury, found appellant guilty of the lesser included offense of criminal attempt to commit breaking or entering. In addition, the trial judge found appellant willfully violated the terms of his probation and sentenced him to serve ten years in the Arkansas Department of Correction.

Appellant raises the following points on appeal: 1) the evidence was insufficient to establish that appellant attempted any breaking or entering; 2) the evidence was insufficient to establish that appellant violated the terms of his probationary sentence.

As his first point, appellant argues there is no evidence in the record that he attempted to enter or break into any object covered by Ark. Code Ann. § 5-39-202(a) (1987). Although appellant concedes that he was seen attempting to break into a realtor's lock box, he contends that the statute does not apply to such realtor's lock boxes, and therefore, it is no crime to attempt to break into a realtor's lock box. We disagree.

In support of this first point appellant cites *State* v. *Scarmardo*, 263Ark. 396, 565 S.W.2d 414 (1978), in which our supreme court held that no breaking or entering occurred where a defendant was accused of breaking into an electrical meter to obtain electricity without payment. The defendant in *Scarmardo* was, however, convicted of theft of services in violation of Ark. Code Ann. § 5-36-104 (1987). Appellant argues that a realtor's lock box is similar to an electrical meter because there was no evidence the box contained money and the statute is designed to reach only larcenous conduct directed against vending machines and other types of containers likely to contain money.

We find this argument untenable. The language of Ark. Code Ann. § 5-39-202 neither limits its application to containers likely to contain money nor limits its application to only specific containers listed therein. The statute provides:

> (a) A person commits the offense of breaking or entering if for the purpose of committing a theft or felony he enters or breaks into any building, structure, vehicle, vault, safe, cash register, money vending machine, product dispenser, money depository, safety deposit box, coin telephone, coin box, or other similar container, apparatus, or equipment.

In addition to containers designed to hold only money, the statute specifically includes containers not designed exclusively to hold money, *e.g.*, vault, safe, safety deposit box. "Similar container, apparatus, or equipment" is broad language that encompasses a variety of containers. The commentary to the statute states that because in most cases the perpetrator intends to take anything of value he finds within the container, "the offense is defined so as to dispense with any need to show the value of the property within the container."

Appellant was convicted of attempted breaking or entering. The criminal attempt statute, Ark. Code Ann. § 5-3-201 provides:

> (a) A person attempts to commit an offense if he:
>
> . . . .
>
> (2) Purposely engages in conduct that constitutes a

> substantial step in a course of conduct intended to culminate in the commission of an offense whether or not the attendant circumstances are as he believes them to be.

When the sufficiency of the evidence is questioned, this court considers the evidence in the light most favorable to the appellee and if there is substantial evidence to support the trier of fact's finding of guilt, we must affirm. *Harris* v. *State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985). Substantial evidence has been defined as evidence that is of sufficient force and character that it will with reasonable and material certainty and precision compel a conclusion one way or the other; it must force or induce the mind to pass beyond suspicion or conjecture. *Jones* v. *State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984).

At trial the state offered the testimony of Bob Campbell who lives in the house next door to the house allegedly burglarized in this case. Mr. Campbell saw appellant "bent over with an object trying to break into a lock box that a realtor had on his front door." Mr. Campbell approached appellant and asked what he was doing. Appellant said he wasn't doing anything and Mr. Campbell said, "[w]ell, you was trying to break in that house." Appellant replied, "I had a friend that broke in on me," . . . "I was just coming back to play a joke on him." Mr. Campbell detained appellant at gun point while Mrs. Campbell called the police. While they waited for the police to arrive, Mr. Campbell saw appellant throw an object in the ditch. When the police arrived they recovered the object, which was a long screwdriver.

George Burks, the owner of the house involved, testified that he did not know appellant, that he had never given appellant permission to enter his house, and that he had never even seen appellant before.

Appellant also testified at trial. On cross-examination he said he knew what a lock box was and the purpose for which it was used. He said he knew that such a lock box hung on a doorknob contained keys.

Based on the foregoing, we find sufficient evidence from which the trial court, without engaging in conjecture or speculation, could find appellant guilty of attempted breaking or entering.

Appellant's second point is also premised on his contention that the breaking or entering statute does not apply to a realtor's box. He argues that because the statute does not include these boxes he has not committed an offense which would give rise to grounds for revocation of his probation. For the reasons stated above, appellant's second point is not persuasive.

Appellant's probation of an earlier sentence was conditioned on his duty to "[r]efrain from violating any law (Federal, State, Local) which is punishable by imprisonment." Having been found guilty of criminal attempt of breaking or entering, a Class A misdemeanor under Ark. Code Ann. § 5-3-203 (1987) punishable for a period of imprisonment not to exceed one year under Ark. Code Ann. § 5-4-401(b)(1) (1987), appellant clearly violated a condition of his probation. Thus, the trial court did not err in finding that appellant violated a condition of his probation or in ordering the revocation and imprisonment.

Affirmed.

JENNINGS and ROGERS, JJ., agree.

LINDELL SQUARE LIMITED PARTNERSHIP, Richard L. Grant, and E.M. Bush *v.* SAVERS FEDERAL SAVINGS & LOAN ASSOCIATION

CA 90-121 799 S.W.2d 569

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

[redacted]

Wood, Smith, Schnipper & Clay, by: *Ray S. Smith, Jr.*; and *David A. Orsini*, for appellants.

Wright, Lindsey & Jennings, for appellee.

JAMES R. COOPER, Judge. This is the second appeal of this case. As shown by our prior opinion, Richard L. Grant was the general partner of Lindell Square Partnership, and E.M. Bush was the limited partner. The appellee bank brought a successful action against Grant and Bush to establish their liability as guarantors under a bond guaranty agreement. Other security was provided by a mortgage executed by Grant as general partner of Lindell Square. A substantial deficiency remained after foreclosure. The chancellor found Grant and Bush individually liable on the guaranty. We affirmed that portion of the chancellor's decision, but held that the chancellor erred in computing the guarantors' liability as a percentage of the deficiency remaining after resorting to other security, rather than as a percentage due on the bonds at the time of default. We found that "the contractual liability of Bush under the guaranty is 20% of $1,316,274.14, and the contractual liability of Grant is 80% of $1,316,274.14, Savers' recovery being limited to the outstanding deficiency of $717,067.99." *Lindell Square Ltd.* v. *Savers Fed. S & L Assn.*, 27 Ark. App. 66, 766 S.W.2d 41 (1989). We reversed on cross appeal and did not remand for further proceedings.

On receipt of our mandate, the chancellor entered the following order:

> 1. Plaintiff Savers Federal Savings & Loan Association ("Savers") is hereby given judgment against defendant Richard L. Grant in the amount of $1,053,019.31, with interest thereon from March 11, 1988, until paid at the rate of 10.5% per annum.
>
> 2. Savers is hereby given judgment against defendant E.M. Bush in the amount of $263,254.83, with interest thereon from March 11, 1988, until paid at the rate of 10.5% per annum.
>
> 3. Savers is hereby given judgment against defend-

ants Richard L. Grant and E.M. Bush, jointly and severally, for attorney's fees incurred by Savers in the amount of $7,160.53.

4. Credit having been given for the proceeds of the foreclosure sale, Savers ultimate recovery from all sources is limited to the outstanding deficiency of $717,067.99, plus accumulated interest until paid.

The appellants excepted to the judgment entered by the chancellor pursuant to our mandate, contending that no allocation of the foreclosure proceeds was made by our opinion, and requesting that the chancellor give them credit for the foreclosure proceeds in calculating the amount of the judgment. The chancellor denied the appellant's exceptions on the ground that our mandate left him no latitude to grant pro-rata credit for the sale proceeds against the respective judgments. From that decision, comes this appeal.

For reversal, the appellants contend that the chancellor erred in interpreting our mandate, and in failing to give them credit for foreclosure proceeds. They also contend that failure to apply the foreclosure proceeds as credits against the judgments denies them due process.

We hold that the issues now raised by the appellants are barred by the doctrine of the law of the case:

> Our court has long adhered to the rule that when a case has been decided by it, and after remand returned to it on a second appeal, nothing is before the court for adjudication except those proceedings had subsequent to its mandate. Matters decided in the first appeal are the law of the case and govern the action of the trial court on remand and our action on a second appeal to that extent, even if we were now inclined to say that we were wrong in the earlier decision. This rule is based on the fundamental concept that judgments must at some point become final and departure from that rule would result in only uncertainty, confusion, and incalculable mischief.

Pickle v. *Zunaman*, 19 Ark. App. 40, 716 S.W.2d 770(1986). The record shows that no evidence was submitted subsequent to our mandate.

The appellants' contention that the chancellor misinterpreted our mandate and erred in failing to give them credit for foreclosure proceeds is based on the premise that we left open the issue of such credit by failing to make an allocation of the foreclosure proceeds in our original opinion. However, we held that "the chancellor erred in applying the foreclosure proceeds to reduce the guarantors' contractual limit of liability, rather than merely to reduce the indebtedness." *Lindell Square, supra.* This holding was based on our stated conclusion that the guarantors' liability was intended to be independent of *and in addition to* other security. *Id.* Given this conclusion, it is clear that the reason no allocation of the foreclosure proceeds was made in our first opinion was because, in deciding the issues there presented, we concluded that such an allocation would be improper under the terms of the agreement. Because the appellants' issue regarding allocation of proceeds was decided on the first appeal, it has become law of the case on the second appeal and we are bound by it. *Wilson* v. *Rogers*, 256 Ark. 276, 507 S.W.2d 508 (1974). Moreover, because the allocation issue as argued by the cross appellant in the original appeal raised the issue of the propriety of crediting the appellants with the foreclosure proceeds under the terms of the agreement, the due process issue now advanced by the appellants was ripe for presentation in the first appeal and should have been argued. The decision on the first appeal is conclusive of any arguments that were or could have been made at that time. *First American Nat'l Bank* v. *Booth*, 270 Ark. 702, 606 S.W.2d 70 (1980). We affirm.

Affirmed.

CRACRAFT, and MAYFIELD, JJ., agree.

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

CA 89-519 799 S.W.2d 571

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

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

Phillip J. Taylor, for appellee.

PER CURIAM. Appellee, Jerry Luper, sued his employer, ERC Mortgage Group, Inc., for breach of the contract of employment. Luper obtained a jury verdict in his favor and a judgment for $5,602.24. The trial court awarded attorney's fees of $1,500.00 pursuant to Ark. Code Ann. § 16-22-308 (Supp. 1989).

ERC appealed, contending that the evidence was insufficient to support the verdict and that the trial court erred in awarding attorney's fees. We decided both issues in Luper's favor. *ERC Mortgage Group, Inc.* v. *Luper*, 32 Ark. App. 19, 795 S.W.2d 362 (1990).

Luper has now filed a motion seeking attorney's fees for the services of his attorney on appeal. In response, ERC contends that we lack authority under Ark. Code Ann. § 16-22-308 to award attorney's fees. That section provides:

> In any civil action to recover on an open account, statement of account, accounts stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, or 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.

It is not clear from the code section whether "the court" refers to the trial court, the appellate court, or both. Two decisions of the Arkansas Supreme Court give us some guidance. *Fitzgerald* v. *Investors Preferred Life Ins. Co.*, 258 Ark. 966, 530 S.W.2d 195 (1975), was an action by dissenting stockholders to recover the value of their preferred shares of stock prior to a merger. Ark. Stat. Ann. § 66-4249 (now Ark. Code Ann. § 23-69-148 (1987)) provided, in pertinent part:

> (3) If the amount determined by the courts as provided for in subsection (2) above, is in excess of such an amount as the surviving, consolidated or acquired corporation shall have offered to pay as the fair cash value of such stock, the court shall assess against the surviving, consolidated or acquired corporation the costs of such proceeding, including a reasonable attorney's fee to the stockholder and a reasonable fee to the appraisers, as it deems equitable; otherwise, such costs and fees to the appraisers shall be assessed one-half (½) against the corporation at one-half (½) against the stockholder.

In construing the statute the supreme court said:

> In view of the authorization in Ark. Stat. Ann. § 66-4249 for the assessment of reasonable attorney's fee for the services of the attorney for the dissenting stockholders, we are directing the trial court on remand to award an additional $1,000.00 for the services of the appellant's attorney in this Court.

A somewhat similar holding may be found in *Rauch* v. *First National Bank*, 244 Ark. 941, 428 S.W.2d 89 (1968). We conclude that the issue here is governed by the decisions in *Fitzgerald* and *Rauch* and that we do have authority under the statute to award attorney's fees to the prevailing party for services of his attorney on appeal. In the case at bar we award a fee of $1,000.00.

Joe Carl LANFORD *v.* STATE of Arkansas

CA CR 90-33 800 S.W.2d 434

Court of Appeals of Arkansas
Division II
Opinion delivered December 5, 1990

Jerry Cavaneau, for appellant.

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

GEORGE K. CRACRAFT, Judge. In 1986, appellant, Joe Carl Lanford, pled guilty to a violation of the Controlled Substance Act. The court suspended imposition of sentence for a period of five years. In 1988, a petition to revoke the suspension was filed alleging that appellant had again violated that act by selling

cocaine. The court heard the petition on January 3, 1989, and took the matter under advisement to enable counsel to submit additional evidence if they desired. On February 22, 1989, at a second hearing, no additional evidence was offered, and the court found by a preponderance of the evidence that appellant had violated the conditions of his suspended imposition of sentence.

Appellant's counsel then announced that an agreement as to disposition had been reached with the prosecuting attorney. The court stated that it would listen to the proposal but was not bound by it. Counsel announced that the parties proposed that appellant be given a sentence of five years in the Arkansas Department of Correction. In exchange for the prosecutor's recommendation, appellant was to dismiss a federal lawsuit challenging the conditions at the Ouachita County jail. After listening to the proposal, the trial court stated:

> THE COURT: All right, Mr. Lanford. I think I'm willing to go most of the way with this, if you're willing to accept the Court's judgment.
>
> It will be the judgment of the Court that the petition to revoke is granted. You will be sentenced to the term of five years in the Arkansas Department of Correction and that sentence will run consecutive with the outstanding sentence that you are now serving which is mandatory. I'm sure you know that and understand it, or you've been told. The Court would also suspend the imposition of an additional sentence to the Arkansas Department of Correction for a period of five years. Now do you understand that that means that when you are released from the Department of Correction you will report to the sheriff that you have been released from the Department of Correction. For five years from that date you will continue on the same terms and conditions that you were under on this original suspended sentence and if you can stay out of trouble, you are not going to have any trouble with me. If you violate that sentence, you are subject to being returned back to the penitentiary for as much as 15 years. Do you have any questions? Anything you don't understand? Anything you want to ask me at this time?
>
> [APPELLANT]: Judge, you're telling me I been placed

back on probation for five years?

THE COURT: I'm saying that when you return from the Department of Correction, you're still under a suspended imposition of sentence. That's correct. I would do this very reluctantly because I intended clearly to impose a much harsher sentence in this case, much harsher. I wish I were convinced that you could return to this community and lead a law-abiding life. I'm really not convinced, they may be, so I would be willing to go along with all of you to see. Do you have any questions?

[APPELLANT]: Well I have a lot of questions but I don't see that it would help any. It's still not going by what I had agreed, that I had understanding with Mr. Gillaspie [appellant's trial counsel] on.

THE COURT: Okay, so in other words, you would rather the Court go ahead with the sentence it had originally planned to impose.

[APPELLANT]: Yes, sir.

THE COURT: With what it originally had in mind?

[APPELLANT]: Well, originally — what we agreed on.

THE COURT: I can understand that, but we didn't agree on anything. The State agreed to make a recommendation that this Court will not accept.

[APPELLANT'S TRIAL COUNSEL]: Your Honor, could I confer with him just a minute?

THE COURT: No, sir, I think having listened to Mr. Lanford, the Court will impose its own sentence. It will be the sentence of the Court that the defendant will be sentenced to the term of 20 years in the Arkansas Department of Correction. That sentence will run consecutive with the sentence that he has to serve at this time. All right. That's all. The defendant will be remanded to the custody of the sheriff for transportation to the Department of Correction.

A judgment and commitment order sentencing appellant to twenty years was issued on February 22, 1989. Appellant then

filed a *pro se* motion to correct an illegal sentence, requesting that the court reinstate the original sentence. *See* Ark. Code Ann. § 16-90-111 (Supp. 1989). Appellant's counsel then filed a motion for reduction of sentence, praying that it be heard together with appellant's *pro se* motion and requesting that, if the court found appellant's sentence not to be illegal, the court reconsider and reduce appellant's sentence. *See id.* The parties then filed a writing in which appellant's counsel recommended that he accept the prosecutor's offer to agree to have the court reduce appellant's sentence from twenty to fifteen years, but reserve for decision appellant's motion to correct an illegal sentence. Appellant accepted that proposal in writing. The court found no merit in appellant's motion to correct an illegal sentence, but it did reconsider the twenty-year sentence pursuant to counsel's motion to reduce and reduced the sentence to fifteen years. New counsel was appointed for appellant on appeal.

Appellant first contends that the twenty-year sentence imposed on him was illegal. He argues that the statements made by the court at the conclusion of the February 22, 1989, hearing constituted the imposition of a sentence of five years to be followed by a suspended imposition of any additional sentence for a period of five years, and that the court was thereafter without "jurisdiction" to alter that sentence. The State argues that these statements by the court amounted to no more than a recitation of what the court would agree to if accepted by appellant, and that, in any event, the court had jurisdiction to alter it at any time before the sentence, if imposed, was placed into execution. The view we take of the case does not require that we resolve the issue of whether the court actually imposed the lesser sentence. We conclude that, even if the court had imposed such a sentence, it had not lost jurisdiction to alter it at the time that the larger sentence was imposed.

It is true that, with the exception of the provisions of Ark. Code Ann. § 16-90-111 (Supp. 1989), a trial court is without jurisdiction to modify, amend, or revise a valid sentence once it is placed into execution. *Redding* v. *State*, 293 Ark. 411, 738 S.W.2d 410 (1987); *Nelson* v. *State*, 284 Ark. 156, 680 S.W.2d 91 (1984). The basis for this rule is that jurisdiction over the offender has passed to the executive branch of government. However, according to *Redding*, it is only "[a]fter the sentence is

placed into execution" that the power to change the sentence passes from the trial court to the executive branch. 293 Ark. at 413, 738 S.W.2d at 411. *See also Charles* v. *State*, 256 Ark. 690, 510 S.W.2d 68 (1974); *Williams* v. *State*, 229 Ark. 42, 313 S.W.2d 242 (1958); *Fletcher* v. *State*, 198 Ark. 376, 128 S.W.2d 997 (1939); *Emerson* v. *Boyles*, 170 Ark. 621, 280 S.W. 1005 (1926). *Redding* also held that, subject to certain exceptions not applicable here, a sentence is placed into execution by the issuance of a commitment order. *See also* Ark. Code Ann. § 12-27-103(b)(1) (1987) ("[t]he department [of correction] shall have exclusive jurisdiction over . . . all persons and offenders *committed to, or in the custody of*, the state penitentiary" (emphasis added)).

In this case, no commitment order had been issued at the time that the twenty-year sentence was imposed. Therefore, we conclude that the trial court had not lost jurisdiction to change any prior sentencing order it may have rendered.[1]

Appellant's reliance on *Standridge* v. *State*, 290 Ark. 150, 717 S.W.2d 795 (1986), is misplaced. In *Standridge*, the court orally suspended imposition of sentence for one year. The "sentence" was rendered, but, before it was reduced to writing, the appellant violated the conditions of the suspension. The only issue before the court there was whether the rendered sentence was effective for the purpose of revocation prior to the formal entry of a commitment order. The court held that the sentence was "effective" when rendered. The question of whether a trial court retained jurisdiction to modify a sentence after rendition but before it was placed into execution was neither an issue nor decided in that case. Nor is *Coones* v. *State*, 280 Ark. 321, 657 S.W.2d 553 (1983), cited by appellant, supportive of his position. At the time *Coones* was decided, our supreme court was committed to the rule that, once a valid sentence is placed into execution,

---

[1] As to double jeopardy considerations, which are not argued in this appeal, see *United States* v. *DiFrancesco*, 449 U.S. 117 (1980), where the United States Supreme Court held that the mere imposition of a criminal sentence is not to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal. The Court noted with approval the established practice in the federal courts that the sentencing judge may recall the defendant and increase his sentence, at least so long as he has not yet begun to serve his sentence.

the trial court is without jurisdiction to modify it. That rule was applied in *Coones* to an order that modified a sentence nearly one year after the appellant had already begun serving his original sentence. The continuance of a trial court's jurisdiction over its orders prior to placing a sentence into execution was not an issue.

Appellant next contends that the trial court abused its discretion in imposing the twenty-year sentence. He argues that the sentence was imposed in anger rather than in the exercise of judicial deliberation, and that appellant was denied the assistance of his counsel at a critical juncture of the proceeding and denied a meaningful choice in accepting or rejecting the sentence that the court was proposing.

From our examination of the record, we cannot agree that the sentence was imposed in anger rather than being based upon the court's conclusion that, on the facts before it, a more severe sentence than was recommended was warranted. There is more merit in the argument that the trial court should have allowed appellant to discuss the matter with his counsel in order to make certain that he fully understood what was happening. However, as noted above, the record discloses that, subsequent to the imposition of the twenty-year sentence, appellant's counsel recommended that appellant accept the prosecuting attorney's offer to recommend a reduction of the sentence to fifteen years and that appellant agreed to that proposal in writing. The court subsequently granted the motion to reduce the sentence to fifteen years pursuant to Ark. Code Ann. § 16-90-111 (Supp. 1989). Since appellant obtained the relief he asked of the court on this point after he had ample opportunity to fully discuss the matter with counsel and obtain his advice, he should not now be heard to complain.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

ARKANSAS TEACHER RETIREMENT SYS. *v.* CORONADO PROPERTIES, LTD., A California Limited Partnership

CA 90-68 801 S.W.2d 50

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

Wilson & Associates, P,.A., by: *Charlene D. Bilheimer*, for appellant.

Steve Clark, Att'y Gen., for appellant State of Arkansas.

Daily, West, Core, Coffman & Canfield, by: *Stanley A. Leasure*, for appellee.

JOHN E. JENNINGS, Judge. This appeal is from a judgment of the Sebastian County Chancery Court holding that appellee, a junior mortgagee, is entitled to the proceeds of a fire insurance policy. We affirm the chancellor's ruling.

Appellant, Arkansas Teacher Retirement System (ATRS), held a note and first mortgage on an apartment project in Fort Smith. On May 24, 1984, appellee, Coronado Properties, owner of the property, conveyed the apartment complex to French Village Investment Company by general warranty deed and French Village assumed the indebtedness owed ATRS and executed a "Wrap-Around Purchase Money Mortgage" in favor of Coronado. The mortgage held by ATRS required French Villager to insure the property against loss for ATRS' benefit, and the insurance policy contained a standard mortgage clause naming ATRS as mortgagee. Coronado was not listed on the policy as a mortgagee or loss payee.

The apartment complex was damaged by fire on December 8, 1988, and the insurance policy in effect on the date of loss named ATRS' servicing agent, Worthen Mortgage Corporation, as mortgagee. Several months afterward, ATRS filed suit to foreclose its first mortgage. ATRS was awarded a judgment *in rem* for $1,366,061.67, and Coronado was given an *in rem* judgment for $195,144.76, and its judgment lien was made inferior to the lien of ATRS. ATRS, the sole bidder at the commissioner's sale, purchased the property in its damaged condition for a bid in excess of its judgment. The court confirmed the sale, and ATRS entered its "Satisfaction of Judgment" on September 17, 1989.

Prior to purchasing the property, ATRS had filed its proof of loss in the amount of $121,300.00 with the insurance carrier. At that time, the loss had not been settled and no repair had been made to the December 1988 fire damage. After ATRS purchased the property and entered its satisfaction of judgment, a check in the amount of $119,300.00 was tendered by the insurance company in full settlement of the fire loss. The check was made

payable to ATRS' agent, Worthen Mortgage Corporation; French Village; and Jerry Mitchel, general partner for Coronado. French Village negotiated the check for payment; however, ATRS and Coronado both claimed the insurance proceeds. By agreed order, the proceeds were interpled into the registry of the court pending a determination of which party was entitled to them.

After a hearing on the merits, the court entered judgment for Coronado. It held that ATRS was not entitled to the insurance proceeds because its judgment had been satisfied at the commissioner's sale. It further found that the wrap-around mortgage held by Coronado created a duty on the part of French Village to insure the property for the benefit of Coronado and, therefore, Coronado was entitled to the insurance proceeds under an equitable lien theory even though there was no loss payable clause in its favor in the policy.

For its first point, ATRS contends that a strict interpretation of the language contained in its mortgage contract assumed by French Village and French Village's insurance policy naming its agent as mortgagee conclusively establishes that it had an absolute legal right to the insurance proceeds. French Village's insurance policy contained a standard or union mortgage clause which provides as follows:

> 11. Mortgage Clause - Applicable Only to Buildings. This clause is effective if a mortgagee is named in the Declarations. Loss to buildings shall be payable to the named mortgagee, as interest may appear under all present or future mortgages on the buildings described in the Declarations in order of precedence of mortgages on them. As it applies to the interest of any mortgagee designated in the Declarations, this insurance shall not be affected by any of the following:
>
> a. any act or neglect of the mortgagor or owner of the described buildings;
>
> b. any foreclosure or other proceedings or notice of sale relating to the property;
>
> c. any change in the title or ownership of the property;

. . . .

When a mortgagee's interest in property is protected by a standard or union mortgage clause, the parties have effected a pre-appropriation of the insurance proceeds and the proceeds cannot be used for another purpose without consent of both parties. *Sharp* v. *Pease*, 193 Ark. 352, 355, 99 S.W.2d 588, 590 (1936); *Bonham* v. *Johnson*, 98 Ark. 459, 461, 136 S.W. 191, 192 (1922). ATRS concludes that, because it was protected by a standard or union mortgage clause and it is the only mortgagee listed on the policy, it has all legal and equitable right to the insurance proceeds and to hold otherwise is to disregard the specific contract language. This conclusion, however, ignores the chancellor's finding that it no longer has a legal or equitable right to the proceeds because its debt has been satisfied in full.

While the specific issue presented here has not been addressed by our courts, the prevailing rule in other jurisdictions is that a mortgagee forfeits its right to proceeds from an insurance policy when the loss occurs prior to the foreclosure and the amount bid at the foreclosure sale is sufficient to satisfy the mortgagee's debt. Both of these conditions have been met here.

As in the case at bar, the owner's insurance policy in *Northwestern National Insurance Co.* v. *Mildenberger*, 359 S.W.2d 380 (Mo. Ct. App. 1962), contained a standard mortgage clause making loss or damage under the policy payable to its mortgagee "as interest may appear," and provided that the mortgagee's rights would not be invalidated by any act of the mortgagor. 359 S.W.2d at 382. The deed of trust in *Northwestern* also gave the trustee the "privilege and authority to make proof of loss and adjust and collect insurance . . . [and] assign policies to purchaser at foreclosure. . .," 359 S.W.2d at 385. In interpreting this language, the court in *Northwestern* stated:

> The provision giving the note holder the privilege to adjust and collect the insurance must be read in context with the rest of the paragraph. When that is done, it is apparent that whatever privileges the holder of the note is given are for the purpose of securing the payment of the note. These privileges were never intended to extend beyond their ultimate purpose of protecting the security for the payment of the note. Once the note is paid, they have no

> further function. If the debt is not paid, the security covered by the deed of trust is to be available to pay it; and to see that the security, the property covered by the deed of trust, will be available to do so, the mortgagee is required to purchase insurance and the mortgagee given certain privileges as to that insurance. . . .
>
> In Hartford Fire Insurance Company v. Bleedorn, 235 Mo. App. 286, 132 S.W.2d 1066 at 1. c. [7, 8] page 1072, this court held that the phrase, "as its interest may appear" in a standard union mortgage clause refers to the amount of the debt owed to the mortgagee and secured by the deed of trust and "* * * does not refer to appellant's (mortgagee's) interest in the property."

Northwestern, 359 S.W.2d at 385-86.

Holdings similar to that in *Northwestern* are found in other jurisdictions. "The law in most jurisdictions seems to be that if the mortgage debt is satisfied by the proceeds of sale, as reflected in the mortgage or deed of trust in this case, the mortgagee is entitled to no further payment on account thereof." *Helmer* v. *Texas Farmers Inc. Co.*, 632 S.W.2d 194, 196 (Tex. Ct. App. 1982). If the mortgagee has bid in the full amount of its secured debt at the sale, it thereby satisfies its lien and loses all entitlement to any insurance proceeds. *Sportsmen's Park, Inc.* v. *New York Property Ins. Underwriting Ass'n*, 97 A.D.2d 893, 470 N.Y.S.2d 456, 459 (1983); *Lembo* v. *Parks*, 372 N.E.2d 1316, 1317 (Mass. App. Ct. 1978).

> Where . . . the loss precedes the foreclosure, the rule is different since the mortgagee has an election as to how he may satisfy the mortgage indebtedness by two different means. He may look to the insurance company for payment as mortgagee under the New York Standard Mortgage clause and may recover, up to the limits of the policy, the full amount of the mortgage debt at the time of the loss. In this event he would have no additional recourse against the mortgagor for the reason that his debt has been fully satisfied.
>
> The second alternative available to the mortgagee is satisfaction of the mortgage debt by foreclosure. If the

> mortgagee elects to pursue this latter option, and the foreclosure sale does not bring the full amount of the mortgage debt at the time of the loss, he may recover the balance due under the insurance policy as owner. If the foreclosure does fully satisfy the mortgage debt, he, of course, has no additional recourse against the insurance company, as his debt has been fully satisfied.

Nationwide Mutual Fire Ins. Co. v. *Wilborn*, 279 So.2d 460, 463 (Ala. 1973) (citations omitted).

The rationale for the rule preventing a mortgagee from claiming insurance benefits after it has bid its total debt at the foreclosure sale was explained in *Smith* v. *General Mortgage Corporation*, 402 Mich. 125, 261 N.W.2d 710 (1978):

> "The rule is not harsh and it is eminently practical. None disputes that the mortgagee is entitled to recover only his debt. Any surplus value belongs to others, namely, the mortgagor or subsequent lienors. Indeed, it is not conceivable that the mortgagee could recover a deficiency judgment against the mortgagor if it had bid in the full amount of the debt at foreclosure sale. To allow the mortgagee, after effectively cutting off or discouraging lower bidders, to take the property—and then establish that it was worth less than the bid—encourages fraud, creates uncertainty as to the mortgagor's rights, and most unfairly deprives the sale of whatever leaven comes from other bidders."

261 N.W.2d at 712 (emphasis deleted) (quoting *Whitestone Sav. & Loan Ass'n* v. *Allstate Ins. Co.*, 28 N.Y.2d 332, 336-37, 270 N.E.2d 694, 697, 321 N.Y.S.2d 862, 866 (1971)).

We have said that a mortgagee can retain only so much of the insurance proceeds to cover his interest in the property. *See Wilbanks & Wilbanks, Inc.* v. *Cobb*, 269 Ark. 936, 939, 601 S.W.2d 601, 603 (Ark. App. 1980). "[W]hen a mortgagee is named as loss payee in its mortgagor's insurance policy, and a loss occurs, the mortgagee is entitled to enough of the proceeds to satisfy the mortgage indebtedness." *Echo, Inc.* v. *Stafford*, 21 Ark. App. 201, 205, 730 S.W.2d 913, 915 (1987).

We conclude that the chancellor correctly found that

ATRS' bid at the foreclosure sale, which satisfied its judgment, extinguished its rights to the proceeds from the insurance policy.

For its second and third points, ATRS argues that the chancellor erred in finding the "wrap mortgage" French Village gave Coronado created a duty on the part of French Village to insure the property for the benefit of Coronado and, therefore, Coronado was not entitled to an equitable lien on the proceeds of the insurance policy.

The wrap mortgage required French Village *for the benefit of Coronado* to "observe the covenants and agreements on the part of the 'borrower' to be performed and/or observed under the terms of the Underlying Notes and the Underlying Mortgages . . . ." It is undisputed that ATRS' mortgage, the "underlying mortgage," specifically required insurance. Construing this mortgage as a whole, the chancellor correctly interpreted the wrap mortgage to require French Village to maintain insurance on the property for the benefit of ATRS and Coronado.

The fact that Coronado was not listed on the insurance policy as loss payee did not defeat its claim to an equitable lien on the proceeds. Where an insurance policy is procured by a mortgagor under an agreement to insure for the mortgagee's benefit, the proceeds *recovered* by the mortgagor are held in trust for the mortgagee, and the mortgagee has an equitable lien on the proceeds of the insurance for the satisfaction of his mortgage, regardless of whether the policy is made payable to him. *Hatley* v. *Payne*, 25 Ark. App. 8, 13, 751 S.W.2d 20, 22 (1988). *See also Nat'l Bedding & Furniture Indus., Inc.* v. *Clark*, 252 Ark. 780, 783, 481 S.W.2d 690, 691-92 (1972); *Sharp* v. *Pease*, 193 Ark. at 354-55, 99 S.W.2d at 590; *Wiener* v. *Sentinel Fire Ins. Co.*, 87 F.2d 286, 288 (2d Cir. 1937); *Jeffreys* v. *Boston Ins. Co.*, 202 N.C. 368, 162 S.E. 761, 762-63 (1932); *Shelton* v. *Providence Washington Ins. Co.*, 131 S.W.2d 330, 332 (Tex. Civ. App. 1939).

ATRS cites *Hatley*, 25 Ark. App. at 13, 751 S.W.2d at 22, as authority for its contention that an equitable lien theory cannot be applied in favor of a mortgagee where a union mortgage clause exists naming a specific mortgagee. ATRS' reliance is misplaced. In *Hatley*, we held that the appellants, who were not listed as loss payees in the policy, were not entitled to an equitable lien on the

insurance proceeds because the insured committed arson. Because their rights to the proceeds could be no greater than the rights of the insured, they could not recover under the insurance policy. Here, there has been no act by French Village which has caused it to forfeit its rights to the proceeds.

We also disagree with ATRS' argument that, because Coronado held only an *in rem* judgment, its judgment was extinguished when the property was sold at the foreclosure sale. A sale of property under a chancery decree to enforce a paramount lien extinguishes a junior lien *or* transfers it to the proceeds of the sale. *Jones, McDowell & Co.* v. *Arkansas Mech. and Agl. Co.*, 38 Ark. 17, 27-28 (1881). A mortgagee is bound to pay to the junior mortgagee any proceeds remaining after discharge of its original debt. *Walton* v. *Gen. Am. Life Ins. Co.*, 383 S.W.2d 854, 856 (Tex. Civ. App. 1964). After ATRS' mortgage was satisfied, the insurance proceeds remained as additional funds for the satisfaction of the junior liens.

ATRS' argument that Coronado is not entitled to the insurance proceeds because it comes to court with unclean hands is also without merit. ATRS has not been injured because its judgment was fully satisfied at the foreclosure sale. A party must prove that he was injured in order for the unclean hands doctrine to apply. *Sandusky* v. *First Nat'l Bank*, 299 Ark. 465, 468, 773 S.W.2d 95, 97 (1989).

Affirmed.

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

William J. WOLFE *v.* CITY OF EL DORADO, et al.

CA 90-149 799 S.W.2d 812

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

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

J. Chris Bradley, for appellee.

JOHN E. JENNINGS, Judge. On September 12, 1987, William J. Wolfe sustained an admittedly compensable injury to his neck resulting from an automobile accident. Wolfe was then an officer with the El Dorado Police Department. His neck injury was treated with physical therapy, muscle relaxants, and pain pills.

On November 23, 1988, Mr. Wolfe's wife, Wanda, drove to work in his pickup truck. When Wolfe discovered his medicine had been left in the truck he drove his wife's car to her work place to retrieve it. On the way home his vehicle was struck from the rear. The accident resulted in an injury to Wolfe's lower back, which was also treated with physical therapy.

The issue is whether the claimant's second injury is compensable. The administrative law judge held that it was, relying on *Preway, Inc.* v. *Davis*, 22 Ark. App. 132, 736 S.W.2d 21 (1987).

The Commission held that it was not, distinguishing *Preway*. We affirm the Commission's decision.

In *Preway* the claimant sustained a compensable back injury. She sought permission from the insurance carrier to see a doctor in her hometown of Paragould but was advised by the carrier to return to her treating physician in Memphis. On the way to the doctor's office the claimant had an automobile accident and suffered a broken ankle. We affirmed the Commission's conclusion that the second injury was compensable. We quoted, with approval, the general rule from Larson that "when an employee suffers additional injuries because of an accident in the course of a journey to a doctor's office occasioned by compensable injury, the additional injuries are generally held compensable. . . ." *Preway, Inc.*, 22 Ark. App. at 134, citing 1 A. Larson, *The Law of Workmen's Compensation* § 13.13 (1985). *See also McElroy's Case*, 397 Mass. 743, 494 N.E.2d 1 (1986); *Laines* v. *Workmen's Compensation Appeals Bd.*, 48 Cal. App. 3d 872, 122 Cal. Rptr. 139 (1975); *Taylor* v. *Centex Constr. Co.*, 191 Kan. 130, 379 P.2d 217 (1963).

We also discussed Larson's concept of "quasi-course of employment":

> By this expression is meant activities undertaken by the employee following upon his injury which, although they take place outside the time and space limits of the employment, and would not be considered employment activities for usual purposes, are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury.

The word "reasonable" as used here by Larson "relates not to the method used, but to the category of activity itself." 1 A. Larson, *The Law of Workmen's Compensation* § 13.11(d) (1990).

While we were correct in holding in *Preway* that the "going and coming rule" did not govern the decision there, some of the general principles associated with the rule certainly are not irrelevant. The claimant bears the burden of proving that his injury was the result of an accident that arose in the course of his employment, and that it grew out of, or resulted from the

employment. *Moore* v. *Darling Store Fixtures*, 22 Ark. App. 21, 732 S.W.2d 496 (1987). In order for an injury to arise out of the employment it must be a natural and probable consequence or incident of the employment and a natural result of one of its risks. *Arkansas Dep't of Health* v. *Huntley*, 12 Ark. App. 287, 675 S.W.2d 845 (1984).

The facts in *Maguire's Case*, 16 Mass. App. 337, 451 N.E.2d 446 (1983) are virtually indistinguishable from the case at bar. There the claimant suffered an injury to a tooth while in the scope and course of her employment. She was treated by a dentist who prescribed penicillin and codeine. A few days later the dentist pulled the tooth. As the claimant headed back to work she realized she had left her codeine at home. On the way back to retrieve it she was injured in an automobile accident. The Massachusetts Appeals Court, while recognizing that recovery is generally allowed for injuries sustained while in route for medical treatment of work-related injuries, held that an injury such as the claimant's was beyond the risk that an employer is required to bear.

A somewhat similar decision was made in *Schander* v. *Northern States Power Co.*, 320 N.W.2d 84 (Minn. 1982). There the claimant was injured in an automobile accident while returning home after attending a retraining course for which he had been certified following a work-related injury. While the court recognized that under Minnesota law an employee has "as much right to receive retraining as he does to receive medical treatment," the court held that compensation should not have been awarded for the second injury:

> We are not convinced, however, that there is a sufficiently direct relationship between employment and injuries sustained by an employee while returning from his retraining course to his home that justify the conclusion that during that time he is in the course of employment.

Schander, 320 N.W.2d at 85.

We agree with the holdings in *Maguire's Case* and *Schander*. Certainly the claimant's prior compensable injury was a cause of his second automobile accident in the sense that, but for the original compensable injury, Wolfe would have had no

occasion to be taking the medicine at all. His conduct in driving to his wife's place of work to get his medicine was not unreasonable in the abstract. However, the risk of injury during the course of this "category of activity," *i.e.* a trip by the claimant to retrieve forgotten medication, is one which, on balance, ought not to be borne by the employer.

Affirmed.

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

Amal OLAIMEY *v.* Nancy (Olaimey) TURK

CA 89-502 799 S.W.2d 572

Court of Appeals of Arkansas
En Banc
Opinion delivered December 12, 1990

Bramlett & Pratt, by: *Eugene D. Bramlett*, for appellant.

Friday, Eldredge & Clark, by: *Barry E. Coplin*, for appellee.

PER CURIAM. In this case, a panel of this court affirmed the

ruling of the chancellor granting appellee's petition for arrearages in child support. Appellee has submitted a motion requesting attorney's fees and costs incurred on appeal. Appellant has responded agreeing to an award of costs, but denying appellee's entitlement to attorney's fees.

In *Elkins* v. *Coulson*, 293 Ark. 539, 739 S.W.2d 675 (1987), the supreme court had before it a petition for a writ of prohibition contesting our authority to award attorneys' fees on appeal. The court ultimately denied the writ and dismissed the petition on procedural grounds, but in doing so, the court stated that "[t]he court of appeals clearly has jurisdiction and authority to award attorneys' fees in divorce cases." The court mentioned, however, in a footnote, citing the case of *Floyd* v. *Isbell*, 211 Ark. 631, 201 S.W.2d 755 (1947) that it may have been error to have awarded fees in that instance. In *Floyd* v. *Isbell*, the supreme court disallowed fees on appeal because the underlying action was to set aside a decree, and that type of action was not covered by the statute authorizing the recovery of attorneys' fees, which is now codified at Ark Code Ann. § 9-12-309(b) (Supp. 1989). Similarly, *Elkins*, *supra*, was an action to set aside a decree.

The clear implication from the above-cited authorities is that attorneys' fees are recoverable on appeal in domestic relations actions for "the enforcement of alimony, maintenance and support," as governed by the statute. Since the instant case involves the enforcement of child support, we do have the authority to award attorneys' fees on appeal.

The question remains, however, as to whether we should award fees in this case, and if so, what amount. In her motion, appellee states that 10.25 hours were spent preparing the appeal at $100 an hour for a total of $1,025, exclusive of costs named at $172.40.

Judging by the issues raised and the brief submitted, this is a reasonable request. In this case appellee was compelled to hire an attorney to enforce her legal rights granted under court order. Even though fees were allowed below, this is no reason to deny fees on appeal. It is rare that the fees awarded by the court adequately compensate the parties for the actual fees incurred. Appeals necessarily require additional time and the costs associated with appeals are rapidly increasing. It would be harsh not to

compensate a party for defending a court order on appeal, simply because they recovered attorney's fees at the trial level.

We have seen a metamorphosis in our society's attitude toward fees. We have shifted the burden of some costs to the wrongdoer or to those who prosecute frivolous actions. We are aware of the ever increasing specialized knowledge needed to become an attorney and to sharpen these skills, as well as the increased cost of private practice. It is surely harsh and unrealistic to deny those persons who perhaps may be the least able to afford fees, i.e. those who attempt to collect arrearages in child support, additional funds on appeal. Far from having a chilling effect on litigation, it may prompt non-custodial parents to voluntarily or more willingly pay sums required under court order.

Therefore, we grant appellee's motion for attorney's fees in the amount of $1,025 with costs of $172.40.

MAYFIELD, J., dissents.

JENNINGS, J., not participating.

MELVIN MAYFIELD, Judge, dissenting. The majority of the court has today ordered the appellant to pay appellee the sum of $1,025.00 for the services rendered by her attorney in the appeal of this case. I dissent for two reasons.

First, I dissent because appellee's motion contains no statement of authority in support of her request for attorney's fee, and makes no attempt to state any reason why the request should be granted. In *Bailey* v. *Montgomery*, 31 Ark. App. 1, 786 S.W.2d 594 (1990), this court stated: "As a general rule, attorney's fees are not allowed in Arkansas unless expressly authorized by statute." We cited the Arkansas Supreme Court opinion of *Damron* v. *University Estates, Phase II, Inc.*, 295 Ark. 533, 750 S.W.2d 402 (1988), in support of that statement. Thus, I would deny appellee's motion because it simply fails to show any reason or authority for us to grant it.

In the second place, even if we were required or desired to determine on our own whether there is reason and authority to grant the motion, I would not do so under the facts and law.

This was an appeal from the trial court's holding that

appellant could not reduce the child support payable to appellee when one of the children started living with him instead of the appellee. While it is true that Ark. Code Ann. § 9-12-309(b) (Supp. 1989) provides that an attorney's fee *may* be allowed to *either* party for the enforcement of child support provided in a divorce decree, I would not allow a fee to the appellee for the services for her attorney in this court under the circumstances of this case. She has already been allowed a fee of $1,000.00 by the trial court and has been allowed court cost for the physical preparation of the brief filed by her in this court, and, in my opinion, the basis of the appellant's appeal clearly demonstrates that in fairness and equity any additional attorney's fee due appellee's attorney for this appeal should be paid by her.

Jerry THORNTON *v.* Darrell David BRUCE

CA 90-143 800 S.W.2d 723

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

Daily, West, Core, Coffman & Canfield, by: *Eldon F. Coffman*, and *Douglas M. Carson*, for appellant.

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, by: *R. Gunner DeLay*, for appellee.

GEORGE K. CRACRAFT, Judge. Jerry Thornton appeals from an order of the Arkansas Workers' Compensation Commission denying him benefits for a back injury alleged to have occurred in the scope of his employment with appellee Darrell David Bruce. The only issue presented on appeal is whether the administrative law judge erred in refusing to allow appellant's wife to testify as a witness. We affirm.

In December 1, 1988, the administrative law judge ordered that lists of witnesses be provided to the Commission and opposing counsel no later than January 15, 1989, and that all depositions be completed by February 15, 1989. The hearing on the merits was scheduled for February 16. On January 24, 1989, appellant's attorney advised the ALJ and appellee's counsel that he was adding appellant's wife to his list of witnesses that was previously provided pursuant to the prehearing order. Appellee objected to appellant's wife being permitted to testify because her name had not been provided to either the Commission or counsel for appellee by January 15, as required by the pre-hearing order. Appellee's objection was sustained. At the conclusion of the hearing on the merits, the ALJ found that appellant had sustained a compensable injury to his right leg and awarded benefits, but denied appellant any benefits attributable to his back problems. The Commission affirmed, adopting the findings made by the ALJ. There was no mention in either the opinion of the Commission or that of the ALJ of the latter's ruling prohibiting appellant's wife from testifying.

On appeal, appellant argues that the ALJ erred in ruling that appellant's wife not be permitted to testify because an ALJ has no authority to prohibit a witness from testifying under the rules of the Commission or the rules of civil procedure. For the reasons stated below, we do not address appellant's argument.

In workers' compensation cases, the Commission conducts a *de novo* review of the record; it is not its function to

review the decision made by the ALJ for error. On appeal to this court, we review the decision of the Commission and not that of the ALJ. *Johnson* v. *Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989). The Commission is authorized to take testimony by deposition or otherwise, Ark. Code Ann. § 11-9-207(a)(10) (1987), or to remand the matter to the ALJ for the purpose of taking additional evidence. Ark. Code Ann. § 11-9-704(b)(7) (1987). Here, appellant sought neither remedy with regard to this witness but simply asks us to reverse the case, contending that the ALJ committed error. Because we find no error in the proceedings before the Commission, the case is affirmed.

MAYFIELD and ROGERS, JJ., agree.

FRANKLIN COLLIER FARMS and Grain Dealers Mutual Insurance Company *v.* Earnestine BULLARD, Widow of John Bullard, Deceased

CA 90-221 800 S.W.2d 438

Court of Appeals of Arkansas
Division II
Opinion delivered December 19, 1990

Boswell, Tucker & Brewster, by: *W. Lee Tucker*, for appellants.

Winfred A. Trafford, for appellee.

JOHN E. JENNINGS, Judge. Franklin Collier Farms has a large farming operation in eastern Arkansas. John Bullard was the farm manager of the farm located at Moscow, Arkansas. On August 10, 1985, Bullard was killed when his airplane crashed in a soybean field on the farm. The Commission awarded death benefits to his widow, Earnestine Bullard. The argument on appeal is that the Commission's finding that Bullard's death arose out of and in the course of his employment is not supported by substantial evidence. We affirm the Commission's decision.

Eddie Bullard, the deceased's brother, was also employed at the Moscow farm. Since his brother's death, Eddie Bullard has taken his place as farm manager. Eddie Bullard testified that on the morning of August 10, 1985, he and John were cutting corn for shipment to Augusta. That morning John told Eddie that they needed to check some of the soybean fields for certain weeds called "coffee beans." John Bullard's home and a private airstrip were located on the Moscow farm. John owned a plane which he used in connection with his duties as farm manager. These duties included inspecting soybean fields for weeds. Later that day Philip Osterman, Lonnie Kagebin, and Chuck Clayton arrived by plane at the Moscow farm airstrip. Clayton and Kagebin were cropdusters; Osterman was a state policeman. Osterman had previously told the Monroe County Sheriff's Department that he would be flying to check for marijuana that afternoon. After some discussion, the group decided to fly in three planes to Pine Bluff to look at a World War II airplane there. There is no contention that the trip to Pine Bluff to see the airplane was a part of John Bullard's duties as farm manager. Eddie Bullard rode with

Clayton, Kagebin flew by himself, and Osterman flew John Bullard's plane.

After viewing the airplane in Pine Bluff, John Bullard told the others that he was going back to work and the group left Pine Bluff to return to the farm at Moscow. This time John Bullard was in the front seat of his own airplane with Osterman in the back, and according to Eddie Bullard's testimony, John was flying the plane. As the three planes neared the farm airstrip, John Bullard's plane veered off from the others and flew "telephone pole high" over some low lying areas of the fields which he had intended to check for coffee beans. His plane crashed in a soybean field located approximately in the middle of the Moscow farm.

It was undisputed that the employer furnished fuel for the plane. Eddie testified that John was a conscientious farm manager and had a habit of flying over and inspecting the farm each time he flew back.

Mr. Franklin Collier testified that John Bullard was on the job on the day of his death. He said that John Bullard had told him that day that he was going to check some of the soybean fields for coffee beans to see if they needed spraying and that Bullard checked the fields with both his airplane and his truck. He also testified that the field in which Bullard's plane crashed was one of the fields he would have been checking for coffee beans.

Appellant correctly notes that it was the appellee's burden to prove that the accident arose out of and in the course of employment. *Woodard* v. *White Spot Cafe*, 30 Ark. App. 221, 785 S.W.2d 54 (1990). When the Commission makes such a finding, the question on appeal is whether the Commission's decision is supported by substantial evidence. The issue of substantial evidence is, as appellant contends, one of law. *See Fuller* v. *Johnson*, 301 Ark. 14, 781 S.W.2d 463 (1989). In determining whether the Commission's findings are supported by substantial evidence, we are obliged to view the evidence in the light most favorable to those findings and give the testimony its strongest probative force in favor of the Commission's action. *Blevins* v. *Safeway Stores*, 25 Ark. App. 297, 757 S.W.2d 569 (1988). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclu-

sion. *College Club Dairy* v. *Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988). We do not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. *Silvicraft, Inc.* v. *Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

While it is true that conjecture and speculation cannot take the place of credible evidence, it is equally true that the Commission has the right to consider all circumstances and proven facts and to draw all reasonable inferences deducible therefrom. *See Wilson* v. *United Auto Workers*, 246 Ark. 1158, 441 S.W.2d 475 (1969). The Arkansas Supreme Court has said that circumstantial evidence is sufficient to support an award and it may be based upon the reasonable inferences that arise from the reasonable probabilities flowing from the evidence; neither absolute certainty nor demonstration is required. *Herron Lumber Co.* v. *Neal*, 205 Ark. 1093, 172 S.W.2d 252 (1943).

Appellant argues that the case at bar ought to be analyzed under the "dual purpose" trip doctrine. *See, generally*, *Rankin* v. *Rankin Construction Co.*, 12 Ark. App. 1, 669 S.W.2d 911 (1984). In *Rankin* we quoted with approval from 1 A. Larson, *The Law of Workmen's Compensation* § 18.00 (1982):

> Injury during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal journey.

We cannot agree that the "dual purpose" doctrine is applicable. In *J&G Cabinets* v. *Hennington*, 269 Ark. 789, 600 S.W.2d 916 (Ark. App. 1980), we said:

> 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. In order for an injury to arise out of the employment, it must be a natural and probable consequence or incident of the employment and a natural result of one of its risks.

(Citation omitted.)

If we assume in the case at bar that John Bullard's trip to Pine Bluff was of a purely personal nature, the undisputed evidence is that at the time of his fatal accident he had returned to the farm. Furthermore the Commission could reasonably infer from the evidence that, at the time of the crash, Bullard was inspecting soybean fields for coffee beans, which was one of the duties of his employment. While it is true that no one can be absolutely certain what John Bullard was doing at the time of his death, absolute certainty is not required. *See Herron Lumber Co., supra.* The inference that he had gone back to work at the time of his death was a reasonable one — one which the Commission was entitled to draw. We therefore hold that the Commission's decision was supported by substantial evidence.

Affirmed.

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

Ronald Shane SMITH *v.* STATE of Arkansas

CA CR 90-51 801 S.W.2d 655

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

Grisham A. Phillips, for appellant.

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

JOHN E. JENNINGS, Judge. Shane Smith was convicted of the second degree murder of Keith McCaskill and was sentenced to ten years imprisonment. On appeal, Smith argues that the trial court erred in: (1) overruling his motion to suppress, (2) excluding evidence of the victim's fighting ability, (3) excluding evidence offered to show that other persons had threatened the victim and that he was in fear for his life, and (4) restricting his cross-examination of the medical examiner. We find sufficient

merit in the third point raised to require reversal. Because the other issues raised may arise again on retrial, they must also be discussed.

Keith McCaskill, 44, was a bouncer in a local nightclub. His body was found by some friends in the garage of his home on November 10, 1988. He had been stabbed approximately one hundred times. While the police were investigating the scene of the crime, they were approached by Ronnie Smith, McCaskill's neighbor, who told them that his nineteen-year-old son, Shane, had witnessed the murder.

Police officers promptly interviewed Shane Smith in his home. Midway through the questioning, the officers asked that the interview be moved to the police department and Smith agreed. Smith told them that early in the morning of November 10 he was watching a movie at home when he saw three men in clown masks knocking at the front door of McCaskill's house. He then saw the men go into McCaskill's garage. According to Smith he got up and put on his coat and went over to McCaskill's house. Two of the men "jumped" him and threw him up against a wall. One of the men stabbed him in the hand and told him to be quiet. Smith said at least one of the men was black. Shortly afterwards, McCaskill arrived home and entered the garage. Smith said that he saw one of the men, "the blond-headed one," stab McCaskill. The men then gave Smith a silver tray and a paper bag containing video cassettes and told him to leave. Smith said that as he was running he slipped in the blood on the garage floor and fell. He saw the men run off in different directions. Smith said that when he got home he washed his clothes, but because he could still smell blood on them, he put them in a garbage bag and threw them into a nearby river. After the interview, Shane Smith went home.

The police subsequently found his blood-stained clothing in the river. They also found the silver tray and a bag containing seven pornographic video tapes in an outbuilding behind the Smith home.

The police questioned the appellant again on the following day, November 11, but this time Smith was advised of his rights and signed a waiver. This statement was basically consistent with the earlier one.

The third and final statement was taken at Smith's request on November 12, after he had been charged with capital murder. There were significant differences between this version and the two previous statements. Some of the more significant differences were that appellant claimed there were five men present, rather than three; that all the men were dressed in black and were wearing black masks, rather than clown masks; and that he did not actually see McCaskill stabbed but only heard the struggle. Smith's testimony at trial was consistent with this last statement given to the police. His explanation for the variations in his statements was that he was scared and confused.

The state medical examiner, Dr. Fahmy Malak, placed the time of death at about the time Smith said it happened. Tennis shoe prints were found at McCaskill's home, but it appears they did not match the shoes worn by appellant that night. Human hair was found clutched in the victim's fist; it did not match the appellant's, but could have been McCaskill's own hair. The murder weapon was never found and no clear motive for the killing was ever established.

As part of his case-in-chief the appellant proffered the testimony of Kenneth Kitler, an inmate in the Department of Correction. Kitler testified that in October of 1988 one Rick Cotton, Sr., offered him $4,000.00 to kill Keith McCaskill, but that Kitler declined. The trial court ruled that the evidence was not relevant and that any probative value was outweighed by the prejudicial effect and the confusion it would cause the jury. Appellant also proffered the testimony of several witnesses to the effect that, shortly before his death, McCaskill had expressed to them that he was in fear for his life because of something he knew. One witness, a long-time police officer, testified that McCaskill had approached him about ten days before his death and told him that three men, one black and two white, had been following him. The witness described McCaskill as very frightened. Again, the trial court excluded the evidence because the probative value was outweighed by prejudice and on the additional basis that it was hearsay.

Generally, all relevant evidence is admissible. Ark. R. Evid. 402. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence

to the determination of the action more probable or less probable than it would be without the evidence." Ark. R. Evid. 401. Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. Ark. R. Evid. 403. The balancing of probative value as against unfair prejudice is a matter, in the first instance, for the trial court. *See Parrish* v. *Newton*, 298 Ark. 404, 768 S.W.2d 17 (1989). The trial court has considerable discretion in such matters. *Carter* v. *State*, 295 Ark. 218, 748 S.W.2d 127 (1988).

Under the circumstances presented here, evidence of the offer to pay for the murder of Keith McCaskill should have been admitted. "Fundamental standards of relevancy, subject to the discretion of the court to exclude cumulative evidence and to ensure orderly presentation of a case, require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged." *United States* v. *Armstrong*, 621 F.2d 951 (9th Cir. 1980); *see also Barnes* v. *State*, 415 So.2d 1280, 1284 (Fla. Dist. Ct. App. 1982) (Grimes, Acting Chief Judge, dissenting). When, as in the case at bar, the evidence is circumstantial, threats to kill made by other parties are relevant to prove motive on the part of someone other than the accused. *Murphy* v. *State*, 36 Tex. Cr. R. 24, 35 S.W. 174 (1896); *see also McAdams* v. *State*, 378 So.2d 1197 (Ala. Crim. App. 1979). Here, the proffered evidence went beyond a mere threat.

Under the peculiar circumstances of this case we also hold that it was error to exclude the proffered evidence of McCaskill's expressions of fear for his life, made shortly before his death. While such evidence might ordinarily be properly excluded, it should be admitted in a proper case. *See* 40 Am. Jur. 2d *Homicide* § 321 (1968). Evidence of the victim's expressions of fear for her life were held admissible in *Karnes* v. *Commonwealth*, 125 Vir. 758, 99 S.E. 562 (1919). The Virginia Supreme Court said:

> In this case the evidence tending to show that the accused had any motive for committing the crime is very slight indeed, if not negligible, whereas, there is much tending to create the suspicion that possibly [a third party] was the guilty agent. . . . [I]t is well settled that, where there is a trend of facts and circumstances tending clearly

> to point out some other person is the guilty party, the prisoner may introduce any legal evidence which is available tending to prove that another person committed the crime with which he is charged.
>
> . . . .
>
> While a large discretion must and should remain vested in the trial court as to the admission of this class of tesitmony, it is always safer, in cases depending upon circumstantial evidence alone, to admit rather than to reject, and this is the tendency of modern statutes and decisions relating to evidence.

99 S.E. at 565 (Citations omitted).

In the case at bar the expressions of fear on behalf of the victim are admissible because of the circumstantial nature of the evidence against the appellant, the nature of appellant's defense, and the evidence of solicitation of murder by a third party. The evidence also should not have been excluded as hearsay as it comes within the state of mind exception of Ark. R. Evid. 803(3). *See Karnes*, *supra*. In a slightly different context the Court in *United States* v. *Brown*, 490 F.2d 758 (D.C. Cir. 1973), said, "The rule then to be distilled from the better reasoned decisions is that a victim's extra-judicial declarations of fear of the defendant are admissible under the state of mind exception to the hearsay rule with a limiting instruction only if there is a manifest need for such evidence, *i.e.*, if it is relevant to a material issue in a case." *See also State* v. *Parr*, 606 P.2d 263 (Wash. 1980).

The appellant also sought to introduce testimony of several witnesses that they had seen the deceased in his capacity as a bouncer throw people out of bars, and that they had seen him win some fist fights. We find no error in the exclusion of this evidence. The jury had before it evidence that the deceased was a "bouncer," evidence of his height and weight, and statements made by police officers that described the deceased as "a multiple bad ass" who would "more than hold his own in a fight." If the evidence was relevant, it was cumulative and need not have been admitted. *See* Ark. R. Evid. 403.

During the cross-examination of the state medical examiner, Dr. Fahmy Malak, defense counsel asked whether

Malak "had ever instructed one of his assistants to fabricate a photograph to have it show something in an inaccurate manner." The trial court sustained the state's objection to the question. We do not think it was error to do so. The matter was collateral, the question was indefinite as to time, and there was no contention that any of the photographs in the case at bar were misleading.

Finally, we hold that the circuit judge's denial of the appellant's motion to suppress statements given to the police was not error. Appellant emphasizes that he was nineteen years old at the time of questioning, and expert testimony showed that his IQ was 81. Appellant also contends that Richard Garrett, a deputy prosecuting attorney involved in the investigation, was the "family attorney." This contention is not borne out by the record. Appellant's father did testify that he had known Garrett for a long time, that he trusted him, and that he had once spoken to him about some legal matters. The appellant testified that he did not know who Garrett was and that it was the police he wanted to talk to. The record also adequately establishes that the police officers initially believed appellant to be merely a witness; that when appellant became a suspect and the interrogation became custodial, he was given proper *Miranda* warnings; and that appellant was able to adequately understand the warnings given. Based on our independent review of the totality of the circumstances, we find that the appellant's statements were freely and voluntarily given. *See Hurst* v. *State*, 296 Ark. 448, 757 S.W.2d 558 (1988).

Reversed and Remanded.

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

ARKANSAS BLUE CROSS AND BLUE SHIELD *v.*
Jackie BROWN, and Ida Brown, His Wife

CA 90-40 800 S.W.2d 724

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

Jim Patton, for appellant.

Bill R. Holloway, for appellees.

MELVIN MAYFIELD, Judge. This case involves a dispute over an exclusion clause in an insurance policy.

Ida Brown, appellee, was insured under her husband's group policy with appellant. She underwent heart bypass surgery on December 6, 1986, and, against medical advice, discharged herself on December 19, 1986. The charges for the heart surgery and related expenses prior to her release amounted to $41,905.48. Appellant denied any coverage based upon the following exclusion in the policy: "No benefits are provided for inpatient services where you terminate such inpatient admission against medical advice." Appellees filed suit to force payment of benefits by appellant. The parties stipulated as to coverage and damages, and the appellant moved for a directed verdict. The motion was

overruled, and the case was presented to the jury on instructions which allowed it to determine whether the above exclusion was ambiguous. The jury returned a verdict in favor of appellees. This appeal followed.

In *Arkansas Blue Cross & Blue Shield* v. *Long*, 303 Ark. 116, 792 S.W.2d 602 (1990), a similar situation arose involving the exact policy language at issue here. There, however, the trial judge directed a verdict for the insured on the basis that the exclusion was against public policy. The Arkansas Supreme Court agreed, holding that "the provision, when weighed against the consequences for the insured, does not square with public policy" and noted that the appellant could accomplish its goals by excluding coverage for expenses accruing *after* a discharge against medical advice. The Court also said:

> Moreover, the provision, as Blue Cross would have it operate in this case, works a forfeiture on the insured, and such provisions have not been favored by the courts in any case. 2 G. Couch, *Couch on Insurance 2d*, (Rev'd ed.) § 15:49 (1984); *Missouri State Life Insurance Co.* v. *Foster*, 188 Ark. 1116, 69 S.W.2d 869 (1934). As we stated in *Foster*,
>
> > Forfeitures cannot and should not be declared when the rights of parties have become vested. . . . We are irrevocably committed to the doctrine that, when liability attaches, no subsequent act of the parties will effect a forfeiture of the policy, unless the contract of insurance by the definite and explicit terms so provides.
>
> This policy exclusion would divest the insured of benefits already accrued, for which no reasonable basis exists. We conclude that the exclusion of benefits prior to an AMA [against medical advice] discharge is against public policy. As stated in 10 G. Couch, *Couch on Insurance 2d*, (rev. ed) § 14:378 (1982):
>
> > The courts must enforce policy conditions in the nature of exceptions or limitations if they do not run counter to statute, are

> not inconsistent with public policy and are explicit in terms and plain of meaning.
>
> At the same time, since the insurance business is affected with the public interest, the right of the insurer to incorporate in its contracts such provisions as it may desire, is subject to the limitation that conditions avoiding the policy should not be unreasonable. . . .

The above opinion of the Arkansas Supreme Court was handed down after the briefs on appeal were filed in the instant case, and the public policy issue was not raised in the trial court in the instant case. Nevertheless, we think it proper to raise the issue on our own motion. The Arkansas Supreme Court has held that there are circumstances under which it is appropriate for a court to act sua sponte. *Davis* v. *Adams*, 231 Ark. 197, 328 S.W.2d 851 (1959). Also, in Leflar, *Appellate Judicial Opinions* 129 (1974), Dr. Leflar has reprinted portions of a law review article in which the following statements are made:

> On occasion the appellate court will recognize in a case a question of public policy which the litigants either through choice or inadvertence have failed to raise. If the question involves a fundamental question of the public policy of the jurisdiction, the court will raise the question and decide the case on the matter.

Vestal, *Sua Sponte Consideration in Appellate Review* 27 Fordham L. Rev. 477, 511 (1959).

The only point presented by the appellant in this appeal is that it was entitled to a directed verdict because the exclusion provision involved in the instant case is not ambiguous. However, we do not think it necessary to discuss that issue. The *Long*, case, *supra*, decided that the very same exclusion is against the public policy of this state. Therefore, we affirm the judgment of the trial court in the instant case because the exclusion, whether ambiguous or not, is against public policy and the judgment appealed from is correct. When the trial court reaches the right result, even on an erroneous theory, we affirm. *See Moose* v. *Gregory*, 267 Ark. 86, 590 S.W.2d 662 (1979); *Mobley* v. *Scott*, 236 Ark. 163,

365 S.W.2d 122 (1963).

Affirmed.

COOPER and JENNINGS, JJ., agree.

NICHOLS BROTHERS INVESTMENTS *v.* RECTOR-PHILLIPS-MORSE, INC. and Bill Haupt

CA 90-116 801 S.W.2d 308

Court of Appeals of Arkansas
Division II
Opinion delivered December 26, 1990

Friday, Eldredge & Clark, by: *Jerry L. Malone*, for appellant.

Gill & Elrod, by: *W.W. Elrod II*, for appellee.

JAMES R. COOPER, Judge. The appellant in this civil case filed an action for fraud and misrepresentation against the appellees. The appellees raised the affirmative defense of res judicata and filed a motion for summary judgment on that basis. The trial court granted the appellees' summary judgment motion in an order entered November 21, 1989. From that decision, comes this appeal.

For reversal, the appellant contends that the trial court erred

in granting summary judgment. We find no error, and we affirm.

The record shows that a representative of the appellant partnership entered into a real estate contract to purchase real property in the Hyland Homes Subdivision in Little Rock. The vendor, Aileen Jackson, had an exclusive listing contract with the appellee, Rector-Phillips-Morse, Inc. (RPM). The other appellee, Bill Haupt, was the salesman with RPM who showed the property to the appellant, which resulted in the appellant entering into a contract to purchase the property from Mrs. Jackson. However, the appellant subsequently denied that it was obligated to purchase the property, and Mrs. Jackson filed a suit for specific performance in the chancery court of Pulaski County. The appellant defended by asserting that it could not obtain financing and that the appellees, as Mrs. Jackson's agents, had made material misrepresentations concerning the size, boundaries, and value of the property. The appellee, Bill Haupt, testified at trial concerning the alleged misrepresentation. The chancellor ordered specific performance of the contract but made no findings regarding the appellant's defense of misrepresentation. The appellant filed a notice of appeal, but subsequently arrived at a settlement with Mrs. Jackson, and the appeal was dismissed.

Subsequently, the appellant filed an action against the appellees in the Pulaski County Circuit Court, alleging fraud and misrepresentation. The appellees' motion for summary judgment on the basis of res judicata was granted, and this appeal followed.

The appellant first argues that summary judgment was erroneously granted because there existed an issue of material fact concerning whether the appellees were in privity with the plaintiff in the prior action. We do not agree. Actual privity is not a prerequisite to the application of res judicata under Arkansas law; instead, one whose liability is dependent on the liability of a person exonerated in an earlier suit on the same facts may take advantage of the bar of the earlier judgment even though he was not a party to the prior action, or in privity with a party to the prior action. *Ted Saum & Co.* v. *Swaffer*, 237 Ark. 971, 377 S.W.2d 606 (1964). In the case at bar we think it clear that the appellees' liability is dependent on the extent to which Mrs. Jackson was subject to the defense of misrepresentation asserted in the specific performance action. The parties do not

dispute that the appellees were Mrs. Jackson's agents in the real estate transaction, or that the chancellor ordered specific performance despite the appellant's defense of misrepresentation by the present appellees as Mrs. Jackson's agents. A judgment in favor of the principal, sued alone, is res judicata in a subsequent action against the agent. *See Ted Saum & Co.* v. *Swaffer, supra.* We see no meaningful distinction in the fact that the appellant, as defendant below, unsuccessfully asserted misrepresentation as a defense, rather than as a cross claim, because the appellant was entitled to assert the alleged misrepresentation of Mrs. Jackson's agents as a cross claim under Ark. R. Civ. P. 13. Res judicata applies to claims that might have been litigated, as well as to those that were actually litigated. We hold that the appellees are sufficiently identified with the plaintiff in the former action to avail themselves of res judicata in the case at bar. *See Wells* v. *Heath*, 269 Ark. 473, 602 S.W.2d 665 (1980).

The appellant next argues that res judicata does not apply because the case at bar is an action for fraud and misrepresentation, while the prior action was for specific performance. We find no merit in this argument. Res judicata bars a subsequent suit when the subsequent suit involves the same subject matters as those determined or which could have been determined in the former suit, and the issues and remedies raised in the subsequent suit need not be identical to those raised in the former suit. *Swofford* v. *Stafford*, 295 Ark. 433, 748 S.W.2d 660 (1988). The case at bar, while raising new factual issues and seeking additional remedies, is based on the same events and subject matter, and might have been presented in the former suit. We find no error on this point.

Next, the appellant contends that res judicata was inapplicable because the present action against the appellees for fraud and misrepresentation could not have been litigated in the prior specific performance action. We do not agree. Arkansas Rule of Civil Procedure 14(a) permits a defendant to file a third-party complaint against a person who is or may be liable to him for all or part of the plaintiff's claim against him. Despite the appellant's assertions to the contrary, the rule does not require that the third party's liability to the defendant be based on the same theory of law as the defendant's liability to the plaintiff. Moreover, it is clear that the chancery court would have had

subject-matter jurisdiction of the present tort claim through exercise of the equity clean-up doctrine. *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986). We conclude that the present action could have been litigated in the prior specific performance action, and we find no error on this point.

Finally, the appellant contends that res judicata does not apply because the chancellor made no findings regarding the defense of misrepresentation asserted by the appellant in the prior action. We find no merit in the appellant's argument that the issue of misrepresentation was not necessarily decided in the prior specific performance action because the chancellor found that the appellant was estopped to deny that any conditions of the contract were not met. The record of the prior action shows that the present appellant asserted that his performance was conditioned on obtaining financing at a specified interest rate. Such a condition, which follows liability on a contract but provides for a contingency which, if it occurs, will defeat a contract already in effect, is a condition subsequent. *See generally* 17 Am. Jur. 2d *Contracts* § 323 (1964). In contrast, the defense of fraud and misrepresentation addresses itself to the validity of the assent essential to the formation of the contract, rather than to acts or events which occur after a contract has been formed. *See Dziga* v. *Muradian Business Brokers, Inc.*, 28 Ark. App. 241, 773 S.W.2d 106 (1989); *see generally* 17 Am. Jur. 2d *Contracts* § 151 (1964). The chancellor in the prior action specifically found that the appellant was estopped to assert failure of conditions subsequent, and made no findings regarding misrepresentation or the validity of the parties' assent.

Furthermore, although it is true that the chancellor made no specific findings with respect to the alleged misrepresentation, it is undisputed that the chancellor did, in fact, order specific performance of the real estate contract. This disposition necessarily involved a determination that no material misrepresentation had been made, because a contract for the purchase of real estate will not be specifically enforced unless it is free from fraud and misrepresentations of material facts. *See Robinson* v. *Florence Sanitarium*, 149 Ark. 355, 232 S.W. 590 (1921). Because the determination that specific performance was warranted could not have been made without deciding the question of misrepresentation adversely to the appellant, the subsequent

action for fraud and misrepresentation was barred by res judicata. *JeToCo Corp.* v. *Hailey Sales Co.*, 268 Ark. 340, 596 S.W.2d 703 (1980).

Affirmed.

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

Lawrence SMITH *v.* STATE of Arkansas

CA CR 89-323 800 S.W.2d 440

Court of Appeals of Arkansas
En Banc
Opinion delivered December 26, 1990

Mike Everett, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case is a black person. He was charged with delivery of a controlled substance, found guilty by an all-white jury, fined $5,000.00, and sentenced to fifteen years in the Arkansas Depart-

ment of Correction. From that decision, comes this appeal.

For reversal, the appellant contends that the trial court erred in restricting his voir dire examination of prospective jurors concerning racial bias. We reverse.

A trial judge has wide discretion to regulate the scope and extent of voir dire, and his restriction of voir dire examination will not be reversed on appeal unless his discretion is clearly abused. *Jones* v. *City of Newport*, 29 Ark. App. 42, 780 S.W.2d 338 (1989). The appellant's counsel in the case at bar wanted to ask the jurors: 1) if they thought white persons could identify black persons as well as they could identify other white persons; 2) how they would feel if they were on trial by a courtroom full of black people; and 3) whether they could give equal weight to the testimony of a black witness or a white witness if they testified differently. These questions were not permitted by the trial judge. Instead, the trial judge questioned the jurors concerning racial bias; he asked the jurors whether the appellant's race would influence their verdict, and received a negative response.

We find no significant distinction between the facts of this case and those presented in *Cochran* v. *State*, 256 Ark. 99, 505 S.W.2d 520 (1974). The trial judge in *Cochran* asked the jurors whether their verdict would be influenced by the fact that the defendants were black, and refused to allow the defendant's counsel to question the prospective jurors regarding racial prejudice. Noting that in many instances an attorney decides "whether to use a peremptory challenge not so much on what a venireman may say, but on how he says it," *id* at 100A, the Arkansas Supreme Court held that the question asked by the trial judge was not sufficient "to focus the attention of the prospective jurors to any racial prejudice they might entertain." *Id.*

We do not hold that the appellant had a right to ask all three of the questions which were disallowed by the trial judge. We only hold that the questioning regarding racial bias was insufficient to focus the attention of the prospective jurors to any racial prejudice they might entertain, *cf. Rogers* v. *State*, 257 Ark. 144, 515 S.W.2d 79 (1974), and that the trial court therefore abused its discretion in restricting voir dire with reference to possible racial bias.

Reversed and remanded.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I do not agree that this case should be reversed. The first question which the majority opinion states defense counsel wanted to ask the prospective jurors was asked. No objection was made to the question, and the record indicates some kind of response by some of the prospective jurors. Counsel then moved to two different versions of that question which he asked without objection. It was when he asked a fourth version that the prosecuting attorney objected. The court sustained the objection but counsel then asked the same question again and got one verbal answer to it.

The next question asked by defense counsel was: "How many of you think that you couldn't judge a man on a drug case as well as you could on another case?" No objection was made to this question, and the record shows that counsel asked a number of questions on this and related subjects and that six jurors indicated some kind of response to these questions. It was only when counsel asked how many of the prospective jurors saw the "NBC News last night" about "people who have served on juries that convicted a man that later changed their mind and they said that they had made—" that the prosecutor objected again. That objection was sustained.

Defense counsel then asked the prospective jurors three more questions without objection. One question was, "How many of you feel like you are the type of person who could be intimidated by other jurors?" The second question was, "Do you think people who are older will make you be more prone to change your mind?" This question was apparently directed to the prospective juror who appeared to be the youngest of the entire group. The third question, apparently to the same juror was, "Do you think you could stay with a not guilty vote for twelve hours in that jury room?" The prospective juror to whom the last two questions were directed answered both questions.

The next question asked by the defense counsel in this case was the same question as the very first one asked. It is the first question which the majority opinion states counsel wanted to ask. Although a new group of prospective jurors were now being

questioned, they had been sitting in the courtroom and the judge asked if they had heard the questions asked of the other prospective jurors. The record does not show the response to this inquiry. However, the trial judge was there and could know how they reacted. In *Johnson* v. *State*, 298 Ark. 617, 770 S.W.2d 128 (1989), the court said:

> [T]he extent and scope of voir dire examination is largely a matter of judicial discretion and boundaries of that discretion are rather wide. The restriction of voir dire examination will not be reversed on appeal unless that discretion is clearly abused.

298 Ark. at 623. *See also Jones* v. *City of Newport*, 29 Ark. App. 42, 780 S.W.2d 338 (1989), where we said the trial court did not abuse its discretion in limiting voir dire by requiring the appellant to address his questions to the panel as a whole. 29 Ark. App. at 48.

So, in the instant case when counsel submitted the same question again that he had previously asked without objection, he may have been talking to people whose reaction to the earlier questions he had already observed. In oral argument of this case, defense counsel told this court that the reaction of the prospective jurors was the real thing he was interested in. Their verbal answers, he said, were not very important. At any event, at this point the trial court sua sponte asked to see counsel at the bench and inquired of defense counsel the purpose of the question just asked. After a discussion in which I do not believe defense counsel explained the real purpose of his question to the trial judge as he did in oral argument in this court, and after the prosecuting attorney objected to the question being asked, the court sustained the objection. The judge then patiently and carefully asked the prospective jurors questions about their ability to decide the case on the law and the evidence without being affected by race consideration and very ably explained the importance of jurors who will "like the goddess of justice blindfolded" consider only the facts and law in reaching their decision in the case. After being satisfied that the panel would properly perform their duty if selected to serve on the jury, the court declared a recess for lunch.

After the recess, defense counsel asked the second and third questions set out in the majority opinion. Although he got several

responses to these questions and asked several more subquestions when the responses were made, the court finally sustained an objection to both questions and they were not further pursued.

My disagreement with the majority opinion is one of degree. That opinion recognizes that voir dire examination is largely subject to the trial judge's discretion. In the instant case, I do not find an abuse of the judge's discretion, certainly not a clear abuse as required by *Johnson* v. *State*, *supra*, for reversal. I think the record shows that the trial judge allowed counsel great latitude in the examination of the prospective jurors. All lawyers and judges with courtroom experience know the importance of voir dire examination, but when the main purpose is to watch the prospective jurors' reaction—and not to get the verbal answer—we get into a very delicate question of balance. I submit that the discretion of the trial judge who is present in the courtroom should be even greater in this situation.

I would affirm the trial judge in this case.

Otis Howard WHITE *v.* AIR SYSTEMS, INC. and Commercial Union Insurance Companies

CA 90-136 800 S.W.2d 726

Court of Appeals of Arkansas
Division II
Opinion delivered December 26, 1990

Melissa E. Smith, for appellant.

Daily, West, Core, Coffman & Canfield, by: *Eldon F. Coffman* and *Douglas M. Carson*, for appellees.

JAMES R. COOPER, Judge. The appellant in this workers' compensation case was injured at work on November 17, 1988, and he filed a claim for benefits which was controverted by the appellees. The administrative law judge awarded benefits, and the appellees appealed to the Workers' Compensation Commission, which reversed the administrative law judge's award of benefits and denied the claim. From that decision, comes this appeal.

The appellant contends that the Workers' Compensation Commission erred in applying the doctrine of res judicata to portions of the administrative law judge's opinion. We agree, and we reverse.

The record shows that, at the hearing before the administrative law judge, the appellees alleged that the appellant had suffered a prior back injury in 1978, and asserted that the

appellant's claim was barred under *Shippers Transport* v. *Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979). The *Shippers Transport* court adopted the rule that false representation as to physical condition in procuring employment will preclude workers' compensation benefits for an otherwise compensable injury if it is shown that:

> 1) the employee knowingly and wilfully made a false representation as to his physical condition;
>
> 2) the employer relied on his false representation, which reliance was a substantial factor in the employment; and
>
> 3) there was a causal connection between the false representation and the injury.

Shippers Transport, 265 Ark. at 369.

The administrative law judge found that the appellees had established both the first and the third requirements of the *Shippers* defense, but failed to establish the second requirement, i.e., the employer's reliance. The administrative law judge concluded that the claim therefore was not barred under *Shippers Transport*, *supra*, and awarded benefits. The appellees filed a petition for a review by the full Commission, stating as grounds that "[t]he findings and award of the administrative law judge are contrary to the law and the evidence, and the administrative law judge erred in his application of the law to the facts." No petition for cross appeal was filed by the appellant.

The Commission, however, confined its review to a single issue. In its opinion, the Commission explained its reasons for doing so as follows:

> The only issue on appeal before this Commission is whether the respondent has proven by a preponderance of the evidence that it substantially relied upon claimant's false representation in hiring him; thereby, proving the second element of the *Shippers* defense. The Administrative Law Judge in his June 30, 1989, opinion, found that the respondent had met both the first and third requirements of the *Shippers* defense. Neither of those findings was appealed; therefore, they became final and are now *res judicata*. Since those findings are now res judicata, we will

> not consider them on appeal. That leaves only the question of whether the respondent has satisfied the second element of the *Shippers* defense.

The Arkansas Workers' Compensation Commission is not an appellate court. *Shippers Transport, supra.* It is, instead, the factfinder, and as such its duty and statutory obligation is to make specific findings of fact, on de novo review based on the record as a whole, and to decide the issues before it by determining whether the party having the burden of proof on an issue has established it by a preponderance of the evidence. *See Shippers Transport, supra*; *Johnson* v. *Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989); *Jones* v. *Tyson Foods, Inc.*, 26 Ark. App. 51, 759 S.W.2d 578 (1988); Ark. Code Ann. § 11-9-705 (a)(3) (1987).

The Commission's decision to limit review to the second element of the *Shippers* defense was wrong for two reasons. First, the doctrine of res judicata applies only to final orders or adjudications, *Sikes* v. *Segers*, 263 Ark. 164, 563 S.W.2d 441 (1978), and the filing of a petition for review with the full Commission within 30 days prevents the order of the administrative law judge from becoming final. Ark. Code Ann. § 11-9-711(a)(1) (1987).

Second, the petition for review filed by the appellees did not limit the issues to be presented to the Commission: instead, the issue before the Commission, as presented in the petition for review, was whether "the findings and award of the administrative law judge are contrary to the law and the evidence." Although the Commission has the statutory authority to require that parties specify all the issues to be presented for review, *McCoy* v. *Preston Logging*, 21 Ark. App. 68, 728 S.W.2d 520 (1987), it also has the statutory duty to decide the issue before it on the basis of the record as a whole, Ark. Code Ann. § 11-9-704(c)(2) (1987), and to decide the facts de novo. *Tyson Food, Inc.* v. *Watkins*, 31 Ark. App. 230, 792 S.W.2d 348 (1990). The petition for review in the case at bar called into question the administrative law judge's award and all the findings on which it was based. Although the appellant did not file a petition for cross appeal as he was permitted to under Ark. Code Ann. § 11-9-711 (1987), no cross appeal was necessary because the appellant had prevailed before the administrative law judge and sought no

affirmative relief before the Commission. *See Moose* v. *Gregory*, 267 Ark. 86, 590 S.W.2d 662 (1979).

When compensation is denied, the Commission must make findings sufficient to justify that denial. *Wright* v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986). All of the administrative law judge's findings were before the Commission for de novo review in the case at bar, and we hold that the Commission's finding that the appellees proved the element of employer's reliance under *Shippers Transport*, *supra*, was, by itself, insufficient to justify denial of compensation. When the Commission fails to make specific findings upon which it relies to support its decision, reversal and remand of the case is appropriate, *Wright* v. *American Transportation*, *supra*, and, accordingly, we reverse and remand. Given our resolution of this issue, we find it unnecessary to address the second argument advanced by the appellant.

Reversed and remanded.

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

OWEN DRILLING COMPANY and Home Insurance Company *v.* Joe Walters ALLISON

CA 90-148 800 S.W.2d 728

Court of Appeals of Arkansas
Division II
Opinion delivered December 26, 1990

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

Spencer, Spencer, Depper & Guthrie, by:*Robert L. Depper, Jr.*, for appellee.

JOHN E. JENNINGS, Judge. The issue to be decided is whether an employee is entitled to recover the full amount of medical expenses incurred as a result of a compensable injury, without offset for amounts previously paid by his own private medical insurance. The Commission held that the employer, or its insurance carrier, was not entitled to an offset. We agree and affirm.

The claimant, Joe Allison, was injured while working for Owen Drilling Company. Owen Drilling controverted the claim, the Commission held the claim compensable, and we subsequently affirmed the Commission's decision. During the two years that compensability was at issue, Allison incurred approximately $48,000 in medical expenses. The claimant's private medical insurance carriers, Blue Cross Blue Shield and Physician's Mutual, paid approximately $42,000 of these expenses and the employer's carrier, Home Insurance Company ultimately paid the balance. Allison then brought these proceedings to recover the amount paid by his own medical insurance carriers.

The Commission relied primarily on *Standard Fire Insurance Co.* v. *Ratcliff*, 537 S.W.2d 355 (Tex. Civ. App. 1976). There the court said:

> Appellant's argument that Plaintiff's claim for medical expenses was defeated because they were paid by International Insurance Co., a third party, is without merit. The rule is well established in workmen's compensation cases that where the claimant's medical expenses were paid by a third party, the claimant is not deprived of his right to recover the value of such services by the workmen's compensation carrier.
>
> The above rule announced and applied in *Cooper* and *Kirchoff* is closely akin to the "collateral source" rule applied in cases other than workmen's compensation. . . .

537 S.W.2d at 358 (citations omitted).

Appellant's contention that the application of the collateral source rule is restricted to tort cases cannot be sustained. The rule

has application in contract actions and, in the law of workers' compensation, has been thus expressed:

> As to private pensions or health and accident insurance, whether provided by the employer, union, or the individual's own purchase, there is ordinarily no occasion for reduction of compensation benefits.

4 A. Larson, *The Law of Workmen's Compensation* § 97.51(a) (1990).

We have twice quoted this general rule with approval. *See Varnell* v. *Union Carbide*, 29 Ark. App. 185, 779 S.W.2d 542 (1989); *Emerson Electric* v. *Cargile*, 5 Ark. App. 123, 633 S.W.2d 389 (1982). In the case at bar the Commission noted that Ark. Code Ann. § 11-9-508(a) (1987) requires the employer to "promptly" provide medical services. The Commission stated:

> We are unable to agree that this payment will unjustly enrich the Claimant, since a holding to the contrary would discourage prompt payment by employers who hope that a private carrier will relieve them of their obligation while the claim is being controverted.

Furthermore, as Professor Larson notes, the result of our holding need not be a windfall to the claimant.

> Although avoidance of duplication cannot ordinarily be achieved under American statutes in these cases by, so to speak, trimming at the compensation end, it is frequently achieved by express language trimming at the private-plan end, that is, by reducing the private benefits by the amount of any compensation payments.

Larson, *supra*, § 97.51(c).

We also agree with the Commission that *McGehee Hatchery Co.* v. *Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961), is distinguishable. There the supreme court held that a claimant, whose medical expenses had been paid in full through a workers' compensation proceeding in another state, was not entitled to receive a duplicate cash award on grounds of public policy. One primary distinction between *McGehee* and the case at bar is that the policy considerations underlying the collateral source rule were absent in *McGehee*. *See* D. Dobbs, *Handbook on the Law of*

Remedies § 3.6 at 186 (1973).

We conclude that the Commission's holding that the employer is not entitled to an offset for medical expenses paid by the claimant's private insurance carrier is correct.

Affirmed.

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

Oliver WARREN *v.* Linda WARREN

CA 90-171 800 S.W.2d 730

Court of Appeals of Arkansas
Division II
Opinion delivered December 26, 1990

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

Easley & Hicky, by: *B. Michael Easley*, for appellee.

JOHN E. JENNINGS, Judge. Linda and Oliver Warren were married on August 31, 1986, and separated on August 31, 1989. While married they lived in the wife's home in Hughes, Arkansas.

They apparently accumulated no marital property and had no children. The chancellor granted Mrs. Warren a divorce on the grounds of general indignities and returned the parties' non-marital property to them. The court also directed Mr. Warren to pay part of two credit card bills and to reimburse her for half of the money she borrowed to pay one-half of joint federal and state income tax liabilities.

On appeal, Mr. Warren contends that the chancellor had no authority to "divide marital debts." The leading case in this state regarding the responsibilities and powers of the chancellor relating to debts in a divorce case is *Hackett* v. *Hackett*, 278 Ark. 82, 643 S.W.2d 560 (1982). In *Hackett* the court said:

> The only aspect of the case that is troublesome is the fact the chancellor found Act 714 did not require him to divide the debts. The parties offered evidence that their outstanding debts, besides mortgage payments on real estate, were about $13,555. The list totalled over thirty different debts and in most instances it is not clear who incurred the debts. The chancellor was not required by Act 714 to divide the debts, that is, to consider each debt and assign a party to pay it. But he was obligated to consider those debts in deciding the questions of alimony, support for the children, and perhaps the division of the property, and the chancellor may well have done so. Debts of the parties have always been a circumstance to be considered in divorce cases in awarding alimony. Debts incurred on behalf of minor children can be ordered paid. Debts incurred by the parties regarding marital property can be ordered to be settled as between the parties. Parties can be enjoined from incurring debts that will encumber property. Obligations jointly made by the parties can be ordered to be settled, as between the parties. An award of realty to the wife, silent as to who shall pay the mortgage, is an award subject to the mortgage.
>
> Indeed it would be unrealistic for a chancellor to refuse to consider the debts of the parties in deciding a divorce case. But that does not mean the chancellor must divide the debts. He may leave the parties as he found them, obligated individually or jointly to the creditor who

> is not ordinarily a party to a divorce and cannot therefore be bound by an order regarding the parties' debts.

278 Ark. at 85 (citations omitted).

While it is true, as appellant contends, that the code does not expressly give the chancellor the power to allocate marital debts as between the parties, the clear implication from *Hackett* is that he does possess such power. *See also McMurtray* v. *McMurtray*, 275 Ark. 303, 629 S.W.2d 285 (1982). The reasons for so holding were expressed in *Srock* v. *Srock*, 11 Ariz. App. 483, 466 P.2d 34 (1970):

> We particularly are compelled to affirm the trial court's discretion to allocate community liabilities because to do otherwise would nullify divorce effectiveness. If the debts already owed by the community, as distinct from the wife's attorneys fees, cannot be allocated between the parties then an essential item of divorce dispute remains unresolved.

11 Ariz. App. at 484, 466 P.2d at 34. *See also Cadwell* v. *Cadwell*, 126 Ariz. 460, 616 P.2d 920 (Ariz. Ct. App. 1980) (court has jurisdiction and inherent authority to allocate debts). We hold that the chancellor had the power to adjust the marital debts as between the parties.

Appellant also contends that the appellee's payment of the joint tax liability and the credit card bills were a gift from her to him. Whether the elements of an effective inter vivos gift have been proven is a question of fact. *See McCune* v. *Brown*, 8 Ark. App. 51, 648 S.W.2d 811 (1983). The elements, including an intention on the part of the donor to make a gift, must be established by clear and convincing evidence. *McCune*, *supra*. On appeal, our standard of review is whether the chancellor's finding in this regard is clearly erroneous. *See Freeman* v. *Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987). In the case at bar we cannot say that the chancellor's finding that no gift was intended is clearly erroneous.

Affirmed.

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

Arnold LUNSFORD *v.* RICH MOUNTAIN ELECTRIC CO-OP

CA 90-39 800 S.W.2d 732

Court of Appeals of Arkansas
En Banc
Opinion delivered December 26, 1990

Walker Law Firm, by: *Eddie H. Walker, Jr.*, for appellant.

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

MELVIN MAYFIELD, Judge. This is an appeal from the Arkansas Workers' Compensation Commission.

On December 8, 1983, the appellant sustained a work-related injury that appellee accepted as compensable. On March 7, 1988, appellant went horseback riding and, after dismounting, experienced an episode of pain which caused him to faint, fall to the ground, and fracture his spine.

At a hearing before an administrative law judge on January 19, 1989, it was stipulated that the only issue to be heard was the

liability for the medical expenses resulting from the March 1988 injury. Appellant contended the difficulties that arose in that regard represented a continuation and recurrence of the 1983 injury, and any medical expenses resulting from that incident were the responsibility of the appellee. The appellee contended the injury sustained as the result of that incident constituted a new injury and that appellant's conduct of horseback riding was "rash" in light of his understanding of his injury.

The appellant testified that the March 7, 1988, incident occurred after he had gone for a short horseback ride and had returned to the pasture where he kept the horse. He said that while he was standing in the corral with a halter in his hand, he had an unbearable pain, became nauseated, dropped the halter, took hold of the top rail of the fence, and that is the last he remembers until he "came to." He said he had never passed out before. Appellant testified that he did not run or trot the horse, or cause the horse to jump over any objects; that he rode on a country road; did not take the horse out in the woods or ride up and down mountains; that the ride was "just strictly walking"; and that he had ridden probably a mile. Appellant also testified that before he did "this" he had cleared it with Dr. MacDade.

The medical records indicate that on May 27, 1986, Dr. MacDade thought appellant could perform sedentary tasks in the light manual arts, fine manipulative activities with the hands, and drive a vehicle. In a medical note dated August 21, 1986, Dr. Wideman stated that he wanted appellant to return to work and that he did not see any reason why appellant could not drive a backhoe or bulldozer as long as he was not lifting any significant weight. And in a progress note dated June 3, 1987, Dr. MacDade stated he was pleased with appellant's progress and instructed appellant to gradually increase his activities. Then, on July 7, 1987, Dr. MacDade stated appellant's back situation was stable and asked appellant to increase his activities.

The law judge issued an opinion that contained the following findings:

> 5. The claimant has proven by a preponderance of the evidence that medical treatment necessitated by the March 7, 1988 worsening in his condition is a compensable consequence of his admittedly compensable injury.

6. Treatment rendered the claimant in connection with the March 7, 1988 worsening in his condition constitutes reasonable and necessary medical treatment for the compensable injury.

7. The respondents are liable for reasonable and necessary medical treatment rendered by authorized treating physicians as a consequence of the claimant's December 8, 1983 injury.

The full Commission reversed the decision of the law judge on the finding that appellant's horseback riding was unreasonable under the circumstances and that this unreasonable activity constituted an independent intervening cause for which the employer was not liable. The Commission explained its decision as follows:

> The preponderance of the evidence is that the two injuries are causally connected in that pain from the first incident caused Lunsford to faint, thereby sustaining the second accident. However, we find that horseback riding was unreasonable under the circumstances of this case and that this unreasonable activity constitutes an independent intervening cause which now insulates the Respondents from liability. Lunsford certainly knew that he had suffered a serious back injury, that he had undergone two surgical procedures, that he had not worked in over three years due to his injuries, and that Dr. Albert D. MacDade had assigned him a 5% anatomical impairment rating. The Claimant and his wife testified that he had nearly fallen on several occasions because of a feeling that his legs were "giving away." Lunsford can hardly be heard to say that he thought the back condition from which he suffered was so minor that it could be ignored. While we can understand his desire to get out of the house and to have a more active lifestyle, we still find it unreasonable for one in his condition to engage in an activity which jostles the back and which requires the rider to lift a heavy saddle and to mount and dismount. Although Lunsford believed that he had cleared this activity with Dr. MacDade, there must have been some misunderstanding, since nowhere in the physician's reports or progress notes can we find any

> reference to a discussion regarding horseback riding or any permission to engage in the sport. Even if Dr. MacDade did tell Lunsford to go ahead and ride, the doctor's opinion that the activity was reasonable is not binding on the Commission. *Barksdale Lumber Company* v. *McAnally*, 262 Ark. 379, 557 S.W.2d 868 (1977).

On appeal, the appellant argues that there "is not substantial evidence upon which to base a conclusion that the horseback riding was an activity that would constitute an independent intervening cause such as to terminate the appellee's liability in this case."

Both parties cite the case of *Appleby* v. *Belden Corporation*, 22 Ark. App. 243, 738 S.W.2d 807 (1987). In that case we said:

> The issue in *Guidry* v. *J & R Eads Construction Co.*, 11 Ark. App. 219, 669 S.W.2d 483 (1984), was the same as the issue here. In *Guidry*, we said that the question is whether there is a causal connection between the primary injury and the subsequent disability; and if there is such a connection, there is no independent intervening cause unless the subsequent disability was triggered by activity on the part of the claimant which was unreasonable under the circumstances.
>
> One of the circumstances which should be considered in deciding if the "triggering activity" was reasonable is the claimant's knowledge of his condition. *See* Larson, *The Law of Workmen's Compensation* § 13.11 (1986).

22 Ark. App. 246.

In the present case, the Commission's opinion quoted above stated: "The preponderance of the evidence is that the two injuries are causally connected in that pain from the first incident caused Lunsford to faint, thereby sustaining the second accident." Thus, the Commission has found that there is a causal connection between appellant's injury in 1983 and the injury in 1988. Therefore, the question is whether the 1988 injury was "triggered by activity on the part of the claimant which was unreasonable under the circumstances." *Appleby* v. *Belden*, *supra*.

In determining whether the appellant's horseback riding was unreasonable under the circumstances, the Commission should have also considered the appellant's knowledge of his condition. The Commission's opinion finds that appellant "believed he had cleared this activity with Dr. MacDade," but the Commission then departs from the considerations mandated by the law as stated above and finds that "there must have been some misunderstanding" and states that "even if Dr. MacDade did tell Lunsford to go ahead and ride, the doctor's opinion that the activity was reasonable is not binding upon the Commission." So, after finding that the appellant "believed he had cleared" the horseback riding with the doctor, the Commission did not find whether this activity was unreasonable by a claimant who "believed he had cleared" it with the doctor.

Although the Commission did conclude its opinion by stating "we find the conduct of horseback riding to be unreasonable," the issue is whether the conduct of horseback riding was unreasonable "under the circumstances" and one of the circumstances to be considered was the fact, found by the Commission, that appellant "believed he had cleared this activity" with his doctor. Because the Commission did not make a finding on the reasonableness of the claimant's activity under all the circumstances shown by the evidence in this case, we remand this matter for that finding to be made.

Reversed and remanded.

CORBIN, C.J., ROGERS, J., and ERNIE WRIGHT, Special Judge, agree.

CRACRAFT and JENNINGS, JJ., dissent.

COOPER, J., not participating.

JOHN E. JENNINGS, Judge; dissenting. Mr. Lunsford suffered an admittedly compensable back injury in 1983. As a result, two successive laminectomies were performed by Dr. MacDade.

While it is true that claimant testified that the March 7, 1988, incident occurred after he had gone for a "short horseback ride," the history taken by Dr. MacDade states, "he had gotten back from a long sojourn on horseback, got off his horse, and then felt some back spasms which radiated around to the lower

abdomen." Certainly the Commission, as trier of fact, can choose to accept the statement made by the claimant to his physician on the date of the injury, rather than the claimant's subsequent testimony.

The Commission had before it the claimant's testimony that he believed he had cleared the horseback riding with Dr. MacDade. It also had before it a number of letters and reports from Dr. MacDade. Although these documents contained considerable advice about what the claimant should and should not undertake to do from a physical standpoint, they contained no mention of horseback riding.

As I understand the Commission's opinion, it held that even if the claimant had been told by his physician that it was all right to go horseback riding, the activity would be unreasonable under the circumstances. In light of the settled rule that the Commission is not bound by medical opinion, *McClain* v. *Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989), and the principle that the Commission, like a jury, is not prohibited from using its collective common sense, I think the Commission could legitimately find that the claimant's activities were unreasonable under the circumstances and therefore constituted an independent intervening cause of the fracture to his spine.

I respectfully dissent.

CRACRAFT, J., joins in this dissent.

Leslie TABOR *v.* LEVI STRAUSS & CO. and The Home Insurance Co.

CA 90-58 801 S.W.2d 311

Court of Appeals of Arkansas
Division I
Opinion delivered December 26, 1990

Martin, Trumbo & Sterling, by: *Brent Sterling*, for appellant.

Bassett Law Firm, by: *Gary V. Weeks* and *Woody Bassett*, for appellees.

MELVIN MAYFIELD, Judge. Appellant Leslie Tabor appeals a decision of the Workers' Compensation Commission which found the appellees had paid appellant compensation benefits at the appropriate wage rate.

The appellant was employed by appellee Levi Strauss & Company on June 15, 1988, when she sustained a compensable injury to her right hand. As a result of her injury, she was off work from June 15, 1988, through August 19, 1988, and received

temporary total disability benefits of $152.57 per week. Appellees paid all medical expenses.

On January 10, 1989, a hearing was held at which the appellant contended her proper compensation rate was $189.00 per week; that all negotiated employee benefits should be considered in computing the proper compensation rate; that she was entitled to additional compensation based upon the difference between the maximum rate and the rate at which she was paid; and that her attorney was entitled to a fee based upon the additional compensation due.

In an opinion filed May 10, 1989, the administrative law judge stated:

> We shall first look at the claimant's contention that fringe benefits should be included in the determination of the proper compensation rate. This one is a non-starter as there is no testimony that the claimant while off work as a result of a job related injury at Levi Strauss loses any of the fringe benefits. Specifically, there is testimony to the contrary that all fringe benefits remain intact even including vacation pay. By definition, if the benefits are not lost as a result of the compensable injury, their loss cannot be considered in determining the proper rate of compensation. Therefore, the issue as framed by the claimant does not exist in this case and it is not necessary to decide the question.

The law judge held that the formula for computing the average weekly wage of a pieceworker as set out in the Arkansas Workers' Compensation Law is not vague or ambiguous; that a respondent in computing the average weekly wage may disregard weeks in which earnings are inordinately low; and that the claimant was entitled to a weekly compensation rate of $152.66, but respondent had paid the claim at the rate of $152.57, an insignificant difference of $.09. The Commission affirmed and adopted the opinion of the law judge.

At the time of appellant's injury, she was a member of the union, doing piecework under a negotiated union contract which covered wages, overtime, job classifications and benefits including bonus, holidays, vacation, hospitalization insurance, life

insurance, disability insurance, sick pay, sick leave, pensions, bereavement pay, seniority rights, and personal and family leave. Under the terms of the union contract, an employee is entitled to receive all benefits while off work because of a work-related injury, and during the time appellant was receiving workers' compensation benefits, she was paid for some holidays and did in fact draw vacation pay even though she was not working. Also, if appellant's dependent husband became sick or was injured during the time she was off work, appellant's insurance at Levi Strauss would cover him.

For vacation pay, piece-rate workers are paid their average hourly rate (determined by the company), and appellant is entitled to three weeks vacation. Under the contract, appellant and all other employees who had at least one year of service as of October 1, 1986, and were on the payroll when the bonus was paid, received a bonus of $600.00. Employees who have completed their probationary period are paid for eleven holidays per year figured at their previous quarterly average for eight-hour days. And the value of the company-provided medical, life and disability insurance is $.74 per hour.

Appellant first argues that fringe benefits for which the employee and employer have negotiated pursuant to a contract were properly before the Commission, and those benefits can be readily identified and calculated and should be included in the calculation of an injured employee's compensation rate. Appellant contends the Arkansas Workers' Compensation Law provides that a temporarily or permanently disabled employee may receive disability benefits based on the employee's average weekly wage; that the definition of "wages" as set forth in Ark. Code Ann. § 11-9-102(8) (1987) includes the value of all fringe benefits negotiated pursuant to a union contract because they are a viable part of the "money rate" for which the employee is recompensed; and that the term "wages" should be liberally construed in accordance with the remedial purpose of the workers' compensation statutes. Appellant further argues that in order to be "just and fair" to all parties the value of negotiated fringe benefits must be included in the calculation of an injured employee's average weekly wage regardless of whether or not those fringe benefits are lost while an employee remains off work due to a compensable injury. Specifically, appellant asks this

court to find the fringe benefits of bonuses, vacation pay, holiday pay, medical insurance, life insurance and weekly disability insurance to be included as part of the "money rate" as set forth in the statutory definition of "wages." The resolution of this issue presents a question of law, not of fact.

Appellant relies on *Ragland* v. *Morrison-Knudsen Co., Inc.*, 724 P.2d 519 (Alaska 1986), for the proposition that fringe benefits should be included in the definition of wages. That case, however, is distinguishable from the case at bar. In that case, it is stated:

> Under M-K's collective bargaining agreement with Ragland's union, a total hourly wage rate is negotiated by the union and M-K. Union members vote to determine how the total wage is divided between cash payments and fringe benefits. The contribution to fringe benefits is thus not speculative, but rather is tied directly to the number of hours worked by the employee. We believe this total hourly wage, no matter how it is apportioned between cash payments and fringe benefits is "the money rate at which the service rendered is recompensed."

724 P.2d at 521. In the instant case, there is no evidence that union members have negotiated for a total hourly wage rate and then voted to determine how that total wage is to be divided between cash payments and fringe benefits.

Similarly, we do not find appellant's case of *Ashby* v. *Rust Engineering Co.*, 559 A.2d 774 (Me. 1989), to be applicable to the case at bar. In that case, the court stated:

> We are not dealing here with the traditional fringe benefit arrangement where the employer unilaterally establishes a plan in which the employee may have no vested rights, and contributes an amount that has no specified value per employee or per unit of time worked and that may in fact vary from year to year at the employer's discretion. Instead, this is a case in which the labor contract specifies an amount that the employer must pay per unit of time worked and the employer totally relinquishes control over the funds just as if they were delivered in the pay envelope.

559 A.2d at 775.

Appellant also relies on *Ex parte Murray*, 490 So. 2d 1238 (Ala. 1986), but that case is not in point. The Alabama statute states "whatever allowances of any character made to an employee in lieu of wages are specified as part of the wage contract and shall be deemed a part of his earnings." The Alabama court held that to read the broad term "allowances of any character" to exclude insurance premiums is unreasonable. However, the Alabama statute is considerably broader than our statute which contains no such provision.

Appellant also relies on *Munroe Regional Medical Center* v. *Ricker*, 489 So. 2d 785 (Fla. Dist. Ct. App. 1986), where the court held that vested pension or retirement benefits must have a real present-day value to be included in the statutory definition of average weekly wage. That is, the worker must be able to withdraw funds at will or vesting must be assured. In the instant case, there is no evidence that appellant may "withdraw the funds at will" or that vesting is assured.

Ark. Code Ann. § 11-9-102(8) (1987) provides:

> "Wages" means the money rate at which the service rendered is recompensed under the contract of hire in force at the time of the accident including the reasonable cash value of board, rent, housing, lodging, or similar advantage received from the employer and including gratuities received in the course of employment from others than the employer when gratuities are received with the knowledge of the employer; . . . .

There is a split of authority on the issue of whether fringe benefits should be included in the calculation of "wages" for the purpose of workers' compensation. The leading case, which represents the majority view on fringe benefits, is *Morrison-Knudsen Construction* v. *Director, Workers' Compensation Programs*, 461 U.S. 624 (1983); 2 Larson, *The Law of Workmen's Compensation* § 60.12(b) (3/87).

In *Morrison-Knudsen*, the United States Supreme Court held that an employer's contributions to union trust funds for health and welfare, pensions, and training are not "wages" for the purposes of computing compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act. Under that

act:

> "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

461 U.S. 629, citing 33 U.S.C. § 902(13). According to the Supreme Court, employer's contributions are not "money . . . recompensed" or "gratuities received . . . from others." Therefore, the narrow question is whether they are a "similar advantage" to "board, rent, housing, lodging." The Court held they were not; reasoning that board, rent, housing, or lodging are benefits with a present value readily converted into a cash equivalent, while the present value of trust funds could not be so easily converted. The Court rejected the argument that their value be determined by reference to the employer's cost because that cost was irrelevant, measuring neither the employee's benefit nor his compensation.

Other state courts have held fringe benefits not to be included within the definition of "wages."

In *Linton* v. *City of Great Falls*, 749 P.2d 55 (Mont. 1988), the court held that health insurance, retirement contributions, and vacation time earned under a union contract were excluded from the compensation calculation. Although the Montana statutory definition of "wages" is more narrow than that contained in the Arkansas statutes (that statute defines "wages" as "the average gross earnings received") that court specifically adopted the rationale of the United States Supreme Court in the *Morrison-Knudsen* case, *supra.*

Likewise, in *Nelson* v. *SAIF*, 731 P.2d 429 (Or. 1987), the court held that money paid by the employer into the pension fund and for premiums for medical and dental insurance was not includable in the daily wage the employee was receiving for purposes of calculating the amount of compensation to which he was entitled. That court took a different approach, however, and ignored the statute defining "wages" for the purpose of workers' compensation and focused on a statute stating the injured

employee's average weekly wage is to be determined by multiplying "the daily wage the worker was receiving." That court reasoned:

> [C]laimant was not receiving the funds in a literal sense. They never came into his physical possession. The money paid for medical and dental insurance was nothing more or less than premiums. The individual members of the class insured, i.e., the employees, had no right *ever to receive* any part of the funds created by payment of those premiums. Until an employee might need medical or dental care, he would not even be entitled to any benefit of the insurance created by payment of the premiums, let alone any part of the money. Until an employee became eligible, through retirement or termination, he would have no right to receive any money in the pension fund.

731 P.2d at 432 (emphasis in *Nelson*).

In *Still* v. *Industrial Commission*, 551 P.2d 591 (Ariz. Ct. App. 1976), the court held fringe benefits paid by the employer into union health, welfare, and pension funds not includable in the computation of a claimant's average monthly wage. That court reasoned that since the fringe benefits in question were not the result of the appellant's individual labor but rather were the fruits of a collective bargaining effort by the union they were properly excluded.

And in *Schlotfeld* v. *Mel's Heating and Air Conditioning*, 445 N.W.2d 918 (Neb. 1989), the court stated:

> The majority view appears to be the more practical and reasonable approach and is the position which we adopt. It seems clear from the definition of "wages" provided in § 48-126 that fringe benefits are not gratuities, nor are they "similar advantages" to board or lodging. The money paid to the union funds should not be considered part of the "money rate" just because it is specified at a per hour rate. The money is not paid to the employee and is not the result of the employee's individual labors, but is the fruit of collective bargaining.

445 N.W.2d 927.

We find the majority view to be persuasive and decline to find that the employer contributions to appellant's fringe benefits of medical, life, and disability insurance in the instant case be included in the term "wages." Appellant had no right to receive any part of these contributions or any benefit from such unless she or her dependent became eligible through illness, death, or disability. Moreover, these benefits accrued to appellant not by virtue of any individual effort on her part but solely through the collective bargaining efforts of the union. Therefore, under the circumstances of this case, those benefits should not be included in the determination of appellant's proper compensation rate.

Nor in the case of a piece-rate worker can bonus, vacation, and holiday pay be included in the calculation of the proper compensation rate. Ark. Code Ann. § 11-9-518(a)(2) (1987) provides:

> Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek in the employment.

Under this statute, "earnings are to be divided by the number of hours required to earn the wages" and clearly in the instant case, no hours were required to be worked to receive these earnings. Therefore, under our statute relating to piece-rate work, bonus, holiday and vacation pay is not to be included in the computation of the average weekly wage, and it is not necessary in the instant case for us to decide whether these fringe benefits are included in the definition of "wages" under § 11-9-102(8).

Finally, we address appellant's contention, in her first argument, that the issue of fringe benefits was properly before the Commission. We think appellant has misconstrued the Commission's finding on this matter. In the law judge's opinion, which was affirmed and adopted by the Commission, the law judge did not hold that appellant's contention was "not properly before the commission" but rather stated:

> By definition, if the benefits are not lost as a result of the compensable injury, their loss cannot be considered in determining the proper rate of compensation. Therefore, the issue as framed by the claimant does not exist in this case and it is not necessary to decide the question.

We are not certain exactly what the law judge meant by this statement. However, in this particular case it is not necessary for us to decide whether benefits must be lost to be considered in determining the proper rate of compensation. As we have stated above, in this case employer contributions to medical, life, and disability insurance cannot be included in the definition of "wages." And whether or not holiday and vacation pay are included in the definition of "wages" makes no difference because in the instant case they are excluded due to the statutory method of determining the average weekly wage of an employee working on a piece basis.

Appellant's next two arguments are related. Appellant argues the appellees and the Commission's application of the piece-rate formula in calculating her average weekly wage is incorrect, and that she should be entitled to the maximum temporary total disability rate of $189.00. Specifically, appellant contends the value of negotiated fringe benefits should be included, that the overtime wages were incorrectly calculated, and that the appellees incorrectly included the week of injury in the calculation.

The formula for computing the average weekly wage of a piece-rate worker is established by § 11-9-518(a)(2) set forth above. According to that statute, the average weekly wage is determined by "dividing the earnings of the employee" by the "number of hours required to earn the wages" during the period "not to exceed fifty-two weeks preceding the week in which the accident occurred" multiplied by the "number of hours in a full-time workweek." We note at the outset that there is no statutory provision for disregarding weeks in which "earnings are inordinately low" and these weeks should therefore be included in the calculation.

Section 11-9-518(b) provides:

> Overtime earnings are to be added to the regular

weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.

According to the above statutes, appellant's average weekly wage is equal to:

$$\frac{(\text{employee earnings}}{(\text{number of hours}} \times 40 \quad \frac{)}{)} + \frac{\text{overtime earnings}}{\text{number of weeks worked}}$$

Applying the statutory formulas to the case before us, we find the calculations made by the law judge and adopted by the Commission, as well as those made by the appellees, to be incorrect. And because of the state of the record, we remand this case to the Commission for recalculation of appellant's average weekly wage with the following guidance:

(1) In determining the average weekly wage, the earnings earned during the week the accident occurred are to be excluded from the calculation;

(2) In determining the average weekly wage, the employee's earnings during the preceding 52 weeks (exclusive of holiday pay, vacation pay, bonus, and overtime earnings) is to be divided by the number of hours (exclusive of any hours in excess of 8 hours in any one day) required to earn the wages;

(3) Because the union contract specifically provides overtime will be paid at one and one-half times the employee's regular rate of pay, overtime earnings are to be calculated by including all earnings received for work performed in excess of 8 hours in any one day; and

(4) In dividing overtime earnings by the number of weeks worked by the employee not to exceed a period of 52 weeks preceding the accident, the number of weeks is to be reduced by those weeks in which the employee did not work.

We therefore affirm in part and remand to the Commission for recalculation of appellant's average weekly wage.

JENNINGS and COOPER, JJ., agree.

AMERICAN MUTUAL INSURANCE COMPANY (Guaranty Fund, Arkansas Insurance Commission) *v.* ARGONAUT INSURANCE COMPANY

CA 90-98 801 S.W.2d 55

Court of Appeals of Arkansas
En Banc
Opinion delivered January 9, 1991

Penix, Penix & Lusby, by: *Bill Penix* and *Richard L. Castleman*, for appellant.

Friday, Eldredge & Clark, by: *Elizabeth J. Robben*, for appellee.

GEORGE K. CRACRAFT, Chief Judge. This is an appeal from an order of the Arkansas Workers' Compensation Commission imposing liability on appellant American Mutual Insurance Company for workers' compensation benefits resulting from an injury suffered by an employee of Tiffany Stand and Furniture. As we conclude that the order is not appealable, we dismiss the appeal.

William Lance Freeman was employed by Tiffany Stand and Furniture in 1982, when he sustained an injury to his back for which compensation benefits were paid. He suffered a recurrence of that injury in 1984 for which Tiffany also afforded him benefits. In 1986, while still in the employ of Tiffany, Freeman

sustained a third episode of disability resulting from pain in his back. At the time of the 1982 and 1984 incidents, Tiffany's workers' compensation carrier was Argonaut Insurance Company. At the time of the 1986 episode, its carrier was American Mutual Insurance Company. American Mutual contended that the 1986 episode was merely another recurrence of the earlier injury for which Argonaut afforded coverage to Tiffany. Argonaut contended that it was in fact a reinjury or aggravation of the earlier condition and was sustained at a time when American Mutual afforded Tiffany workers' compensation coverage. The Commission found that the 1986 episode of disability resulted from an aggravation of the earlier injury and that American Mutual afforded the coverage to Tiffany for that injury.

American Mutual appeals, contending that the Commission erred in finding that Freeman had suffered an aggravation rather than a recurrence and, alternatively, in not apportioning the loss. We do not address these issues on their merits because we conclude that the Commission's order is not final and appealable.

The order from which this appeal was taken concludes as follows:

> Accordingly, for the foregoing reasons, we reverse the decision of the administrative law judge and find that the claimant suffered an aggravation of his pre-existing back condition in October 1986. Therefore, respondent No. 2 [American Mutual] is liable for appropriate compensation benefits. *This case is hereby remanded to the Administrative Law Judge for the purpose of determining claimant's appropriate wage rate at the time of the October 1986 injury.* In addition, the Administrative Law Judge indicated that the period of temporary total disability be determined by review of claimant's attendance records; *while on remand we would suggest that he set out the specific periods of temporary total disability which the facts support.*

(Emphasis added.)

Arkansas Code Annotated § 11-9-711(b)(2) (1987) provides that appeals from the Commission to this court shall be allowed as in other civil actions. As a general rule, orders of

remand are not final and appealable; ordinarily, an order is reviewable only at the point where it awards or denies compensation. *Samuels Hide & Metal Co.* v. *Griffin*, 23 Ark. App. 3, 739 S.W.2d 698 (1987); *Lloyd* v. *Potlach Corporation*, 19 Ark. App. 335, 721 S.W.2d 670 (1986); 3 A. Larson, *The Law of Workmen's Compensation* § 80.11 (1983). For an order to be appealable, it must be a final one. To be final, the order must dismiss the parties from the court, discharge them from the action, or conclude their rights as to the subject matter of the controversy. *Gina Marie Farms* v. *Jones*, 28 Ark. App. 90, 770 S.W.2d 680 (1989).

It also has been stated that appealable orders of the Commission are not limited to those that make a final disposition of an entire case. *Ozark Rustic Homes* v. *Albright*, 269 Ark. 696, 600 S.W.2d 420 (Ark. App. 1980). However, we have held that the test for determining whether an order of the Workers' Compensation Commission is appealable is whether it puts the Commission's directive into execution, ending the litigation or a separable part of it. *Gina Marie Farms* v. *Jones*, *supra*. An order that establishes a party's right to recover but remands for a determination of the amount of that recovery ordinarily is not an appealable one. *Id.*; *Hope Brick Works* v. *Welch*, 27 Ark. App. 90, 768 S.W.2d 37 (1989). *See Arkansas State Highway Commission* v. *Kesner*, 239 Ark. 270, 388 S.W.2d 905 (1965).

The purpose of the above rules is to prevent piecemeal litigation. The order entered here finds liability but does not settle the issue or put the Commission's directive into execution, as it remands the case for the administrative law judge to determine claimant's appropriate wage rate and periods of temporary total disability, and to make an award in accordance with those determinations. To hold this order appealable would not further the purpose of avoiding having cases tried on a piecemeal basis, as the very issues left to be decided by the administrative law judge on remand are not uncommonly subjects of appeal in their own right. *See, e.g., Noggle* v. *Arkansas Valley Electric Coop.*, 31 Ark. App. 104, 788 S.W.2d 497 (1990); *Herman Young Lumber Co.* v. *Koon*, 30 Ark. App. 162, 785 S.W.2d 44 (1990); *Wright* v. *Tyson Foods, Inc.*, 28 Ark. App. 261, 773 S.W.2d 110 (1989). On the other hand, requiring the parties to wait until entry of an award before appealing to this court will not prevent appellant

from making the arguments it now makes, as well as any others that may arise as a result of the proceedings yet to be had below. We conclude that an order of remand for the purpose of determining the amount of disability benefits to be awarded is not appealable.

Dismissed.

MAYFIELD and ROGERS, JJ., concur.

DANIELSON, J., not participating.

MELVIN MAYFIELD, Judge, concurring. I concur with the holding in the majority opinion that the order of the Workers' Compensation Commission sought to be appealed in this case is not an appealable order. This matter, however, needs a "bright-line" rule by which attorneys may determine whether an order of the Commission is or is not appealable.

As the majority opinion points out, the purpose of the requirement of an appealable order is to prevent piecemeal litigation. But it is not always clear just when an order of the Commission is appealable. The majority opinion also points out that the order does not have to make a final disposition of the entire case but that an order to be appealable "must dismiss the parties from the court, discharge them from the action, or conclude their rights as to the subject matter of the controversy." And the opinion states the "test" for determining appealability is whether the order "puts the Commission's directive into execution, ending the litigation or a separable part of it." *Gina Marie Farms* v. *Jones*, 28 Ark. App. 90, 770 S.W.2d 680 (1989), is cited in support of these statements.

The language in some of the cases, both before and after *Gina Marie Farms*, fails to include the phrase "or a separable part of it." I think it important to keep this phrase in mind. The opinion in *Gina Marie Farms* explains the decision in a number of cases by applying the "test" of whether the order sought to be appealed "puts the Commission's directive into execution ending the litigation or a separable part of it." Only by the application of this test to the statement that "to be final, an order must dismiss the parties from the court, discharge them from the action, or conclude their right as to the subject matter in controversy" can we find any "bright-line" that will explain many of the decisions

of the past or serve as a more complete guide for the future.

At first blush, the order in the present case would appear to be appealable since it holds that the appellant American Mutual Insurance Company (now Guaranty Fund, Arkansas Insurance Commission) is liable for the appropriate compensation benefits, and the appellee Argonaut Insurance Company is not liable. This order appears to put the Commission's directive into execution and to end a separable part of the controversy. But not so. As the majority opinion states, the controversy is between the claimant William Lance Freeman and his employer Tiffany Stand & Furniture Company, neither of which is a real party to this appeal. The real parties to this appeal are the employer's insurance carriers. Thus, the Commission's opinion did not end a "separable part" of the real controversy which is between the claimant and his employer.

What may be needed is something akin to Ark. R. Civ. P. 54(b) which allows a judgment to be final to one or more but fewer than all of the claims or parties if the trial court makes "an express determination that there is no just reason for delay" and makes "an express determination for the entry of judgement." Obviously, this rule of civil procedure does not apply to proceedings in and appeals from the Workers' Compensation Commission. I think, however, that the careful application of our opinion in *Gina Marie Farms, supra*, will be helpful in determining whether an order of the Commission is appealable.

JUDITH ROGERS, Judge, concurring. Under the authority cited by the majority opinion, I must concur in the decision to dismiss this appeal, as the Commission's order is not final and, therefore, is not properly before this court for review. I do think, however, that it is an unnecessary expenditure of attorney's fees and time to have two insurance carriers participating in this litigation until all liability is ascertained. These additional costs must necessarily be borne by someone, and it appears that, under present case law, this is a problem to be addressed by the legislature or the Commission under its rule-making authority.

B.C. BENSON ESTATE by Herbert V. Pierce and Dwight Pierce, Executors *v.* FIRST NATIONAL BANK of De Queen, Kerwin Gray, William Gray, and Mary Warrengton

CA 90-62 801 S.W.2d 58

Court of Appeals of Arkansas
Division II
Opinion delivered January 16, 1991
[Rehearing denied February 13, 1991.]

Jones & Petty, by: *John Harris Jones*, for appellants.

Daily, West, Core, Coffman & Canfield, by: *Ben Core* and *Robert W. Bishop*, for appellees Kerwin Gray, William (Bill) Gray, and Mary Warrengton.

Steel & Steel, by: *Jim Bob Steel*, for appellee Mary Warrengton.

JAMES R. COOPER, Judge. The appellants, executors of the B.C. Benson Estate, brought an action asserting that the Estate should be determined to be the owner of certificates of deposit issued by the First National Bank of De Queen. The appellees Mr. Gray and Ms. Warrengton claimed ownership of the certificates of deposit, on which their names had been added by the decedent. The chancellor concluded that Mr. Gray and Ms. Warrengton were the owners of the certificates of deposit by virtue of joint survivorship under Ark. Code Ann. § 23-32-1005 (1987). From that decision, comes this appeal. We affirm.

The record shows that, prior to his death in 1989, B.C. Benson had funds on deposit with the appellee First National Bank of De Queen in the form of certificates of deposit. They were initially purchased between 1986 and 1988. B.C. Benson, at

various times between September 1988 and January of 1989, made seven different trips to the bank for the purpose of adding the names of the appellee Kerwin Gray to two CD's; the appellee William Gray, a/k/a Bill Gray, to three CD's; and the appellee Mary Warrengton to two CD's. The appellees Kerwin and William Gray lived next door to Benson and had been close to Benson during his lifetime, helping take care of his needs and giving him advice after the death of his wife. The appellee Mary Warrengton is Benson's niece. Benson had no surviving children.

Upon B.C. Benson's death in January 1989, the appellants, acting as executors of Benson's estate, brought suit against the individual appellees whose names had been added to the CD's, as well as the appellee First National Bank of De Queen, where the funds in question were on deposit. The appellants claimed that, when the names were added, no rights of survivorship were created with respect to any of the funds and that the $136,000.00 represented by the CD's rightfully belonged to Benson's estate. The chancellor found that a right of survivorship had been created in the funds and denied the appellants' claims of ownership. From that ruling comes this appeal.

Arkansas Code Annotated § 23-32-1005(1)(A) (1987) (Act 843 of 1983) is controlling here:

> Unless a written designation to the contrary is made to the banking institution or federally or state-chartered savings and loan association, when a deposit has been made or a certificate of deposit purchased in the names of two (2) or more persons and in form to be paid to any of the persons so named, or the survivors of them, the deposit or certificate of deposit and any additions thereto made by any of the persons named in the account shall become the property of those persons as joint tenants with right of survivorship.

The appellant relies upon several cases decided after the effective date of the Act, but those cases dealt with joint accounts which were opened prior to such date and therefore were governed by former Ark. Stat. Ann. § 67-552 (Repl. 1980). All bank accounts and CD's in two names opened or purchased after March 23, 1983 (the effective date of Act 843 of 1983), are governed by the new code section. Both *Courtney* v. *Courtney*, 296 Ark. 91, 752 S.W.2d 40 (1988), and *Hall* v. *Superior Fed.*

Bank, 303 Ark. 125, 794 S.W.2d 611 (1990), address the issue of joint ownership of accounts opened after the Act took effect. We follow those holdings in affirming the lower court.

Here, the accounts in question were opened and the names were added after the effective date of the Act. In accordance with the Supreme Court's holding in *Hall*, *supra*, 303 Ark. at 133, 794 S.W.2d at 615, we must give the words in the statute their usual and ordinary meaning, and where there is no ambiguity, we give the statute effect just as it reads. Here, the deceased clearly directed the bank to add the names, and the CD's stated on their face: "If more than one of you are named above, you will own the certificate as joint tenants with right of survivorship (and not as tenants in common)." No contrary designation was made by B.C. Benson.

These certificates clearly come within the language of § 23-32-1005(1)(A) (1987) and are payable to the survivors, since no written designation to the contrary appears. *Courtney*, *supra*, 296 Ark. at 95-96, 752 S.W.2d at 42. We find nothing to support the appellants' argument that Benson failed to create a survivorship interest in the certificates.

Affirmed.

CRACRAFT, C.J., and JENNINGS, J., agree.

Willie REED *v.* REYNOLDS METALS, et al.

CA 90-182 801 S.W.2d 661

Court of Appeals of Arkansas
Division I
Opinion delivered January 16, 1991

B. Dewey Fitzhugh, for appellant.

Friday, Eldredge & Clark, by: *James C. Baker, Jr.* and *J. Michael Pickens*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Workers' Compensation Commission.

Appellant, Willie Reed, sustained a compensable injury on April 17, 1979, when he was working from an elevated forklift platform and was struck by an overhead crane. Appellant received temporary total disability benefits from April 18, 1979, through September 3, 1979, and from December 18, 1984, through January 6, 1986; permanent partial disability benefits in a lump sum for 67 ½ weeks; and bi-weekly permanent partial disability benefits from January 7, 1986, through November 14, 1986.

On February 10, 1989, at a hearing before the administrative law judge, appellant contended he sustained emotional and psychological injuries as a result of the April 17, 1979, compensa-

ble injury which left him permanently and totally disabled; that he is entitled to additional temporary total disability from December 18, 1984, until October 18, 1988, when he was finally released by Dr. James Moneypenny; and that the appellee violated the Safe Place to Work Statute.

The administrative law judge found appellant had sustained permanent partial disability in the amount of 60% to the body as a whole (25% physical impairment, 5% psychological impairment, and 30% wage loss) as a result of the admittedly compensable injury; that appellant was not entitled to additional temporary total disability benefits; and that appellant failed to prove a safety violation pursuant to Ark. Code Ann. § 11-9-503 (1987). The full Commission reduced the disability to 30% to the body as a whole (the amount of the anatomical rating) and affirmed the law judge on all other issues.

In its opinion, the Commission stated:

> Here, instead of having motivation to look for additional employment, claimant has chosen to draw disability and retirement benefits from the respondent. In fact, claimant testified that he considers himself to be retired, and admitted drawing retirement benefits in an amount of $400.00 per month. Since claimant considers himself retired from the work force and is actually drawing retirement benefits, we find that he has suffered no loss in wage earning capacity. The Commission in the recent decision of *Edith Curry* v. *Franklin Electric Co.*, Full Commission opinion filed September 6, 1989 (D306062 and C803992), held that the claimant was not entitled to additional benefits since she was already receiving Social Security retirement benefits. This Commission reasoned that workers' compensation benefits were intended to replace income lost when a compensable injury impaired a claimant's earning capacity and since the claimant in *Curry* had retired from the work force, her earning capacity was no longer relevant. Similarly, the claimant in this case considers himself to be retired and is drawing retirement benefits from the respondent. Given those facts, we find claimant's earning capacity no longer relevant since he has voluntarily retired from the work force.

> Therefore, based upon this fact as well as all of the other wage loss factors, we find that the claimant has failed to prove by a preponderance of the evidence that he has suffered any loss in wage earning capacity.

Appellant first argues the Commission erred in finding, since he voluntarily retired from the work force, his earning capacity is no longer relevant and in denying him permanent total disability benefits. Appellants contends that drawing retirement pay does not mean per se that a worker possesses no earning capacity.

A similar issue was addressed in the recent case of *Curry* v. *Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990), where we reversed the decision of the Commission that denied the appellant permanent and total disability benefits, specifically wage loss benefits, based upon the appellant's receipt of social security benefits due to her age. In that case we said:

> 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. . . . [A]t 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. . . . 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.

32 Ark. App. at 173. In the instant case, as in *Curry*, the Commission made no finding with regard to appellant's wage earning capacity but found "claimant's earning capacity no longer relevant since he has voluntarily retired from the work force" and based its decision upon appellant's drawing of retirement benefits.

■ Therefore, we reverse on this point and remand to the Commission to determine appellant's wage loss disability based

on a consideration of appellant's age, education, experience, and other matters affecting wage loss. *See Glass* v. *Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). *See also Arkansas State Police* v. *Welch*, 28 Ark. App. 234, 772 S.W.2d 620 (1989).

Appellant then argues the Commission erred in failing to grant the statutory penalty under Ark. Code Ann. § 11-9-503 (1987) and in holding that appellant did not meet his burden of proof in showing that appellee was guilty of a violation of a safety statute. Appellant does not rely on the violation of any specific Arkansas statute or official regulation pertaining to the health and safety of employees, but cites Ark. Code Ann. § 11-2-117 (1987), the general unsafe place to work statute in support of his argument. Appellant contends there were at least two company safety rules in effect at the time of the accident which, if followed, would have avoided appellant's injury, and that appellee knew of the risk of serious bodily injury several days before the accident but its supervisors failed to communicate and implement known procedures to avoid a risk of serious bodily injury.

Arkansas Code Annotated § 11-2-117 states:

> (a) Every employer shall furnish employment which is safe for the employees therein and shall furnish and use safety devices and safeguards. He shall adopt and use methods and processes reasonably adequate to render such an employment and place of employment safe and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of the employees.

Here, there is evidence that the appellee had written safety regulations concerning the operation of cranes near fork-lifts where men were working in an overhead area; that these rules were taught when employees took their training; that rules prohibiting a crane operator from moving over a fixed object were placed inside a "bridge crane," in areas of the plant where a monorail crane was operated from the floor, and were posted on the wall of the building nearby; and that there were established rules in place so this type of accident would not happen and to make the plant a safe place to work. There was also evidence that appellee held regular safety meetings with its employees to reinforce awareness of safety in the work place and what could be done to avoid accidents. The evidence demonstrates that appellee

made diligent efforts to provide its employees with a safe place to work and we affirm the Commission's finding that appellant failed to prove a safety violation.

Finally, appellant contends the full Commission's refusal to award additional temporary total disability benefits is not supported by substantial evidence. Appellant argues that the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition and that his condition improved as a result of Dr. Moneypenny's treatment.

We are unable to address this issue because in its opinion the Commission made no findings regarding additional temporary total disability benefits. Therefore, we remand on this issue for a finding to be made.

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

CRACRAFT, C.J., and ROGERS, J., agree.

Daniel VALDEZ *v.* STATE of Arkansas

CA CR 90-111 801 S.W.2d 659

Court of Appeals of Arkansas
Division I
Opinion delivered January 16, 1991

Jonathan P. Shermer, Jr., for appellant.

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

JUDITH ROGERS, Judge. The appellant, Daniel Valdez, was adjudged a delinquent juvenile by the Franklin County Juvenile Court on a finding that he was guilty of theft of property. As a juvenile offender, appellant was committed to the Division of Children and Family Services/Youth Services Center. On appeal, appellant contends that, due to the enactment of the Juvenile Code of 1989, he was entitled to a jury trial below. We find no merit in this contention and affirm.

The Juvenile Code of 1989 is codified at Ark. Code Ann. § 9-27-301 *et seq.* (Supp. 1989). A "delinquent juvenile" is described as any juvenile ten years or older who has committed an act other than a traffic offense or game and fish violation which, if such act had been committed by an adult, would subject such adult to prosecution for a felony, misdemeanor, or violation under the applicable criminal laws of this state. Ark. Code Ann. § 9-27-303(11) (Supp. 1989). The purposes of the code with particular regard to delinquent juveniles are found in Ark. Code Ann. § 9-27-302(3) & (4) (Supp. 1989), which provides as follows:

> (3) To protect society more effectively by substituting for retributive punishment, whenever possible, methods of offender rehabilitation and rehabilitative restitution, recognizing that the application of sanctions which are consistent with the seriousness of the offense is appropriate in all cases;
>
> (4) To provide means through which the provisions of this subchapter are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.

The code does provide that all hearings shall be conducted by the judge without a jury. Ark. Code Ann. § 9-27-325(a) (Supp. 1989). Appeals from juvenile court may be brought to this court or the Arkansas Supreme Court. Ark. Code Ann. § 9-27-343 (Supp. 1989).

The issue raised by appellant was settled by the United States Supreme Court in *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1974), where it was held that the Constitution does not

require a jury trial in the adjudicative phase of state delinquency proceedings. In *McKeiver*, the Court had before it consolidated appeals from both Pennsylvania and North Carolina. The appellants in those case, as does the appellant in the instant case, argued that since the state proceedings were "substantially similar to a criminal trial," they had a right to a jury trial. The Court noted previous decisions holding that constitutional rights to notice, counsel, confrontation, cross-examination and the privilege against self-incrimination were guaranteed juveniles. However, the Court recognized for a variety of reasons that the absence of a jury trial did not detract from the established due process standard of fundamental fairness in juvenile proceedings. To the contrary, the Court was of the view that to require a jury trial as a matter of constitutional precept might "remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding." *Id.* at 545. The Court concluded by saying, "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence." *Id.* at 551. The decision allowed the states license to experiment and to pursue the rehabilitative goals of a juvenile system.

The issue of the right to a jury trial in juvenile proceedings has also been decided by the appellate courts of Arkansas. Prior to the decision in *McKeiver*, the supreme court, in reference to the then existing juvenile act, held that there was no right to a jury trial under the Arkansas Constitution. *See Martin* v. *State*, 213 Ark. 507, 211 S.W.2d 116 (1948). In *Martin*, with a rationale similar to that in *McKeiver*, Chief Justice Griffin Smith wrote:

> From this beginning the more modern institutions have emerged, with a gradual recognition by the General Assembly that society gains more through reformation of juveniles than it does from punishing them. The entire purpose is one for moral recovery. A criminal charge is treated as evidence of delinquency when established. Felonious conduct and misdemeanors are not dealt with as such, but are considered only in determining what is best for the minor when all of the circumstances of birth, environment, opportunity, habit and demonstrated tendencies are measured.

Id. at 513, 211 S.W.2d at 119.

Thereafter, in *Elkins* v. *State*, 7 Ark. App. 166, 646 S.W.2d 15 (1983), we also determined that one who is charged as a delinquent has no right to a jury trial. Relying on *Martin* v. *State*, *supra*, and the applicable statutes, we observed:

> A reading of the above two sections makes it clear that when, as here, appellant is charged as a delinquent, he has no right to a jury trial. This is to his benefit in light of the stated purpose of the Juvenile Code at Ark. Stat. Ann. § 45-402 (Repl. 1977). This avoids the placement of a minor in our penitentiary system with adult criminals, and hopefully wards off any future criminal activity by minor delinquents.

Id. at 166-67, 646 S.W.2d at 17.

While recognizing the cases previously mentioned, appellant argues that a jury trial is now required by virtue of the enactment of the Juvenile Code of 1989. In making his argument, appellant relies on the following language in *Martin* v. *State*, *supra*:

> We quite agree with counsel for appellant that if the Juvenile Court Act were a substitute for prosecution, and that punishment as for a crime attended the exercise of jurisdiction, there would be an invasion of the defendant's right to trial by jury, guaranteed by Sec. 7 of Art. 2 of the Constitution of 1874.

Id. at 512, 211 S.W.2d at 118. It is the appellant's contention that a jury trial is required in that the new code represents such a "substitute for prosecution." We disagree.

The revisions found in the Juvenile Code of 1989 were designed to promote and further safeguard the interests of accused juvenile offenders. We do not perceive the code as a departure from the fundamental principles recognized in *McKeiver*, *supra*, *Martin*, *supra*, or *Elkins*, *supra*, but as rather a reaffirmation and rededication to those goals. As such, the code is not a "substitute," but rather a strengthening of the system. The drafters of the Code and the General Assembly specifically addressed this issue and declined to provide for a jury trial. The due process standard of fundamental fairness is maintained in the

code without affording a jury trial in this setting.

Affirmed.

CRACRAFT, C.J., and MAYFIELD, J., agree.

Joseph COLE *v.* STATE of Arkansas

CA CR 90-154 802 S.W.2d 472

Court of Appeals of Arkansas
Division II
Opinion delivered January 23, 1991

Robert S. Blatt, by: *William J. Kropp III*, for appellant.

Steve Clark, Att'y Gen., by: *Kelly K. Hill*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Chief Judge. Joseph Cole appeals from his conviction of the crimes of interference with a law enforcement officer and battery in the second degree. He advances two points for reversal, both of which involve challenges to the sufficiency of the evidence. We affirm.

On appeal, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the appellee, and will affirm if there is substantial evidence to support the verdict. *Dillard* v. *State*, 20 Ark. App. 35, 723 S.W.2d 373 (1987). A recital of a portion of the factual background is necessary in order to bring these issues into focus. On June 27, 1989, appellant became despondent over financial matters and threatened to take his own life. He so frightened his wife and child that they called his brother and left the home. Appellant's brother, Steve Cole; appellant's nephew and his wife, Anthony and Elizabeth Martin; and Elizabeth Martin's mother drove to appellant's residence to counsel with him. When Anthony Martin and Steve Cole got out of their vehicle and approached the house, appellant came out and fired five shots at them with a .22 rifle and several more with a 30-30 rifle. Martin and Steve Cole then got into the vehicle and were backing out of the driveway when a bullet pierced the windshield, causing head wounds to both

Martin and his wife.

A detective with the sheriff's department responded to a call about the disturbance. He, too, was met with a burst of gunfire when he approached the residence. He alerted the state police, and a SWAT team surrounded the house. After more than five hours, appellant surrendered and was placed under arrest. He was charged with two counts of battery in the second degree and one count of interference with a law enforcement officer in the discharge of his official duties. A jury found him guilty of the charges of interference and second-degree battery as to Anthony Martin, but of the lesser offense of third-degree battery as to Elizabeth Martin. The third-degree battery conviction is not appealed.

Appellants first contends that the evidence does not support a finding that he interfered with the officer and that he could only be found guilty of the crime of resisting arrest. Arkansas Code Annotated § 5-54-104 (1987) provides that one commits the offense of interference with a law enforcement officer if he knowingly employs force or threatens to employ force against a law enforcement officer engaged in performing his official duties. Arkansas Code Annotated § 5-54-103 (1987) provides that one commits the offense of resisting arrest if he resists a person known by him to be a law enforcement officer effecting an arrest. Appellant argues that these statutes are to be strictly construed and that one cannot be held to have interfered with an officer in the performance of his duties when the interference is merely a resistance to his own arrest. *See Price* v. *State*, 276 Ark. 80, 632 S.W.2d 429 (1982); *Gilmer* v. *State*, 269 Ark. 30, 602 S.W.2d 406 (1980); *State* v. *Bocksnick*, 268 Ark. 74, 593 S.W.2d 176 (1980); *Breakfield* v. *State*, 263 Ark. 398, 566 S.W.2d 729 (1978); *Easterly* v. *State*, 8 Ark. App. 135, 648 S.W.2d 843 (1983).

Although those cases do so hold, they do not imply that one may not be found guilty of interference where he interferes with an official investigation that precedes an effort to effect an arrest. In this case, the officer testified that when he arrived at the scene he was informed by the Martins of what had happened and that appellant might still be inside the house. Appellant's physical condition was not known by the Martins. The officer

stated that one of his reasons for approaching appellant's dwelling was to find out in fact what had happened since the Martins had left the residence. He was then asked:

> Q. You wanted to arrest Mr. Cole, didn't you, for the shooting?
>
> A. No, sir, not at that point in time. Like I say, we had been given some information at that point in time, had been given some information that we felt that Mr. Cole himself might be injured. We weren't sure what we were going to do at that time.

The officer stated that he had information that appellant might have injured himself and it was his duty and responsibility to protect life and property and render assistance to injured persons. He further stated that the first time he knew the appellant was still alive and in the house was when the shots were fired at him.

We think that the jury could have concluded from the officer's testimony that his initial purpose in approaching the house was investigatory and in the performance of his duties to determine the facts and protect both life and property, that appellant interfered with the officer as he was performing a duty other than seeking to arrest appellant, and that the determination to make the arrest and appellant's resistance to it occurred thereafter. From our examination of the record, we cannot conclude that there is no substantial evidence to support appellant's conviction for interference with a law enforcement officer.

Appellant next contends that the evidence was not sufficient to sustain a conviction of second-degree battery as to Anthony Martin. Appellant argues that the State failed to prove that he acted with the purpose of causing physical injury to anyone or that Martin suffered serious physical injury. We find no error.

Arkansas Code Annotated § 5-13-202(a) (1987) provides in pertinent part that one commits battery in the second degree if (1) with the purpose of causing physical injury to another person, he causes serious physical injury to any person; (2) with the purpose of causing physical injury to another person, he causes physical injury to any person by means of a deadly weapon; or (3) he reckless causes serious physical injury to another person by means of a deadly weapon. A person acts

"purposely" with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result. Ark. Code Ann. § 5-2-202(1) (1987). One's intent or purpose, being a state of mind, can seldom be positively known to others. Since intent ordinarily cannot be proven by direct evidence, jurors are allowed to draw upon their common knowledge and experience to infer it from the circumstances. *Tarentino* v. *State*, 302 Ark. 55, 786 S.W.2d 584 (1990). From our review of the record, we cannot conclude that the finding that appellant fired the shots with the purpose of causing physical injury to someone is not supported by substantial evidence.

Nor can we agree with appellant's argument that the State's failure to prove that Anthony Martin suffered "serious physical injury" requires that his conviction be reversed. Since, as we have concluded above, the jury reasonably could have found that appellant acted purposely, and since the injury was occasioned by use of a deadly weapon, only "physical injury" need have been shown. Ark. Code. Ann. § 5-13-202(a)(2) (1987).

Arkansas Code Annotated § 5-2-102(14) (1987) defines "physical injury" as the impairment of physical condition or the infliction of substantial pain. Here, the evidence discloses that a bullet fired by appellant struck Martin in the head, which was bleeding at the time the detective arrived at the scene. There was evidence that, even though stitches were not required, a portion of the bullet lodge in Martin's head and had to be removed.

The fact that Martin did not verbalize his pain is not conclusive. In *Holmes* v. *State*, 15 Ark. App. 163, 165, 690 S.W.2d 738, 739 (1985), we said that "[t]he fact that the victim in this case did not verbally relate the extent of his pain and anguish is not controlling. Pain is a subjective matter and difficult to measure from testimony." We further said that in determining whether an injury inflicts substantial pain, the factfinder must consider all of the testimony and may consider the severity of the attack and the sensitivity of the area of the body to which the injury is inflicted. The factfinder is not required to set aside its common knowledge and may consider the evidence in light of its observations and experiences in the affairs of life. In light of the evidence above, we cannot conclude that the jury could not find that Martin suffered substantial pain.

Appellant finally argues that the verdicts were inconsistent and that his conviction for second-degree battery as to Anthony Martin must be reduced to third-degree because the jury found him guilty only of third degree battery as to Elizabeth Martin. We cannot agree. In the first place, appellant has failed to demonstrate that he raised this point during trial. Our review of appellant's appendix reflects no objection after the jury's findings and sentencing were read, and we do not consider issues of this nature that are raised for the first time on appeal. *Williams* v. *State*, 303 Ark. 193, 794 S.W.2d 618 (1990). In any event, since the evidence in this case was sufficient to warrant a conviction of the greater offense on both counts, appellant is in no position to complain of the jury's having extended him greater leniency than he was entitled to. *See Riddick* v. *State*, 271 Ark. 203, 607 S.W.2d 671 (1980).

Affirmed.

JENNINGS and ROGERS, JJ., agree.

HOPE BRICK WORKS *v.* Freddie WELCH, Deceased

CA 90-206 802 S.W.2d 476

Court of Appeals of Arkansas
En Banc
Opinion delivered January 30, 1991

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

The Lowber Hendricks Law Firm, by: *Robert B. Buckalew*, for appellee.

JAMES R. COOPER, Judge. The appellee in this workers' compensation case, now deceased, filed a claim for workers' compensation benefits alleging that he had contracted silicosis during twenty-two years of employment with the appellant. The appellee died after the initial hearing, and an appeal to the full Commission was brought by his dependents. The Commission found that the appellee's claim had been established by clear and convincing evidence and it remanded to the Administrative Law Judge to determine the benefits to which the appellee's dependents were entitled. The appellant then brought an appeal of the Commission's order to this Court, which was dismissed as premature. *Hope Brick Works* v. *Welch*, 27 Ark. App. 90, 768 S.W.2d 37 (1989). The amount of benefits have since been determined, and the Commission entered a final order on March 13, 1990, finding that the appellee established his claim by clear and convincing evidence. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in finding that the appellee established entitlement to

occupational disease benefits by clear and convincing evidence. We affirm.

Arkansas Code Annotated § 11-9-601 (1987) requires that a causal connection between the claimant's occupation or employment and the occupational disease from which he suffers must be established by clear and convincing evidence. Subsection 11-9-601(g)(1)(A) provides that an employer shall not be liable for any compensation for an occupational disease unless:

> The disease is due to the nature of an employment in which the hazards of the disease actually exist and are characteristic thereof and peculiar to the trade, occupation, process, or employment and is actually incurred in his employment.

The appellant first contends that the Commission erred in finding that the appellee proved by clear and convincing evidence that there was a causal connection between his silicosis and his employment duties at Hope Brick Works. We do not agree.

When the findings of the Workers' Compensation Commission are challenged on appeal, we review the evidence in the light most favorable to those findings and affirm if they are supported by substantial evidence. *Deboard* v. *Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). We will not reverse the Commission's findings unless we are convinced that reasonable minds could not have reached the conclusion arrived at by the Commission. *Sanyo Mfg. Corp.* v. *Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984).

The appellant does not contend that the appellee did not suffer from silicosis. Prior to his death, the appellee testified that he had smoked in 1950 but that he had not smoked in 25 years and had no breathing problems until 1983. He also stated that he was sometimes assigned to cutting brick with a saw, which produced dust. Finally, he testified that he was often exposed to dust in various locations of the brick works, and that the dust originated in the clay from which the bricks were made. John Gardner, Production Manager of Hope Brick Works, testified that clay was a mineral, and that the clay used for making bricks was composed for the most part of alumino-silicates.

The medical evidence shows that the physicians who treated the appellee at first suspected that he suffered from lung cancer.

After a biopsy was performed, however, anthrasilicosis was suspected, and the appellee underwent further surgical procedures in order for his physicians to obtain a large piece of tissue for pathological examination. A report from Doctors Donald Paynter and F. Charles Hiller stated that:

> With the available pathologic information it is our impression that Mr. Welch has progressive massive fibrosis secondary to chronic mineral dust inhalation. This appears to be related to his employment in a brick manufacturing plant. A portion of the pathological specimen has been sent for x-ray defraction studies to better identify the mineral crystals involved.

The appellee subsequently received the following letter from Dr. Hiller:

> The findings at [your] operation indicate that you have disease called silicosis. Silicosis is caused by the inhalation of certain types of dust. The disease sometimes occurs in people who work in sand blasting, in mines, and in rock quarries. It is definitely possible that you inhaled this silica dust during your work at the brick plant. The reason I am writing you is to suggest that you contact the Occupational Safety and Health Administration which . . . can only check the work place if an employee makes a complaint. They cannot act on the report of a doctor unless the patient has made a request.
>
> . . . .
>
> I feel it is very important that this situation be checked so that other workers are not exposed to this problem also.
>
> . . . .
>
> /s/
>
> F. Charles Hiller, M.D.
> Professor of Medicine
> Pulmonary Division

The appellant asserts that this evidence is too speculative to support a finding of a causal connection between the appellant's silicosis and his employment. However, causal connection is generally a matter of inference, and possibilities may

play a proper and important role in establishing that relationship. *Carter* v. *Flintrol, Inc.*, 19 Ark. App. 317, 720 S.W.2d 337 (1986). Moreover, in workers' compensation cases medical opinions need not be expressed in terms of reasonable medical certainty in speaking of a causal connection when there is supplemental evidence supporting the causal connection when there is supplemental evidence supporting the causal relationship. *Id.* In the case at bar, supplemental evidence is provided by the appellee's testimony that he was often exposed to dust from the clay used in making brick, and John Gardner's testimony that this clay was composed of alumino-silicates. Although the appellant argues that Mr. Gardner's expressed opinion that there was no free silica dust in the plant should have led the Commission to an opposite conclusion, the question for the reviewing court is not whether the testimony would have supported a finding contrary to the one made, but is instead whether the testimony supports the finding actually made by the Commission. *Reynolds Mining Co.* v. *Draper*, 245 Ark. 749, 434 S.W.2d 304 (1968). We hold that the Commission's finding of a causal connection between the appellee's silicosis and his employment is supported by substantial evidence.

Nor do we find merit in the appellant's argument that the evidence was insufficient to support a finding that the hazard of contracting silicosis is characteristic of the employment in which the appellee was engaged. There was evidence that the appellee was employed in a process which exposed him to alumino-silicate dust because that is the material from which bricks are made. "Silicosis" is statutorily defined as "the characteristic fibrotic condition of the lungs caused by the inhalation of silica dust." Ark. Code Ann. § 11-9-602(a)(1) (1987). We think the hazard of silicosis was clearly shown to be characteristic of the process in which the appellee was engaged by the evidence considered by the Commission, and we find no error on this point. *See Brown Shoe Co.* v. *Fooks*, 228 Ark. 815, 310 S.W.2d 816 (1958).

We note that both parties have advanced arguments concerning an OSHA report which the Commission allowed into evidence but declined to give any weight because the appellant was unable to cross examine the author. Because we affirm on the ground that the other evidence before the Commission consti-

tuted substantial evidence to support its findings, the issues relating to the OSHA report are moot and we will not address them.

Affirmed.

DANIELSON, J., not participating.

STUTTGART ELECTRIC CO., INC. *v.* RICELAND SEED COMPANY, d/b/a Stratton Seed Company

CA 90-184 802 S.W.2d 484

Court of Appeals of Arkansas
Division I
Opinion delivered January 30, 1991

Dennis R. Molock, for appellant.

Green & Henry, by: *J.W. Green*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Arkansas County Chancery Court denying appellant's request for a mandatory injunction to require appellee to remove a portion of a warehouse which encroaches onto appellant's property by up to 2.3 feet. After trial on the merits, the chancellor issued a letter opinion which set out his findings and conclusions as follows:

> 1. The encroachment by the building is slight and was not done intentionally.
>
> 2. Due to its angle, the building line intersects with the actual property line. This could leave the [appellant] with approximately as much land as the building took.
>
> 3. Removal of the building would be a harsh, drastic and totally inequitable remedy.
>
> 4. The boundary line should be changed to follow the building line. The [appellant] and his successors will be awarded an easement in perpetuity over the land gained and the [appellee] likewise granted an easement in perpetuity over the land gained.
>
> 5. The [appellant] should be awarded $1,000.00 in compensatory damages and an attorneys fee for $750.00 plus costs.

Appellant appeals from the judgment entered upon the above findings and conclusions and contends the chancellor erred in refusing to order the encroachment removed and that the remedy fashioned by the chancellor is both contrary to law and insufficient.

There is evidence that in 1985 appellant sold appellee the south 25 feet of a lot adjoining appellee's property, and appellee built a metal warehouse building upon that property and additional property to the south which appellee already owned. No survey was performed before the warehouse was built, but a survey conducted about three years after construction revealed

that the north side of the building crosses the common east-west property line at about the midpoint of the building and at the east end encroaches 2.3 feet upon the appellant's property.

At the time the structure was built, neither party was aware of the encroachment. In the process of adding another building to its property in 1988, the appellee discovered the encroachment of the 1985 building and notified the appellant of this fact. Appellant then had its own survey made, and in early 1989 wrote appellee that there were three ways the appellee could settle the problem: (1) remove the building, (2) buy the remaining portion of the vacant lot on which appellee's building encroached (this would be the north 19.3 feet of the lot from which appellant had sold the south 25 feet to appellee), or (3) buy only the strip of land upon which appellee's building encroached. However, the appellant made it clear the third option was not acceptable. No settlement was reached and this suit was filed on June 1, 1989.

The president of the appellant company testified that he had offered to sell the remaining portion of this vacant lot to other parties before he offered it to appellee. He said his company really did not need the property, but he was not trying to force the appellee to buy it. He said the property had been offered for sale in 1986 and in 1987. He also admitted that he did not know whether the fact that the appellee's building encroached on the lot had affected its price; that the asking price had not come down since he learned of the encroachment; and that he would have been willing to accept the north edge of the appellee's building as the property line if he had not been told of the encroachment.

It was also admitted by both parties that the appellee had constructed an underground drainage pipe along the north wall of its building; that this also encroached upon appellant's property; and that it was constructed at appellant's suggestion (but at a time when appellant did not know the building encroached upon appellant's land). The president of the appellee corporation testified that it would cost $10,000.00 to remove its building from the portion of appellant's land upon which the building encroached. There is no evidence in the record as to the value of the building although there is an exhibit which shows the building is 101 feet wide and 124.6 feet long.

The appellant cites our case of *Smith* v. *Stewart*, 10 Ark.

App. 201, 662 S.W.2d 202 (1983), where we reversed the chancellor's refusal to grant a mandatory injunction requiring the appellees to remove a house which they constructed by mistake on the appellant's land. In that case, we said:

> In their arguments on appeal, appellees recognize the established line of cases wherein Arkansas courts have issued or directed mandatory injunctions requiring the removal of improvements placed upon the land of another. *Dendy* v. *Greater Damascus Baptist Church*, 247 Ark. 6, 444 S.W.2d 71 (1969) (a small church was mistakenly built upon adjoining landowner's unfenced, wooded acre); *McLendon* v. *Johnston*, 243 Ark. 218, 419 S.W.2d 309 (1967) (a newly constructed house encroached a distance of 3.4 feet onto the adjoining landowner's property); *Beaty* v. *Gordon*, 236 Ark. 50, 364 S.W.2d 311 (1963) (the eaves of a newly built house extended over the property line of the adjoining landowner); *Fulks* v. *Fredeman*, 224 Ark. 413, 273 S.W.2d 528 (1954) (a brick wall leaned over adjoining landowner's property line); and *Leffingwell* v. *Glendenning*, 218 Ark. 767, 238 S.W.2d 942 (1951) (a stone and cement wall encroached upon a twenty-six foot strip owned by the adjoining landowner). Appellees argue these prior cases are factually distinguishable from the situation presented herein because the removal of appellees' house would destroy it; they contend the application of the rule requiring the removal of the house as an encroachment is too harsh and inequitable. In support of appellees' position, they cite two Michigan Supreme Court cases, *Hardy* v. *Burroughs*, 251 Mich. 578, 232 N.W. 200 (1930), and *Rzeppa* v. *Seymour*, 230 Mich. 439, 203 N.W. 62 (1925). The simple answer to appellees' argument is that the rule applied by the Arkansas Supreme Court in such encroachment matters differs from the more lenient rule adopted by the Michigan court.

10 Ark. App. at 203.

In the instant case, the appellee points to the final paragraph of the decision in *Leffingwell* v. *Glendenning* (the basic precedent cited in the above quotation), which states:

> The decree in the instant case reserved to appellant his

> property right in the land onto which the wall curved, hence the statute of limitation would not run. There is ample evidence of a sincere desire on the chancellor's part to reach an equitable result without permitting the encroachment to take permanently from appellant the three or four inches of land occupied by the wall. However, a majority of the court take the view that the cost to appellees of removal is not disproportionate to the value appellant appears to place on the land, and for that reason they think it was error not to issue the injunction, restricted to the 26-ft. strip described in the decree.

Appellee also cites 43A C.J.S. *Injunctions* § 81 (1978), where it is stated:

> A mandatory injunction to compel the removal of buildings or other structures wrongfully placed on the land of another will not be granted when it will operate inequitably or oppressively, or where the encroachment is trifling and the result of an innocent mistake and the damage caused to defendant by removal would be greatly disproportionate to the interest which plaintiff claims.

And the appellee cites *Hamilton* v. *Smith*, 212 Ark. 893, 208 S.W.2d 425 (1948), where the trial court refused to grant an injunction requiring the appellees to remove a building which they constructed on land over which the appellant had an easement. The trial court found the appellant was estopped by his delay in seeking relief and the appellate court affirmed saying "equity will lend its aid only to those who are vigilant in asserting their rights." Appellee also cites *Richards* v. *Ferguson*, 252 Ark. 484, 479 S.W.2d 852 (1972), where the chancellor held a city ordinance, which rezoned some property for apartment and quiet-business use, to be arbitrary and capricious. The Arkansas Supreme Court reversed on the grounds that the appellees had waited until the appellant had purchased the property, incurred substantial other expense, and was ready to build on the property before they brought the suit to invalidate the ordinance. The court said:

> No excuse for their protracted delay is offered. In the circumstances a court of equity must hold that they have slept upon their rights for such an unreasonable length of

> time that they are precluded from obtaining affirmative relief.

252 Ark. at 487.

The issue of encroaching structures is discussed in Dobbs, *Handbook on the Law of Remedies* § 5.6 at 355-56 (1973), where it is said:

> In such cases the approach is to balance several factors—the relative hardship to the parties and the equities between them—and to grant or deny the injunction as the balance may seem to indicate. In balancing the hardships and equities, courts are guided by two central considerations. First, no one should be permitted to take land of another merely because he is willing to pay for it. This would amount to a private eminent domain. No one should be permitted to accomplish this indirectly, by intentionally trespassing with the hope that an injunction would be denied and he would be permitted to remain on the land. The second consideration moves in the opposite direction. Though private eminent domain cannot be sanctioned, neither can extortion, and if an injunction is issued to protect an insignificant strip of the plaintiff's land at the expense to the defendant of tearing down a large building, one may expect the plaintiff, having procured the injunction, to "compromise" for an extortionate figure.... These two policy considerations have usually led to the view that if the defendant intentionally or recklessly builds his structure partly on the plaintiff's land, he will be compelled by injunction to remove it to avoid what otherwise would amount to a right of private eminent domain. Even if he is not wilful or intentional, but only negligent, this will weigh as one factor against him and in favor of an injunction. On the other hand, if the defendant has acted in good faith most courts will proceed to consider other factors, such as the hardship to the defendant if removal is compelled. If the hardship likely to result to the defendant if the injunction is granted seems great in comparison to the hardship likely to result to the plaintiff if it is denied, no injunction issues, and the structure is allowed to remain, subject to payment of damages.

[redacted]

We think the law, as indicated by the authorities discussed above, holds that the right to an injunction requiring the removal of encroaching buildings upon the property of others is governed by equitable principles. In *Smith* v. *Stewart*, *supra*, this court reversed the trial judge who refused to grant a mandatory injunction requiring the removal of a house constructed upon the land of another. Our opinion said the trial judge found that the owners of the property "were not negligent in looking after their property or in failing to warn appellees against starting—or stopping—the construction of the house." But the opinion also states that the trial court found that "*while they may have been careless to some extent*, appellees built the house in good faith." (Emphasis added.) Thus, our decision was not based solely on a rule of law, but indicates concern with a "balancing of the equities." The Arkansas cases of *Leffingwell* v. *Glendenning*, *Hamilton* v. *Smith*, and *Richards* v. *Ferguson*, *supra*, took the same approach. This is also the approach taken by the Restatement of Torts where it is stated:

> Elementary justice requires consideration of the hardship the defendant would be caused by an injunction as compared with the hardship the plaintiff would suffer if the injunction should be refused. Though the expression "balance of convenience" is sometimes used to designate the weighing process here involved, it does not state the proper test. This term suggests a nice measurement of relative advantages and a denial of the injunction if the scales tip in the defendant's favor. The law does not grant an injunction merely because of the advantage that the plaintiff might reap from it, and it does not refuse an injunction merely because of the convenience that the refusal might afford the defendant. The problem is more complex than that. It cannot be summed up in any phrase less elastic than "relative hardship."
>
> In its broader aspects, the problem may be viewed as one of balancing all of the equities of the situation. This process first involves consideration of the relative hardships of the two parties; but it extends beyond hardships to other factors, such as the character of the conduct (including the respective motives) of the defendant and the plaintiff that produced the situation and created the

attendant hardships.

Restatement (Second) of Torts § 941 (1977).

In our review of cases tried without a jury, we do not set aside findings of fact unless clearly erroneous (clearly against the preponderance of the evidence), and we must give due regard to the opportunity of the trial judge to judge the credibility of the witnesses. Ark. R. Civ. P. 52(a). Here, the trial judge found the encroachment by the appellee's building was slight and not done intentionally. He also found that due to its angle, the building intersects the property line in such a manner that the appellant could be left with approximately as much land as the building took. (This means, when applied to the evidence, that neither party loses any land.) Considering these findings by the court and the evidence that it would cost $10,000.00 to remove the building from appellant's land; that the building only encroaches upon appellant's land by a maximum of 2.3 feet at one end; that the amount of land left to appellant is approximately the same that was left after appellant sold a portion of the lot to appellee; that the appellant's asking price for the land left was the same after it learned of the encroachment as it was before; and that the building had been constructed for three years before either party (both of whom were acting in good faith) became aware of the encroachment, we cannot say it was clearly erroneous (or clearly against the preponderance of the evidence) for the trial court to find that "removal of the building would be a harsh, drastic and totally inequitable remedy."

We, therefore, affirm the above ruling of the trial court. However, we do not believe the court should have granted each party an easement over the property of the other. Dobbs, in his book on the *Law of Remedies*, *supra*, points out that neither private eminent domain nor extortion can be sanctioned. It seems to us that the proper decision in this case is to simply deny the appellant's petition for a mandatory injunction and award it any proper damages sustained. This was the procedure followed in *Hamilton* v. *Smith*, *supra*, except in that case there was no adjudication of damages and the opinion stated that the decree denying the injunction "should not bar an action" for damages. *See also Cammers* v. *Marion Cablevision*, 26 Ill. App. 3d 176, 325 N.E.2d 62 (1975) (cited in support of our above quotation

from 43A C.J.S. *Injunctions* § 81). In the present case, the court awarded damages and attorney's fee. Neither party questions that award in this appeal.

We affirm the trial court's denial of appellant's request for a mandatory injunction and affirm the award of $1,000.00 compensatory damages, $750.00 attorney's fee, and $59.95 trial court cost. We reverse the trial court's award of an easement in perpetuity to each party. Each party shall pay its own cost of appeal.

Affirmed as modified.

CRACRAFT and ROGERS, JJ., agree.

TEC and Commercial Union Insurance Companies *v.* Michelle T. UNDERWOOD

CA 90-242 802 S.W.2d 481

Court of Appeals of Arkansas
En Banc
Opinion delivered January 30, 1991

Daily, West, Core, Coffman & Canfield, by: *Eldon F. Coffman* and *Douglas M. Carson*, for appellant.

Eddie H. Walker, Jr., for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Workers' Compensation Commission.

Appellee Michelle Underwood was employed by TEC, which the opinion of the administrative law judge stated was "a temporary employment company." On May 21, 1987, while on a work assignment at Baldor Electric in Fort Smith, Arkansas, Ms. Underwood suffered an admittedly compensable injury to her lower back. She was paid temporary total disability benefits of $95.81 per week from May 21, 1987, through July 17, 1987, when she was released to go back to work.

At the hearing before the administrative law judge, the appellee contended that the proper compensation rate was $146.67 per week and that she was entitled to additional medical treatment. The appellants controverted the difference in the rate at which compensation was paid and the rate claimed by appellee and contended that all unpaid medical expense was unauthorized and therefore not their responsibility. The administrative law judge held appellee's proper compensation rate was $146.67 and that the appellants were liable for the unpaid medical treatment. The Commission affirmed and adopted the opinion of the law judge.

The appellee testified she was employed by TEC in February 1987 and assigned to work the "3:30 to midnight shift" at Calvert-McBride where she earned $3.50 per hour and worked 40 hours per week. Appellee testified she told the TEC employee who hired her that she liked Calvert-McBride, but didn't like the hours, and if something came open with better hours to "keep me in mind for it." Appellee said that toward the end of April she was told TEC had an opening at Baldor and was asked if she wanted it. Appellee testified she was told the hours were 2:00 p.m. to 10:00 p.m. daily and that she would be making $5.50 per hour. Appellee

testified further that she worked at Baldor "at least three weeks, closer to a month" and "[a]s far as I recall, I was getting 40 hours a week and I was getting $5.50 an hour."

The appellants argue that the Commission erroneously determined appellee's compensation rate by refusing to consider either her actual work schedule or the actual wages earned. Appellants contend the Commission ignored the plain language of the Arkansas Workers' Compensation Act. In support of this argument they rely upon the following portions of Ark. Code Ann. § 11-9-518 (1987):

> (a)(1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment.
>
> . . . .
>
> (c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

Appellants contend that employees of TEC are assigned from work place to work place, while still remaining an employee of TEC, and these employees "commonly exercise much more flexibility in their job schedules than the typical 'full-time' employee." It is argued that the appellee here worked a full 40-hour week only "two of her seven weeks" at Baldor, and the Commission should have used the actual hours she worked there instead of treating her as full-time employee. Appellants also argue that the Commission should have used a wage rate based on her employment at both Calvert-McBride and Baldor. In short, appellants contend the Commission should have used some other formula—one which would be "fair and just" under Ark. Code Ann. § 11-9-518(c), *supra.*

Much of appellants' argument is based upon what they contend is a payroll record which they offered into evidence but which the law judge refused to admit because it was not properly identified and authenticated. Appellants, however, argue that

this does not matter because the "record" was shown to appellee on cross-examination and she admitted it was correct. Actually, the appellee was asked: "Are you saying this is not correct?" Her answer was: "I am not saying that's not correct. I'm saying as far as I remember I worked 40 hours." Appellee went on to explain that she was assigned to work at Baldor 40 hours a week at $5.50 per hour; that she worked at Baldor "at least three weeks, closer to a month when I got hurt"; that possibly during her employment she could have missed a couple of hours; and that she probably did work only eight hours one week because she was going to school and had final exams that week, but the rest of the weeks she worked 40 hours a week at Baldor.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible 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). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Bearden Lumber Company* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

Arkansas Code Annotated § 11-9-519 (1987) provides that in cases of total disability, the injured employee shall be paid during the continuance of the total disability, compensation equal to 66 ⅔% of his average weekly wage. Section 11-9-518(a)(1), *supra*, provides compensation shall be computed upon the average weekly wage earned by the employee under the "contract of hire in force at the time of the accident" and in no case shall be computed on less than a "full-time work-week" in the employment.

We think there is substantial evidence to support the Commission's finding that appellee's compensation rate was $146.67 (based upon an average weekly wage of $5.50 per hour for 40 hours), and we cannot say that the evidence shows such exceptional circumstances that the Commission's determination was not "just and fair" to the appellants.

Appellants also argue that the Commission erred in ordering

them to pay the medical bills of Dr. Mertz. Appellee had been treated by Dr. Wolfe in Fort Smith and subsequently married and moved to Stillwater, Oklahoma. Without obtaining the approval of the Commission or agreement by appellants, the appellee began seeing Dr. Mertz in Oklahoma. Appellants argue they are not responsible for charges for care provided by or ordered by Dr. Mertz because appellee failed to request permission for a change of physician, the treatment received was not "emergency treatment," and the Commission has no authority to retroactively approve a change of physician. In support of this argument appellants cite *Wright Contracting Company* v. *Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984), and *American Transportation Company* v. *Payne*, 10 Ark. App. 56, 661 S.W.2d 418 (1983), where we held the Commission no longer had the discretion to retroactively approve a change of physicians and absent compliance with the statute, the employer was not liable for a new physician's services.

However, these cases have no application here because Dr. Mertz's treatment was a "referral" rather than a "change of physician." Appellee testified that she had telephoned the office of Dr. Wolfe and asked for a referral "over there," that she was told "they" would talk to Dr. Wolfe and he would refer her to someone; that she was given the name of Dr. Mertz; that Dr. Wolfe sent her "records and everything to Dr. Mertz and let him know that I was going to be seeing him." The record also contains a letter from Dr. Mertz to Dr. Wolfe thanking him for referring appellee. The law judge held that appellee's request for a referral was not "doctor shopping under the circumstances." The full Commission made the same factual determination and adopted the law judge's finding. We think the Commission's decision is supported by substantial evidence and the law. *See Electro-Air* v. *Villines*, 16 Ark. App. 102, 697 S.W.2d 932 (1985).

Affirmed.

John Mark BLISS *v.* STATE of Arkansas

CA CR 90-174 802 S.W.2d 479

Court of Appeals of Arkansas
Division II
Opinion delivered January 30, 1991

Daniel D. Becker for appellant.

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

JUDITH ROGERS, Judge. The appellant, John Mark Bliss, appeals from his conviction of possession of a controlled substance (marijuana) with intent to deliver, a violation of Ark. Code Ann. § 5-64-401 (1987). The appellant entered a conditional plea of guilty to the above offense, pursuant to Ark. R. Crim. P. 24.3(6), pending resolution of his motion to suppress. On Febru-

ary 27, 1990, the trial judge denied the motion and ordered the appellant to serve four years in the Arkansas Department of Correction. This appeal arises from the denial of the motion to suppress. We affirm.

The record reveals that on April 20, 1989, a confidential informant telephoned the Polk County Sheriff's Office to speak to Officer Bill Nelson. In Nelson's absence, the informant asked to speak with James Cox, Polk County Deputy Sheriff. The informant told Cox that the appellant "was leaving the Mena area with a so-called brick of marijuana and would be going to the Mount Ida area by the route of Black Springs over 8, Highway 8 . . . [H]e would be driving a 70's,. . ., red Chevrolet Monte Carlo and that he had left the Mena area approximately five to ten minutes prior to me getting the phone call."

Deputy Sheriff Cox then relayed the information to Sheriff James Carmack of the Montgomery County Sheriff's Office. Carmack radioed Trooper Barry Spivey and told him to set up a check point outside of Black Springs. Trooper Spivey related that no more than thirty seconds elapsed before he observed the appellant's vehicle. Spivey followed him to a nearby country store where he asked the appellant to pull over to the side because he needed to speak with him. Trooper Spivey testified that he informed the appellant that he was suspected of transporting drugs. Spivey then obtained the appellant's consent to search his vehicle. The subsequent search revealed a bag of marijuana weighing approximately less than ten pounds.

On appeal, the appellant presents two points of error which he contends mandate reversal. First, the appellant argues that the trial court erred in refusing to suppress the bag of marijuana because his consent to search was not voluntary. Next, the appellant argues that there was no reasonable cause to request a search of his vehicle. Inasmuch as these arguments are related, we will address them in one discussion.

■ The Fourth Amendment protection against unreasonable searches and seizures extends to persons driving down the street. *Reeves* v. *State*, 20 Ark. App. 17, 722 S.W.2d 880 (1987). Consistent with the Fourth Amendment, police may stop persons on the street or in their vehicle in the absence of either a warrant or probable cause under limited circumstances. *Terry* v. *Ohio*,

392 U.S. 1 (1968). One of those limited circumstances involves the investigatory stop. *Miller* v. *State*, 21 Ark. App. 10, 727 S.W.2d 393 (1987). In *United States* v. *Hensley*, 496 U.S. 221 (1985), the court stated that when an informant is the source of the information that results in one law enforcement agency requesting another agency to stop a suspect, the officers who originally dealt with the informant must have reasonable suspicion to stop the appellant. The common thread which runs through the decisions makes it clear that the justification for the investigative stop depends upon whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person or vehicle may be involved in criminal activity. *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 284 (1982).

Arkansas Rule of Criminal Procedure 3.1 provides in pertinent part:

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

In determining the reasonableness of the officer's suspicion, Ark. R. Crim. P. 2.1 provides:

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

In the case at bar, Polk County authorities possessed reasonable suspicion to stop the appellant's vehicle. Sheriff Cox received information regarding the appellant's activities from a confidential informant. Shortly after the information was relayed to Montgomery County authorities, Trooper Spivey observed a vehicle exactly matching the description given by the informant. Given the fact that the informant's information was verified by

the officer's observations and the informant's reliability was established by his previous work with Polk County personnel, we cannot say reasonable suspicion did not exist to permit an investigatory stop of the appellant.

Our inquiry does not end here. Next, we must decide whether the search of the appellant's vehicle was proper. The appellant argues that he did not knowingly and intelligently consent to the search of his vehicle. We cannot agree. The state has the burden of proving by clear and positive testimony that consent to a search was freely and voluntarily given and there was no actual or implied duress or coercion. *Scroggins* v. *State*, 268 Ark. 261, 595 S.W.2d 219 (1980); *Rodriquez* v. *State*, 262 Ark. 659, 559 S.W.2d 925 (1978).

In the case at bar, Trooper Spivey testified that he told the appellant that he had received information that the appellant was possibly transporting drugs. Spivey then asked the appellant for permission to search his vehicle. According to Trooper Spivey, the appellant said "take all the time you want; do anything you want to do." However, prior to the search, Spivey explained the potential penalties the appellant could be facing if he were caught with a large quantity of marijuana. Spivey again asked the appellant for permission to search and the appellant responded in the affirmative. Spivey testified that no force or coercion was used in obtaining the appellant's consent. In addition, Deputy Sheriff Russell Carmack stated that the appellant nodded his head acknowledging that he twice consented to a search of his vehicle. Considering the above testimony, we are unable to say that the appellant's consent was not freely and voluntarily given.

We note that the appellant relies heavily upon *Kaiser* v. *State*, 296 Ark. 125, 752 S.W.2d 271 (1988), in arguing that the record is devoid of evidence establishing the reliability of the informant. The decision in *Kaiser* is distinguishable from the present case because in *Kaiser* the *sole* basis for the stop of Kaiser's car was information received from the Missouri State Police who told the Randolph County Sheriff their information came from a reliable informant. Here, Polk County authorities received information from an informant who had previously given testimony resulting in at least four felony drug convictions. Based upon the proven past reliability of the informant and the

verification of the informant's information due to the officer's observation, the investigative stop and subsequent search of the appellant's vehicle was proper.

After a thorough and careful review of the record, we find no error in the trial judge's denial of the motion to suppress. We, therefore, affirm the appellant's conviction and sentence of four years in the Arkansas Department of Correction.

Affirmed

CRACRAFT, C.J., and JENNINGS, J., agree.

Bobby SAWYER *v.* Clement MTARRI and Aetna Life & Casualty, Inc.

CA 90-194 806 S.W.2d 7

Court of Appeals of Arkansas
En Banc
Opinion delivered February 6, 1991

Bart Mullis, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this workers' compensation case was injured on December 16, 1988, while employed by Clement Mtarri. The appellees defended by asserting that the appellant failed to disclose a previous hip condition on

his employment application, and that his claim was barred under *Shippers Transport* v. *Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979). The Commission concluded that the appellee's claim was barred by the *Shippers* defense and dismissed. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in finding that the appellant willfully and knowingly misrepresented his physical condition; that the employer relied on this misrepresentation; and that there was a causal connection between the false representation and the appellant's injury.

The record shows that the appellant was treated by Dr. Kenneth Martin for hip pain in 1985. Dr. Martin diagnosed the appellant's condition as avascular necrosis of the right hip and advised him to consider a profession other than construction work. The appellant, however, continued to do construction work. There is evidence that the appellant was laid off from one construction job because he was unable to perform his work as quickly as the other workers. Subsequently, in April 1988, the appellant applied for employment with the appellee Clement Mtarri. The employment application included the question, "Do you have any physical limitations that preclude you from performing any work for which you are being considered?" The Commission held that the appellant's negative response to this question constituted willful and knowing concealment of his avascular necrosis of the right hip. We disagree, and we reverse.

The claimant in *Stillman* v. *Multi-States Electric*, 28 Ark. App. 193, 771 S.W.2d 807 (1989), was asked the same question as the appellant in the case at bar, and the Commission found that the answer to the question constituted a false representation of the claimant's physical condition. We reversed, noting that there was no substantial evidence to show that the claimant made a knowing misrepresentation, or that he did in fact have a physical limitation that would preclude his performance, given the evidence that the claimant did in fact fully perform his duties for over four months until he injured his back in a freak accident caused by soapy water and oil on the floor. We note that the appellant in the case at bar performed his duties for almost eight months and was injured when he slipped on a plastic liner.

Nevertheless, a more fundamental reason for our rever-

sal is found in *Knight* v. *Industrial Electric Co.*, 28 Ark. App. 224, 771 S.W.2d 797 (1989), which was decided the same day as *Stillman, supra.* In *Knight* we held that the question, "Do you have any physical condition which may limit your ability to perform the job applied for," was too broad and general to support the *Shippers Transport* defense. We cited *College Club Dairy* v. *Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988), for the proposition that:

> The employer knows which physical conditions or maladies would be relevant to fitness for the particular tasks he expects the applicant to perform. Therefore, employers relying upon the *Shippers Transport* affirmative defense must show that the employee was questioned in some degree regarding health history, and present condition in such a way as to elicit responses likely to be worthwhile in assessing the employee's health history, condition, and capacity for performing the employment.

Carr, 25 Ark. App. at 218, 756 S.W.2d at 128. We noted that it was not unreasonable to require questions calling for factual information rather than opinion, since the *Shippers* defense relieves an employer of liability for an otherwise compensable injury. We observed that questions calling for opinions have the effect of promoting litigation and we held that the question in *Knight* was too broad, and we reversed. The same analysis is applicable to the question contained in the application in the case at bar and for the reasons discussed above, we reverse and remand for further proceedings before the Commission. Because of our disposition of this case on this point, we need not reach the other issues raised by the appellant.

Reversed and remanded.

James RICHARDSON *v.* STATE of Arkansas

CA CR 90-101 803 S.W.2d 557

Court of Appeals of Arkansas
Division I
Opinion delivered February 6, 1991

Lynn Frank Plemmons, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant James Richardson was convicted by a jury of the crime of rape and sentenced to ten years in the Arkansas Department of Correction.

Prior to trial, appellant filed a motion in limine asking that the "complaining witness" be prohibited from testifying, and that the "Prosecutor and prosecution witnesses" be prohibited from testifying concerning any prior convictions of the appellant. At a pretrial hearing held immediately before trial, appellant challenged the competency of the complaining witness (the victim) to testify due to lack of mental capacity and lack of ability to comprehend truth from falsehood. After hearing testimony from the victim and another witness, the trial court held that the victim "understands the obligation of the oath" and permitted her to testify.

On appeal the appellant first argues the court erred in allowing the victim to testify at the trial. Appellant contends the victim admitted she did not comprehend the difference between the truth and a lie; that she did not comprehend the obligation of the oath or the consequences of false swearing; and that she was merely "parroting" responses which she had learned would please the questioner. Appellant then points to the pretrial testimony of the other witness, a licensed professional counselor, who administered tests to the victim and testified they showed the victim had an intelligence quotient of 45 or 50. The counselor also testified she could not say whether the victim could comprehend the difference between truth and falsity.

In *Logan* v. *State*, 299 Ark. 266, 773 S.W.2d 413 (1989), the appellant, who worked at a school for developmentally handicapped children, was convicted of seven counts of rape by deviate sexual activity. At trial he challenged the competency of the victims to testify, and the trial court held six of the seven victims were competent. In affirming the trial court's ruling, the Arkansas Supreme Court said:

> A trial court must begin with the presumption that every person is competent to be a witness. A.R.E. Rule 601. The burden of persuasion is upon the party alleging that the potential witness is incompetent. To meet that burden the challenging party must establish the lack of at least one of the following: (1) the ability to understand the obligation of an oath and to comprehend the obligation imposed by it; or (2) an understanding of the consequences of false swearing; or (3) the ability to receive accurate impressions

> and to retain them, to the extent that the capacity exists to transmit to the factfinder a reasonable statement of what was seen, felt or heard. *Jackson* v. *State*, 290 Ark. 375, 720 S.W.2d 282 (1986). The competency of a witness is a matter lying within the sound discretion of the trial court and, in the absence of clear abuse, we will not reverse on appeal. *Hoggard* v. *State*, 277 Ark. 117, 640 S.W.2d 102 (1982).

299 Ark. at 272. And in *Curtis* v. *State*, 301 Ark. 208, 783 S.W.2d 47 (1990), in affirming the trial court's holding that a young victim could testify, our supreme court said:

> While it is true that the victim stated that she did not know what a lie was, nor what happens to a person when they tell a lie, her overall testimony showed her ability to understand the obligation of an oath and the consequences of false swearing. We cannot say that the judge abused his discretion in refusing to declare the witness incompetent.

301 Ark. at 213.

Here, the 14-year-old victim did tell the trial judge that she did not know what it means "to state you will tell the truth," but she said she would be in trouble if she did not tell the truth. Although she said that you can also get into trouble if you tell the truth, she said that a lie will "get you in the most trouble." The professional counselor's training was in the educational field rather than psychology, and she said the tests could be interpreted as showing the victim had a mental age of around six years. She also said she was not trained to make an assessment of whether someone could tell the difference between the truth and a lie. Giving due regard to the trial judge's superior ability to observe the victim, we cannot say he abused his discretion in finding her competent to testify.

Appellant next argues the trial court erred by improperly withholding its ruling on appellant's motion in limine regarding the admissibility of evidence of appellant's prior conviction. Appellant argues the trial court violated the guidelines set out in *Simmons* v. *State*, 278 Ark. 305, 645 S.W.2d 680, cert. denied 464 U.S. 865 (1983), and that he was forced to make the decision to testify not knowing whether the court would admit

evidence of a prior conviction.

At the pretrial hearing held immediately before trial it was disclosed that appellant had a prior conviction which involved the sexual abuse of a sibling of the victim. At that time, the trial judge said prior convictions could be used for impeachment if the prejudicial value did not outweigh the probative value of the evidence, but said he was withholding any ruling until the appellant testified. Then, after the state rested, defense counsel renewed his motion to exclude the prior conviction, and the judge said he could not rule at that time because he did not know "the context in which it will arise." The appellant then elected to testify and when the prosecuting attorney got to the point on cross-examination where he wanted to ask a question about the prior conviction he asked the trial court to rule on appellant's motion. In chambers, the court specifically found that the probative value of the evidence of the prior conviction outweighed its prejudicial effect and held the prior conviction evidence admissible.

We think the appellant's argument as to the trial court's failure to follow the guidelines set out in *Simmons* v. *State* is misplaced. In *Smith* v. *State*, 300 Ark. 330, 778 S.W.2d 947 (1989), the court said it was extending the *Simmons* rule and "now adopt the doctrine promulgated in *Luce* v. *United States*, 469 U.S. 38 (1984), which states that in order to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." The court said one reason it was necessary for the defendant to testify was because the reviewing court could not otherwise weigh the probative value of the impeachment evidence against its prejudicial effect. While the court also said the new rule would apply prospectively only, that opinion was handed down on November 6, 1989, and the present case was tried on December 12, 1989. Thus, under the rule in *Smith*, the trial court was not in error in waiting to rule on appellant's motion until he had testified.

It is also argued that the trial court erred in allowing the state to show the nature of the prior conviction where it was of a similar nature to the charge on which appellant was being tried. Appellant cites *Jones* v. *State*, 274 Ark. 379, 625 S.W.2d 471 (1981), where the Arkansas Supreme Court discussed Ark. R. Evid.

609(a)(1) which provides "for the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime [punishable by death or imprisonment in excess of one year] shall be admitted [if] the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness. . . ." The court held that under that rule evidence of a prior conviction of rape involving a little boy was not admissible to impeach the credibility of the defendant in that case where he was on trial for the sexual abuse of another young boy. The court said the prior conviction was not admissible because its prejudicial effect would outweigh its probative value. The court pointed out that there were two previous convictions for burglary and theft that could be used to impeach credibility and "proof of still a third conviction, for a similar assault upon a little boy, would have been of scant probative value as compared to its significantly prejudicial effect on the jury."

The *Jones* case, *supra*, was discussed in *Floyd* v. *State*, 278 Ark. 342, 645 S.W.2d 690 (1983), also cited by appellant, where the court said that Rule 609(a)(1) grants the trial court discretionary power to determine whether the probative value of the evidence of the prior felony conviction outweighs its prejudicial effect. The court said this provision was applied in *Jones*, where the appellant court held the evidence inadmissible, but the question involved had to be decided on a case by case basis. In *Floyd*, the appellate court said "when an accused, or a witness, takes the stand he may be asked on cross-examination how many times he has been convicted, within the applicable restrictions set forth under Rule 609."

Many cases have dealt with this rule of evidence, but it would probably serve no useful purpose to review them in detail. In *Pollard* v. *State*, 296 Ark. 299, 756 S.W.2d 455 (1988), the court said: "In determining the admissibility of such evidence, the trial court has wide discretion, and we will not reverse absent an abuse of discretion." 296 Ark. at 301. Also, in *Sims* v. *State*, 27 Ark. App. 46, 766 S.W.2d 20 (1989), we listed some factors that should be considered by the trial court in determining whether the probative value of the prior conviction outweighs its prejudicial effect to a party or witness. *See also Washington* v. *State*, 6 Ark. App. 85, 638 S.W.2d 690 (1982) (discussing the importance of

impeachment evidence when credibility is a crucial factor).

In the instant case, we do not think the trial court abused its discretion in admitting the evidence of appellant's previous conviction. Some factors which support that decision are (1) while it was shown the prior conviction was for statutory rape, it was not shown that it involved a sibling of the victim in this case, (2) the jury was instructed in the words of AMCI 203 that a prior conviction could only be used for the purpose of judging credibility and not as evidence of guilt, (3) the importance of appellant's credibility in this case where there were only two witnesses who knew what happened, and (4) the appellant's testimony that he had been alone in the house with the victim on many other occasions, from which the jury might infer that "nothing ever happened before."

Affirmed.

CRACRAFT, C.J., and ROGERS, JJ., agree.

Loyd E. CARROLL *v.* Deborah Sue CARROLL

CA 90-110 802 S.W.2d 932

Court of Appeals of Arkansas
En Banc
Opinion delivered February 6, 1991

Loyd E. Carroll, pro se.

No response.

PER CURIAM. The appellant in this divorce case has requested that the original court transcript submitted to this Court for purposes of his appeal be returned to him for his use in other unspecified pending legal actions. We delivered our opinion in this case on December 19, 1990, and we treat his request as a motion to withdraw the transcript. We deny his motion.

Arkansas Supreme Court Rule 25(2) provides for the withdrawal of certain exhibits filed but not attached to the transcripts filed in civil cases. There is no rule for the withdrawal of the transcript; however, Rule 25 (1) does allow an attorney to obtain the record in a disposed of case and give the Clerk a receipt enabling the attorney to retain the record for thirty days. We think that the appellant's proper course of action is to request his attorney to obtain the transcript upon receipt to the Clerk. His counsel can then copy the documents necessary for the other legal proceedings.

Although this rule does not specifically address the appellant's motion, it is the practice of this court to retain the transcript and only release it to an attorney for thirty days upon a receipt to the Clerk. Arkansas Supreme Court Rule 23 provides that in cases where no provision is made by statute, or covered by other rules, then proceedings in this Court shall be in accordance with the practice heretofore existing.

Motion denied.

Len Jeffery HILL *v.* STATE of Arkansas

CA CR 90-91 803 S.W.2d 935

Court of Appeals of Arkansas
Division II
Opinion delivered February 13, 1991
[Rehearing denied March 13, 1991.]

McDaniel & Wells, by: *John Barttelt*, for appellant.

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

GEORGE K. CRACRAFT, Chief Judge. Len Jeffery Hill appeals from his conviction of eight counts of delivery of a controlled substance, advancing several points of error. We find sufficient merit in one of them to warrant reversal and remand for a new trial. We also address two other points due to the likelihood that they will arise again on retrial.

The State introduced evidence that on eight occasions appellant purchased controlled substances with money furnished to him by undercover police officer Roger Ahlf or Ahlf's confidential informant, Paul Carruthers. After each purchase, appellant delivered the controlled substance to the officer and his informant. Appellant admitted that he had delivered controlled substances in exchange for money on those occasions but contended that he had been entrapped. In anticipation of appellant's defense of entrapment, the State in its case-in-chief elicited from both Ahlf and Carruthers that they had been engaged in an undercover narcotics operation for a period of six months, during which over one hundred arrests had been made. They testified that the operation had been conducted properly in every respect and that none of those arrested had been subject to entrapment, inducement, or intimidation. They also testified that Carruthers had been advised not to carry a weapon or engage in any violent action during the operation and that he had complied with that instruction. Both testified that they had not used, sold, or given away any drugs during that period. Each vouched for the good conduct of the other and denied that they had committed any specific acts of misconduct during the operation.

After appellant cross-examined the two witnesses about these subjects, and after the State rested its case, appellant sought to impeach their testimony through contradictory proof about the manner in which the operation had been conducted and its integrity. Appellant proffered for the record the testimony of four witnesses who were investigated for and/or charged with drug-related crimes as a result of their involvement with Ahlf and Carruthers during this six-month police operation. Those four witnesses variously would have testified that during this period they had been induced by Ahlf and Carruthers to commit drug-related crimes, that Ahlf and Carruthers had both used and given away drugs to them, that Carruthers carried a weapon at all times, and that he had once pulled the weapon in order to intimidate a fifth person.

The trial court excluded this evidence on the ground that it was collateral, extrinsic, and, as such, prohibited by Ark. R. Evid. 608(b). We agree with appellant that the trial court erred in so ruling.

Rule 608(b) of the Arkansas Rule of Evidence prohibits the introduction of extrinsic evidence of specific instances of a witness's conduct, other than conviction of a crime, for the purpose of impeaching his credibility. However, Rule 608(b) has no application on the issue of "impeachment by contradiction." *Garst* v. *Cullum*, 291 Ark. 512, 726 S.W.2d 271 (1987); *McFadden* v. *State*, 290 Ark. 177, 717 S.W.2d 812 (1986). Since the Arkansas Rules of Evidence do not provide a rule on impeachment by contradiction, we must look to the common law. *Garst* v. *Cullum, supra.* While it is clear that a witness cannot be impeached by extrinsic evidence on collateral matters brought out in cross-examination, this limitation does not apply to answers given on direct. Rather, when a witness testifies on direct examination that he has not committed collateral acts of misconduct, that testimony may be contradicted by extrinsic evidence. *McFadden* v. *State, supra*; *Howell* v. *State*, 141 Ark. 487, 217 S.W. 457 (1920). *See also Garst* v. *Cullum, supra*; W. Gitchell, *Admissibility of Evidence*, pp. 25, 53, 131 (1990).

Here, the evidence that appellant sought to contradict was elicited from the State's witnesses on direct examination. Since Ark. R. Evid. 608(b) does not apply, and since Ark. R. Evid. 403 would not have been offended by admission of the evidence, *see McFadden* v. *State, supra*, we conclude that the trial court erred in excluding the proffered evidence.

■ Appellant next contends that the trial court erred in refusing to instruct the jury on the lesser included offense of possession of a controlled substance. We agree that possession of a controlled substance is a lesser included offense of delivery of a controlled substance, *Glover* v. *State*, 273 Ark. 376, 619 S.W.2d 629 (1981), and that it is reversible error not to give a correct instruction on a lesser included offense if there is any rational basis upon which the jury could find the accused guilty of the lesser crime. However, it is equally well settled that where a jury rationally could only find the accused guilty of the greater offense or of nothing at all, such an instruction should not be given. *Doby* v. *State*, 290 Ark. 408, 720 S.W.2d 694 (1986); *Flurry* v. *State*, 290 Ark. 417, 720 S.W.2d 699 (1986).

Here, appellant argued only that he was not guilty of the offenses charged because he had been entrapped. He admitted

that on each occasion, at the request of Ahlf and Carruthers, he took their money, purchased controlled substances, and transferred the substances to them. As appellant thus admitted every element of the greater offenses, *see, e.g., Webber* v. *State*, 15 Ark. App. 261, 692 S.W.2d 255 (1985), there could be no rational basis for a lesser offense instruction. On the facts of this case, the jury was required to convict him of the greater offenses or acquit him because he had been entrapped.

Appellant next contends that the trial court erred in refusing his three alternative instructions on the defense of entrapment and in giving the following instruction instead:

> Len Jeffery Hill asserts the defense of entrapment to the charge of delivery of cocaine, eight (8) counts. To establish this defense the defendant must prove: that a law enforcement officer or any person acting in cooperation with him, induce the commission of the offense by using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

This instruction is a combination of Arkansas Model Criminal Jury Instructions (AMCI) 4001 and 4007.

Appellant argues that AMCI 4007 is inadequate and prejudices the criminal defendant because it does not define normally law-abiding persons and fails to instruct the jury that the primary focus should be on the conduct of the law enforcement officer or persons acting in cooperation with him. Appellant offered three alternative instructions, any one of which he argues would have cured the defects.

By per curiam order dated January 29, 1979, the supreme court provided that the model instructions should be used unless the trial court finds that they do not accurately state the law. The instruction given by the trial court in this case was taken almost verbatim from the statute authorizing the defense. *See* Ark. Code Ann. § 5-2-209 (1987). We cannot conclude that it does not contain a correct statement of the law applicable to the defense. While it might have been permissible for the trial court to have given appellant's requested instruction No. 3, which

correctly states our case law, we cannot conclude that it was error for the trial court not to do so.

Appellant also argues other points of error. As they are not likely to arise again on retrial, we do not address them.

Reversed and remanded.

ROGERS and JENNINGS, JJ., agree.

Vickie SCARBROUGH *v.* CHEROKEE ENTERPRISES and Royal Insurance Company

CA 90-268 803 S.W.2d 561

Court of Appeals of Arkansas
Division II
Opinion delivered February 13, 1991
[Rehearing denied March 20, 1991.]

Anthony W. Bartels, for appellant.

Barrett, Wheatley, Smith & Deacon, by: *Paul D. Waddell*, for appellee.

JOHN E. JENNINGS, Judge. On October 27, 1984, Vickie Scarbrough was employed as a housekeeper with the appellee, Cherokee Enterprises. While carrying a vacuum cleaner down a stairway, she lost her balance and began to fall. She apparently

avoided a fall but, in the process, "twisted her back." She had suffered a previous back injury while working as a housekeeper for Best Western Motel.

The claimant was treated by Dr. Ungerank who treated her for several weeks and released her from his care as asymptomatic, to return to her normal work on November 30, 1984. It was Dr. Ungerank's opinion that the claimant was without permanent injury.

A workers' compensation claim was filed and on June 10, 1985, the administrative law judge held that the claimant suffered a compensable injury, that she was entitled to payment for four weeks temporary total disability and that she sustained no permanent injury. No appeal was taken from this decision.

On September 11, 1989, a second hearing was held before the ALJ on the claimant's contention that she was permanently and totally disabled from the October 27, 1984 injury. The administrative law judge held that she had no permanent disability as a result of her injury and the full Commission affirmed and adopted the law judge's opinion.

On appeal to this court the claimant contends that the Commission erred in finding that she was without permanent disability and urges us to change our present standard of review in workers' compensation cases. We find no error on the first point and, for reasons which follow, decline to change our standard of review.

During the 1989 hearing the claimant testified that she had filed for social security disability and had been found to be not disabled. She said that she had not attempted to get a job since the October 1984 incident because she knew she could not work. Carla Jean Scarbrough, her sister, testified that the claimant did not see a doctor for her back for a period of two years, because she couldn't pay for treatment. Dr. S.M. Young stated in a letter dated March 13, 1985, that the claimant should have no permanent disability. In a report dated September 1986, Dr. Raymond Lopez diagnosed her as having degenerative disc disease with a chronic back strain. In November of 1986, Dr. Robert Atkinson suspected fibromyalgia. By 1987, Dr. Ungerank thought that her injuries would "probably keep her from ever being able to hold

down a full time job." An October 1987 report from the George W. Jackson Community Mental Health Center diagnosed the claimant as suffering from major depression. In November of 1987, Dr. John Ashley diagnosed her as having disc disease, fibromyositus and major depression. It was his opinion that the claimant was totally disabled at the time he saw her.

In December 1987, Dr. Larry Mahon, an orthopedic surgeon reported:

> After review of this patient's history as given by her and also that determined from review of the medical reports provided me, it appears that she did have difficulty prior to the alleged injury of October 1984. At the present she does appear to have degenerative disc disease of the lumbar spine with chronic lumbosacral strain and possibly myositis. No neurological abnormality of any acute or chronic nerve root impingement was demonstrated at the time of my examination. Although I feel there was considerable element of symptom magnification present at the time of my examination, it is conceivable that she did sustain an aggravational component of her pre-existing condition as a result of the October 27, 1984 injury. However, although her complaints are bothersome and a nuisance to her, I feel this aggravational component represents no additional permanent partial impairment to the body as a whole.

The claimant asks us to adopt the approach adopted by the Eighth Circuit Court of Appeals, citing *Thomas v. Sullivan*, 876 F.2d 666 (8th Cir. 1989) and *Gavin v. Heckler*, 811 F.2d 1195 (8th Cir. 1987). In *Gavin*, the court said:

> There is a notable difference between "substantial evidence" and "substantial evidence on the record as a whole." "Substantial evidence" is merely such "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." "Substantial evidence on the record as a whole," however, requires a more scrutinizing analysis. In the review of an administrative decision, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." Thus, the court must also take into consideration the weight of the evidence in the record and apply a balancing

> test to evidence which is contradictory. It follows that the only way a reviewing court can determine if the entire record was taken into consideration is for the district court to evaluate in detail the evidence it used in making its decision and how any contradictory evidence balances out.

811 F.2d at 1199 (citations omitted).

The claimant contends that we should adopt this approach because the Commission is "a political body and not a truly impartial fact finding body," that it is "mystifying" why the Commission hears compensation claims *de novo* when it is the ALJ who actually hears the witnesses, and that we would be merely a "rubber stamper" if we did not adopt the approach taken by the Eight Circuit. The claimant's first two contentions have been discussed before, *see Webb* v. *Workers' Compensation Comm'n*, 292 Ark. 349, 352, 730 S.W.2d 222, 726 (1987) (Newbern, J., concurring), but our law in this regard remains as it was.

As to our standard of review we are unquestionably bound both by statute and the decisions of the Arkansas Supreme Court. Ark. Code Ann. § 11-9-711(b)(4) provides that, "[t]he court shall review only questions of law and may . . . reverse . . . upon any of the following grounds, and no other: . . . (D) That the order or award was not supported by substantial evidence of record." In *Arkansas Power & Light Co.* v. *Hooks*, 295 Ark. 296, 749 S.W.2d 291 (1988), the supreme court said that the established rule of review in workers' compensation cases is that the Commission's findings must be upheld unless there is no substantial evidence to support them. The court said:

> The commission is the fact finding body in the administrative procedure of workers' compensation claims. On appellate review, the court is not to substitute its judgment for that of the commission regarding facts. The appellate role is only to see if there is substantial evidence to support the commissions's findings.

Hooks, 295 Ark. at 299 (citations omitted). Substantial evidence exists if reasonable minds could have reached the same conclusion. *Wade* v. *Mr. C. Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989). The weight and credibility of a witness's testimony are

exclusively within the province of the Commission. *Wade*, 298 Ark. at 370. While it is clear that we utilize a less stringent standard of review than that adopted by the Eighth Circuit, we have also made it clear that the substantial evidence test does not wholly insulate the Commission from judicial review.[1] *See Boyd* v. *General Industries*, 22 Ark. App. 103, 733 S.W.2d 750 (1987). In any event we are clearly obliged to follow the decisions of the Arkansas Supreme Court.

In the case at bar we are persuaded that the Commission's decision that the claimant was not permanently disabled as a result of her 1984 back injury is supported by substantial evidence.

Affirmed.

CRACRAFT, C.J., and ROGERS, J., agree.

Gary HERAL, d/b/a Heral Enterprises, Inc. *v.* Edna H. SMITH, et al.

CA 90-115 803 S.W.2d 938

Court of Appeals of Arkansas
Division I
Opinion delivered February 13, 1991

[1] Not everyone agrees that it is necessarily wise to expand the scope of judicial review. *See, e.g.*, Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751 (1957).

J. Michael Hankins, for appellant.

Scott, Lashlee & Watkins, by: *John R. Scott*, for appellee.

ELIZABETH W. DANIELSON, Judge. Gary Heral, d/b/a/ Heral Enterprises, Inc., appeals from a judgment in favor of appellees in an unlawful detainer action. We affirm.

On June 1, 1979, Howard and Margaret Halley leased some commercial real property to appellant for a term of ten years for $1,200 per month. The lease contained the following statement: "Lessee is hereby granted two options to renew this Lease for a term of five (5) years each, terms and conditions to be negotiable but not to exceed the annual cost-of-living index." On May 4, 1989, appellant sent a letter to appellees, the Halleys' children and heirs, stating that he wanted to exercise his option to renew

the lease. The parties were not successful in negotiating a new lease, and on July 17, 1989, appellees served appellant with notice of unlawful detainer and demanded that he vacate the premises. On October 13, 1989, appellees filed a complaint, asserting that appellant began unlawfully detaining the property on September 1, 1989. Appellees requested possession, rent of $1,200 per month for June, July, and August 1989, and treble damages since September 1, 1989. Appellant answered that, if a valid lease did not exist, he was a year-to-year tenant.

On December 4, 1989, the court entered judgment for appellees and found that the written lease terminated on May 31, 1989; that, thereafter, appellant occupied the property as a month-to-month tenant and that since September 1, 1989, the appellant had been in possession of the leasehold but that the hold-over was not willful. Appellant was given 45 days from the date of entry of the judgment to vacate the leasehold and, if appellant did not do so, he would be willfully holding over and entitling appellees to treble damages.

On appeal, appellant argues: (1) the trial court erred in holding that the renewal provision in the lease was void for vagueness; (2) the trial court erred in finding that appellant was a month-to-month tenant after the expiration of the original lease; (3) the trial court erred in holding that appellees could maintain an unlawful detainer action when appellant's actions were found to not be willful; and (4) the trial court erred in holding that appellant would be willfully holding over if he did not vacate the premises within 45 days. On cross-appeal, appellees argue that the trial court erred in failing to award treble damages for appellant's holding over after August 31, 1989.

We agree with the trial court that the option for renewal in the original lease was void for uncertainty. Generally, courts will not supply missing terms in a lease when the parties have not stated in their agreement a definite basis to guide the court's effort to effectuate the parties' agreement. *Lonoke Nursing Home, Inc.* v. *Wayne and Neill Bennett Family Partnership.*, 12 Ark. App. 282, 676 S.W.2d 461 (1984). The supreme court has consistently held that an option in a written lease to renew upon terms to be agreed upon in the future is void for uncertainty. *Hatch* v. *Scott*, 210 Ark. 655, 197 S.W.2d 559 (1946). In the case

at bar, the statement that the amount of rental could not exceed the cost-of-living index is simply not objective enough to guide the court in fixing the terms of a new lease and therefore cannot be enforced.

Appellant next argues that the trial court erred in holding that he was a month-to-month tenant after the expiration of the lease. Citing *Jonesboro Trust Co.* v. *Harbough*, 155 Ark. 416, 244 S.W. 455 (1922), appellant asserts that, upon holding over after the expiration of the lease, he became a year-to-year tenant with a right of six-months' notice to vacate. In *Jonesboro Trust*, it was held that a tenancy from year to year was created based upon the parties' conduct after the expiration of a lease. The supreme court stated:

> We have held to the common-law rule that a tenant under a lease for a term of years, by holding over after the end of the term without any new agreement, and paying rent according to the terms of the lease, which has been accepted by the landlord, becomes a tenant from year to year, and that this tenancy cannot be terminated by either party except upon notice of six months.

Jonesboro Trust, 155 Ark. at 418-19, 244 S.W. at 455-56.

In *Jonesboro Trust*, there was no allegation that the parties unsuccessfully attempted to negotiate a renewal of the original lease or to enter into a new lease. Additionally, the court acknowledged that the implication of law that a tenancy from year to year is created by the tenant's holding over can be rebutted by proof. *See also* 49 Am. Jur. 2d *Landlord and Tenant* § 1139 (1970).

It cannot be said that, in every instance, a year-to-year tenancy is automatically created whenever a tenant holds over after the expiration of a lease. *See Wilson* v. *Davis*, 202 Ark. 827, 153 S.W.2d 171 (1941). *See also* 49 Am. Jur. 2d *Landlord and Tenant* § 1120 (1970). "[W]here the holding over is with the consent of the landlord, pending negotiations for a new lease, which fell through, the holding over does not render the tenant liable for another term." 49 Am. Jur. 2d *Landlord and Tenant* § 1136 (1970).

In the case at bar, the court found that a month-to-

month tenancy had been created after the original lease expired. The evidence demonstrates that, after the expiration of the lease, the parties unsuccessfully attempted to renegotiate a new lease and did not intend to enter into a year-to-year tenancy. We do not reverse the factual findings of a trial judge unless they are clearly against the preponderance of the evidence. ARCP 52(d).

Appellant's next argument is that the trial court erred in ruling that appellees could *even maintain* an unlawful detainer action since appellant's actions were found not willful enough to support an award of treble damages. *See* Ark. Code Ann. §§ 18-60-304 and 18-60-309 (1987). Here, the trial court refused to award treble damages because appellant was operating under a reasonable belief that he was entitled to a renewal of the lease. Nevertheless, the court did find that appellees were entitled to possession of the property and that appellant should vacate the premises within 45 days of entry of the judgment. Appellees were also awarded rent for the months following the expiration of the lease.

Appellant is incorrect in arguing that, absent willful conduct warranting an award of treble damages, an action for unlawful detainer cannot be successful. In *Johnson* v. *Taylor*, 220 Ark. 46, 246 S.W.2d 121 (1952), the Arkansas Supreme Court affirmed a chancellor's finding that the lessor was entitled to possession of the premises in an action for unlawful detainer but reversed the chancellor's award of treble damages. The court stated:

> [B]efore treble damages may be assessed under § 34-1516, it must be shown that appellant held over "willfully and without right" as provided in §34-1503. If appellant held over under the *bona fide* belief that he had a right to do so, or while he had reasonable grounds for such belief, the highly penal, treble damage, provision above should not be assessed against him. The statute must be strictly construed and cannot be extended by intendment beyond its express term.

Johnson v. *Taylor*, 220 Ark. at 50, 246 S.W.2d at 123. *See also Lesser-Goldman Cotton Co.* v. *Fletcher*, 153 Ark. 17, 239 S.W. 742 (1922).

This approach is in accord with the general rule that

multiple damage statutes, being penal, must be strictly construed. *Warmack* v. *Merchants Nat'l Bank of Fort Smith*, 272 Ark. 166, 612 S.W.2d 733 (1981).

In the case at bar, the trial court was correct when it awarded rent and possession to appellees but would not award treble damages to appellees unless appellant held over past 45 days following entry of the judgment. We cannot agree with appellant's argument that the willful holding over necessary to support a judgment for treble damages is also required to support any action for unlawful detainer. To hold that this action could not be maintained if treble damages were not appropriate would be entirely out of keeping with the policy behind the unlawful detainer statutes. *Gorman* v. *Ratliff*, 289 Ark. 332, 712 S.W.2d 888 (1986).

We also find no error in the trial court's finding that appellant would be willfully holding over if he did not vacate the property within 45 days. Clearly, under Ark. Code Ann. § 18-60-309 (1987), the trial court could have given appellant significantly less time to vacate. We cannot see how this allowance of 45 days' time to vacate works to appellant's detriment.

We find no merit in appellees' cross-appeal for treble damages, because, although appellant was in error, we cannot say the trial court was clearly erroneous in finding that he was completely justified in believing he had a valid option to renew the lease. *See Johnson*, 220 Ark. 46, 246 S.W.2d 121.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

R.E. JOHNSON, et al. *v.* Michael U. JONES, et al.

CA 89-241 807 S.W.2d 39

Court of Appeals of Arkansas
Division II
Opinion delivered February 20, 1991
[Rehearing denied March 27, 1991.]

Pamela D. Walker, for appellant.

Arnold, Grobmyer & Haley, by: *Ronnie A. Howell*, for appellees Jack A. Nahlen and Michael U. Jones.

GEORGE K. CRACRAFT, Chief Judge. This appeal presents a question of whether the circuit court properly refused to enforce fines imposed by a labor union against some of its members, appellees Jack Nahlen, Steven Smith, and Michael Jones, for working during a strike. We hold that, under the facts of this case, the circuit court did not err in refusing to enforce the fines.

On April 24, 1990, we certified this case to the Arkansas Supreme Court as one involving an issue of significant public interest and involving a legal principle of major importance. Certification was refused by that court on April 30, 1990. Jurisdiction of the case is, therefore, in the Court of Appeals.

On September 19, 1982, the Brotherhood of Locomotive Engineers went on strike against the Missouri-Pacific Railroad; this strike continued until September 22, 1982. Appellees, employees of the railroad, were members of the American Train Dispatchers Association (ATDA) at the time of the strike. Appellees continued to work for the railroad during the strike and were charged with breaching the union's constitution and by-laws. In 1983, the union held an internal trial on the charges brought against appellees, who did not attend. Appellees were found to have accepted employment to perform service as train dispatchers during the strike and were found guilty of violating Article XIV, Section 1, Paragraphs (e) and (i) of the union's constitution and by-laws. Each appellee was issued a reprimand and fined $1,000.00. Article XIV, which is styled "Misconduct and Penalties," provides in pertinent part:

> Sec. 1.
>
> Except as otherwise provided in this Constitution & By-Laws, any officer or member of this Association, after charges, trial and conviction on any of the following offenses, . . . may be reprimanded, fined, removed from office, and/or suspended or expelled from membership as the evidence may warrant. . . . The following shall constitute misconduct:
>
> . . . .
>
> e. Crossing a picket line or accepting employment on any railroad to perform service in any capacity where a strike or lockout is in progress.

. . . .

i. Conduct unbecoming a member of this Association. . . .

Appellees did not pay or internally appeal the fines.

On April 21, 1986, appellants, representatives of the union, filed a complaint in circuit court to enforce the fines. Appellees asserted in their answers that appellants could not enforce the fines in court. In his answer, appellee Jones asserted that his fine was unreasonable. On January 12, 1987, appellants moved for summary judgment. In his response, appellee Jones asserted that the fine was levied in violation of the union's constitution and by-laws. Appellees Nahlen and Smith asserted in their response that the union could not enforce a penalty under the contract law of this state and also moved for summary judgment.

On February 9, 1989, the circuit court entered summary judgment in favor of appellees. In doing so, the court assumed, as alleged by appellants, that appellees violated Article XIV but found that the union could not enforce these fines in the courts of this state:

> It is clear from the language of the contract itself [Appellants] are seeking to enforce a penalty. Looking at the [Appellants'] actions which show their own interpretation of the contract, the Notice sent to [Appellees] used the term "fine." Under the laws of the State of Arkansas, a contractural [sic] provision for a penalty is not enforceable. *McIlvenny* vs. *Horton*, 227 Ark. 826, 302 S.W.2d 70, (1957). Contractual provisions for penalties violate the public policy of the State of Arkansas. *MoPac R.R. Co.* vs. *Winburn Tile Mfg. Co.*, 461 F. 2d 984 (8th Cir. 1972). It is clear from the language of the parties' contract that a penalty is assessed rather than liquidated damages. Thus, the contract is not enforceable.

On appeal, appellants assert that the circuit court erred in refusing to enforce the fines. Appellants argue that the fines are not penalties but are simply liquidated damages, which are enforceable in the courts of this state. Appellants argue that the word "penal" does not necessarily determine whether a provision is for a penalty or liquidated damages. They also argue that

federal labor law preempts state law in this instance.

A contract will be construed as properly stipulating for liquidated damages where, from a prospective view of the contract, it appears (1) that the parties contemplated that damages would flow from a failure to perform the contract; (2) that such damages would be indeterminate or difficult to ascertain; and (3) that the sum bears some reasonable proportion to the damages which the parties contemplated might flow from a failure to perform the contract. *Alley* v. *Rodgers*, 269 Ark. 262, 599 S.W.2d 739 (1980). Where the sum agreed upon bears no reasonable relationship to the damages which likely would result following a breach, the amount agreed upon will be held to be a penalty. *McIlvenny* v. *Horton*, 227 Ark. 826, 302 S.W.2d 70 (1957); *Muradian* v. *Haley*, 12 Ark. App. 138, 671 S.W.2d 210 (1984). *See also McMaster* v. *McIlroy Bank*, 9 Ark. App. 124, 654 S.W.2d 591 (1983); *Hearrell* v. *Rogers*, 7 Ark. App. 230, 646 S.W.2d 703 (1983). If a stipulation is for a penalty, rather than liquidated damages, it cannot be enforced in the courts of the state of Arkansas. *Lane* v. *Pfeifer*, 264 Ark. 162, 568 S.W.2d 212 (1978); *Canadian Mining Co.* v. *Creekmore*, 226 Ark. 980, 295 S.W.2d 357 (1956). *See also Breeden Dodge, Inc.* v. *Acme Indus. Laundry, Inc.*, 269 Ark. 837, 601 S.W.2d 239 (Ark. App. 1980).

In determining whether a provision in a contract is for a penalty or for liquidated damages, generally, the intention of the parties will control *Lasater* v. *Western Clay Drainage Dist.*, 177 Ark. 997, 8 S.W.2d 502 (1928); *Reed* v. *Wright*, 270 Ark. 45, 603 S.W.2d 422 (Ark. App. 1980). Whether the parties intended a provision of a contract to be a penalty or a stipulation for liquidated damages is a question of fact. *McIlvenny* v. *Horton*, *supra*. The mere fact that the words "liquidated damages" are used is not controlling. *Reed* v. *Wright*, *supra*. Nor is use of the word "penal" controlling, but it must be considered in determining the intention of the parties to the contract. *Montague* v. *Robinson*, 122 Ark. 163, 182 S.W. 558 (1916). Additionally, the court must look at the language of the contract, the subject of the contract in its surroundings, the ease or difficulty of measuring the breach in damages, and the sum stipulated. *McIlvenny* v. *Horton*, *supra*.

Here, it is readily apparent that the ATDA's constitu-

tion and by-laws provide for a penalty in the event of breach. Article XIV provides for "penalties and fines"; it does not set forth *any* sum of money which may constitute a fine in the event of breach by the union member, nor is there a maximum fine that may be levied. Hence, this provision cannot be construed as one providing for liquidated damages. We therefore agree with the circuit court's finding that the constitution and by-laws did indeed provide for a penalty in the event of breach by the union members and that, under Arkansas law, the fines against appellees cannot be enforced.

Appellants next argue that state contract law is preempted by federal labor policy in the enforcement of a union's fines against its members for working during a strike. We cannot agree.

Federal law does not control every issue that may arise in the context of labor relations:

> It has authoritatively been decided that the federal legislation as to labor-management relations did not preempt full jurisdiction in the field and leaves an area in which state action is permissible; and the states still have the power to control many phases of industrial relations involving employers or unions engaged in or affecting interstate commerce.
>
> . . . .
>
> Federal pre-emption is usually invoked whenever there are very real potentials of conflict between federal and state regulation. Such real potentials of conflict exist when it is clear or may fairly be assumed that activities which the state purports to regulate are prohibited by the National Labor Relations Act or interfere with or impinge on rights granted thereby.

51 C.J.S. *Labor Relations* § 23, at 606-08 (1967).

In *Int'l Assoc. of Machinists* v. *Gonzales*, 356 U.S. 617 (1958), the United States Supreme Court stated that the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law. A discussion of the applicable National Labor

Relations Act (NLRA) standards appears in R. Gorman, *Basic Text on Labor Law*, Ch. 29, § 1, at 677 (1976):

> Section 8(b)(1)(A) of the Labor Act declares that it shall be an unfair labor practice for a union "to restrain or coerce employees in the exercise of their rights guaranteed in section 7." Section 7 accords employees the right to form, join or assist unions and the right to engage in concerted activities, and also "the right to refrain from any or all of such activities." Congress's central intention was to forbid the use by unions against nonmembers of the kinds of intrusive economic and physical threats sometimes used by employers against union supporters and barred by section 8(a)(1). Congress also forbade union attempts at disciplining nonmembers or recalcitrant members which took the form of inducing the employer to revoke job benefits (or indeed to terminate the job itself). Congress addressed this problem in section 8(b)(2), which declares it unlawful for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of" section 8(a)(3). Historically, however, the major form of union discipline has been neither threats of physical reprisal nor inducement of discharge from employment but rather internal union sanctions, such as expulsion, suspension of [sic] fine. Union constitutions and bylaws commonly itemize membership wrongs against the union, stipulate the possible sanctions and provide for procedures within the union for charges, trial and penalties. Congress in 1947 declared an apparent intention not to interfere with these "internal" union measures by enacting as a part of section 8(b)(1)(A) a proviso: "Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

In *National Labor Relations Board* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967), the United States Supreme Court held that Congress did not intend, by § 8(b)(1)(A) of the NLRA, to *prohibit* the imposition of reasonable fines on full union members who failed to honor an authorized strike or to *prohibit* attempts to collect such fines. The Court acknowledged the role that membership support of a union

strike plays in its success in collective bargaining and that Congress did not intend to *interfere* with union measures to implement internal discipline. "Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." 388 U.S. at 195.

Allis-Chalmers is also notable for what it did *not* decide: (1) whether the NLRA *protects* actions by unions to enforce fines against members; and (2) the full extent to which union action for enforcement of disciplinary penalties is pre-empted by federal labor law. The Court stated: "Our conclusion that § 8(b)(1)(A) does not prohibit the locals' actions makes it unnecessary to pass on the [National Labor Relations] Board holding that the proviso protected such actions." 388 U.S. at 192, n. 29. Further, the Court said, "Not before us is the question of the extent to which union action for enforcement of disciplinary penalties is pre-empted by federal labor law." 388 U.S. at 197, n. 37.

In *Scofield* v. *National Labor Relations Board*, 394 U.S. 423, 430 (1969), the United States Supreme Court affirmed the court of appeals and NLRB rulings that a union could properly enforce a union rule related to production ceilings through the collection of fines. The Court also expressly held that the NLRA does not affirmatively *protect* union discipline of members:

> Unless the rule or its enforcement impinges on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter governed by local law. As the trial examiner put it in this case, the Board "never intended . . . to suggest that the disciplinary action[s] in enforcement of [union] rules . . . were affirmatively protected under the Act, as opposed to merely being not violations thereof." *It is thus a "federally unentered enclave" open to state law.*

394 U.S. at 426, n. 3 (emphasis added).

In *National Labor Relations Board* v. *Boeing Co.*, 412 U.S. 67 (1973), the United States Supreme Court held that the adjudication by the NLRB under § 8(b)(1)(A) of the NLRA of an unfair labor practice allegedly committed by a union does not include the authority to determine whether the amount of a

disciplinary fine levied by a union against a member is reasonable, since the issue is one of internal union affairs over which the NLRB has no jurisdiction. The Court then stated:

> Given the rationale of *Allis-Chalmers* and *Scofield*, the Board's conclusion that § 8(b)(1)(A) of the Act has nothing to say about union fines of this nature, whatever their size, is correct. Issues as to the reasonableness or unreasonableness of such fines must be decided upon the basis of the law of contracts, voluntary associations, or such other principles of law as may be applied in a forum competent to adjudicate the issue. Under our holding, state courts will be wholly free to apply state law to such issues at the suit of either the union or the member fined.

412 U.S. at 74.

Clearly, in light of the above, a state's law of contracts should be applied in determining the enforceability of a union's fine against a member. In *Cunningham* v. *Independent Soap & Chemical Workers of Kansas City*, 207 Kan. 812, 486 P.2d 1316, 1320 (1971), the court agreed:

> It is almost universally accepted that the relationship between a union and its members is a contractual one. As the source of the union's disciplinary authority lies in the contractual relationship between the organization and its members, it is to the rules of contract law that we must turn in evaluating the union's conduct. (See International Association of Machinists and Aerospace Workers, Local Lodge No. 504 (Arrow Development Co.) and David O'Reilly, 1970 CCH NLRB [§ 22,260] 185 NLRB 22.)
>
> . . . .
>
> Since this is a matter of contract law it is essentially a question of state law.

Accord Local 248 UAW v. *Natzke*, 36 Wis. 2d 237, 153 N.W.2d 602 (1967); *Posner* v. *Utility Workers Union of America*, 47 Cal. App. 3d 970, 121 Cal. Rptr. 423 (1975); *Jost* v. *Communications Workers of America*, 13 Cal. App. 3d Supp. 7, 91 Cal. Rptr. 722 (1970); *North Jersey Newspaper Guild* v. *Rakos*, 110 N.J. Super. 77, 264 A.2d 453 (1970).

Here, the fines levied against appellees were penalties and not liquidated damages. The issue of the enforceability of these fines has been left by Congress to be determined by the law of contracts of this state. Accordingly, the circuit court correctly refused to enforce these fines.

Affirmed.

ROGERS and JENNINGS, JJ., agree.

Lucian D. WEAST and Sibyl J. Weast *v.* HEREINAFTER DESCRIBED LANDS; and Rudolph Laho, et al.

CA 90-176 803 S.W.2d 565

Court of Appeals of Arkansas
Division I
Opinion delivered February 20, 1991

Michael E. Kelly, for appellant.

Gresham & Kirkpatrick, for appellee.

JAMES R. COOPER, Judge. The appellants in this property case filed a petition under Ark. Code Ann. § 18-11-102 (1987) to quiet title and establish their possession of wild and unenclosed lands, asserting that they had paid taxes on those lands for over seven years under color of title. The chancellor concluded that the appellants had failed to establish color of title and dismissed the appellants' complaint. From that decision, comes this appeal.

For reversal, the appellant contends that the chancellor erred in ruling that color of title is not created by a deed from a

man to himself and his wife made for the express purpose of creating color of title. We affirm.

The facts are not in serious dispute. The record shows that the appellee, Ruth Ann Metzger, obtained record title to the property through a series of conveyances from her father to her sister to herself by quitclaim deed. The appellant, Lucian D. Weast, purchased the property for delinquent taxes and was issued a tax deed on December 15, 1977. The tax deed contained a void description. On December 17, 1980, Lucian D. Weast, along with his spouse, Sibyl J. Weast, executed their warranty deed to themselves, which they recorded the following day. This deed contained an accurate description of the property, and the Weasts have paid all taxes due on the property from 1974 taxes through current 1988 taxes. Neither the appellants nor the appellees were in actual possession of the property.

Because the tax deed was void for lack of an adequate description, *see Charles* v. *Pierce*, 238 Ark. 22, 378 S.W.2d 213 (1964), the question before this Court is whether the appellants' deed to themselves constitutes color of title to establish possession of the property under Ark. Code Ann. § 18-11-102 (1987), which provides that:

> Unimproved and unenclosed land shall be deemed and held to be in possession of the person who pays the taxes thereon if he has color of title thereto, but no person shall be entitled to invoke the benefit of this section unless he, and those under whom he claims, shall have paid the taxes for at least seven (7) years in succession.

The chancellor found that the deed was a simulation that did not constitute color of title.

The effect of fabricated color of title was discussed in *Bailey* v. *Jarvis*, 212 Ark. 675, 208 S.W.2d 13 (1948), where our Supreme Court quoted with approval the case of *State* v. *King*, 77 W. Va. 37, 87 S.E. 170 (1915):

> "Color of title is not, in law, title at all. It is a void paper, having the semblence of a muniment of title, to which, for certain purposes, the law attributes certain qualities of title. Its chief office or purpose is to define the limits of the claim under it. Nevertheless, it must purport to pass title.

> In form, it must be a deed, a will, or some other paper or instrument by which title usually and ordinarily passes. Such qualities as are imputed to it by the law, for limited purposes, are purely ficticious and are accorded to it only to work out just results. Fictions are never used in procedure or law for any other purpose. (Citing cases)."
>
> It was [in *King, supra,*] further said: "To permit it to become the shield and protection of admitted fabrication of papers having the muniments of title, such as forged deeds and wills and deeds made by men having no titles, at the instance of persons having knowledge of their lack of title, for the express purpose of founding claims thereon, would be a flagrant perversion of it to unworthy purposes and a departure from the judicial intent and design in the adoption thereof."

Bailey v. *Jarvis*, 212 Ark. at 680.

We think that there was sufficient evidence in the case at bar to support a finding that the deed in question was admittedly made for the purpose of creating color of title upon which to found a claim. Sibyl Weast testified that the deed from the Weasts to themselves was executed, on their attorney's advice, "for the purpose to clear the title, color of title." Under these circumstances, we hold that the chancellor did not err in ruling that the Weasts' deed did not create color of title in them, and we affirm.

Affirmed.

DANIELSON and MAYFIELD, JJ., agree.

Donald Vernon SAUL *v.* STATE of Arkansas

CA CR 90-129 803 S.W.2d 941

Court of Appeals of Arkansas
Division II
Opinion delivered February 20, 1991

David Schoen, for appellant.

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

JOHN E. JENNINGS, Judge. Donald Vernon Saul was convicted of possession of drug paraphernalia and possession of marijuana. He was sentenced to ten years in the Arkansas Department of Correction for the former offense and one year in the Boone County Jail for the latter. On appeal to this court Saul raises three arguments: (1) that his conviction for possession of

marijuana must be reversed because possession of only a "trace" amount was shown; (2) that the trial court should have suppressed the evidence found in the passenger compartment of appellant's vehicle; and (3) that the court erred in finding that appellant had consented to the search of the trunk of the car. We find no error and affirm.

On January 1, 1989, Jim Trammell, a Boone County deputy sheriff, was on routine patrol. As he was driving through a rest area north of Harrison, the caretaker, Jim McNelley, waved for him to stop. McNelley reported that a man who had driven a brown Chevrolet to the rest stop had been in the rest room for two and a half hours.

Trammell ran a registration check on the license plate and received information that the tag was issued to a green Subaru. He looked into the vehicle to see if "there was something such as a registration lying in view that would disclose whose vehicle it was." He saw no registration but did see a shotgun lying in the back seat of the car. The gun was covered by a coat except for the tip of the muzzle and the end of the stock. He opened the driver's side door to retrieve the shotgun and check to see if it was loaded. Trammell testified that he did this for his own safety before he dealt with the suspect. When he opened the door he saw a large curved blade dagger. He also saw a clear plastic container in the front seat which contained "some green residue." Trammell testified that based on his training and experience he believed the green residue to be marijuana. He seized the container as contraband and the gun and the knife for his own protection, before entering the bathroom to talk with the appellant. According to Trammell's testimony, he then entered the rest room and asked the appellant how he was feeling. Saul told Trammell that he had severe diarrhea, that the shotgun was for deer hunting, that he was sharpening the knife for a friend, and that he knew nothing about the bottle with the marijuana in it. Trammell testified that Saul agreed to let him search the car and took out his car keys and handed them to him. Saul's testimony was that the search was conducted without his consent and that he had left the keys in the vehicle. The search of the trunk of the car turned up several items of drug paraphernalia.

Appellant contends that the possession of merely a

trace amount of a controlled substance will not support a conviction, citing *Harbison* v. *State*, 302 Ark. 315, 790 S.W.2d 146 (1990). The state argues that the issue is waived because the appellant did not move for a directed verdict at the close of all the evidence, citing Ark. R. Crim. P. 36.21(b) and *White* v. *State*, 302 Ark. 515, 790 S.W.2d 896 (1990). In *Moore* v. *State*, 304 Ark. 257, 801 S.W.2d 638 (1990), the supreme court held that even if a general motion for a directed verdict is made, the *Harbison* issue is waived unless specifically raised. We therefore need not reach the merits of the argument.

When the state claims that a search is justified by consent, it has the burden of proving that the consent was freely and voluntarily given and that there was no actual or implied duress or coercion. *Scroggins* v. *State*, 268 Ark. 261, 595 S.W.2d 219 (1980). In reviewing a trial court's ruling in this regard, we make an independent determination based on the totality of the circumstances, but reverse only if the ruling was clearly against the preponderance of the evidence. *Campbell* v. *State*, 294 Ark. 639, 746 S.W.2d 37 (1988). In the case at bar the testimony of the officer and that of the appellant were in direct conflict. In such circumstances we have said that the decision amounts simply to the question of which witness to believe, a decision which is left to the trier of fact. *See Hamm* v. *State*, 296 Ark. 385, 757 S.W.2d 932 (1988); *Johnson* v. *State*, 27 Ark. App. 54, 766 S.W.2d 25 (1989). While it is true, as appellant points out, that the caretaker's testimony contradicted the officer's as to some details, when all the circumstances are considered together, we cannot say the trial court's finding that Trammell's testimony was more credible is clearly against the preponderance of the evidence.

Finally, appellant argues that the officer's warrantless entry into the passenger compartment of the vehicle requires suppression of the evidence obtained as a result. We cannot agree. Appellant correctly notes that any warrantless search of a vehicle is presumptively unconstitutional and that the burden is on the state to show legal justification for it. *Leopold* v. *State*, 15 Ark. App. 292, 692 S.W.2d 780 (1985). Appellant attempts to distinguish this case from *Michigan* v. *Long*, 463 U.S. 1032 (1983) and *Terry* v. *Ohio*, 392 U.S. 1 (1968). He notes the following language in *Michigan* v. *Long*:

> [T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

Long, 463 U.S. at 1049, citing *Terry* v. *Ohio*, 392 U.S. 21.

Appellant argues that the officer had no reason to believe that the appellant was dangerous and refers us to Trammell's admission that, at the time he entered the vehicle to retrieve the shotgun, he had no reason to feel that he was in danger.

It is clear one has a lesser expectation of privacy in a motor vehicle. *New York* v. *Class*, 475 U.S. 106 (1986); *Cardwell* v. *Lewis*, 417 U.S. 583 (1974). When the safety of the officer is the proposed justification for the intrusion on privacy, that consideration is both legitimate and weighty. *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977). It is unreasonable to require police officers to take unnecessary risks in the performance of their duties. *Terry* v. *Ohio*, 392 U.S. 1 (1968). The protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger. *Michigan* v. *Long*, 463 U.S. 1032 (1983). The issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. *Terry*, 392 U.S. at 27. The touchstone of the analysis is the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. *Pennsylvania* v. *Mimms*, 434 U.S. at 108 (citing *Terry*, 392 U.S. at 19). In *Michigan* v. *Long*, the Court said:

> In this case, the officers did not act unreasonably in taking preventive measures to ensure that there were no other weapons within Long's immediate grasp before permitting him to reenter his automobile. Therefore, the balancing required by Terry clearly weighs in favor of allowing the police to conduct an area search in the passenger compartment to uncover weapons, as long as they possess an articulable and objectively reasonable belief that the

> suspect is potentially dangerous.

463 U.S. at 1051.

In the case at bar it is true that appellant did not have immediate access to the shotgun at the time the officer entered the vehicle to retrieve it. However, in *Michigan* v. *Long*, where there were two officers on the scene, the Supreme Court rejected the Michigan Supreme Court's view that it "was not reasonable for the officers to fear that [respondent] could injure them, because he was effectively under their control during the investigative stop and could not get access to any weapons that might have been located in the automobile. *Long*, 463 U.S. at 1062 (Brennan, J., dissenting). As the majority noted, "[t]he circumstances of this case clearly justified [the officers] in their reasonable belief that Long posed a danger if he were permitted to reenter his vehicle."

In this case the police officer testified that he entered the vehicle to seize the shotgun "for my safety before I dealt with Mr. Saul." The entry into the vehicle for this limited purpose does not seem unreasonable in view of the likelihood that Mr. Saul would be asked to return to the vehicle and enter it to retrieve whatever registration papers he might have. This is not a case of a search for possible weapons, but rather a seizure of a deadly weapon in plain view. The danger, while perhaps not immediate, was clearly imminent.

In *New York* v. *Class*, 475 U.S. 106 (1986), the Supreme Court upheld as constitutional the entry of police officers into a vehicle for the purpose of attempting to locate a vehicle identification number. There the Court said, "there is no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails," citing *Terry* v. *Ohio*, 392 U.S. at 21 (1968). The Court in *Class* listed three factors it considered pertinent: (1) the safety of the officers was served by the governmental intrusions; (2) the intrusion was minimal; and (3) the search stemmed from some probable cause focusing suspicion on the individual affected by the search. In upholding the search the Court said:

> Any other conclusion would expose police officers to potentially grave risks without significantly reducing the intrusiveness of the ultimate conduct — viewing the VIN

> — which, as we have said, the officers were entitled to do as part of an undoubtedly justified traffic stop.

Class, 475 U.S. at 119.

If the intrusion in *Class* was constitutionally permissible, where no deadly weapon was in plain view and there was no reason to suspect the car was stolen or that the appellant himself was dangerous, we cannot reach a contrary conclusion here.

Our conclusion is that no reversible error was committed.

Affirmed.

CRACRAFT, C.J., and ROGERS, J., agree.

Charles STARKS *v.* STATE of Arkansas

CA CR 90-156 804 S.W.2d 728

Court of Appeals of Arkansas
Division I
Opinion delivered February 20, 1991
[Rehearing denied March 20, 1991.]

Smith & Smith, by: *Norman Smith* and *Wilson, Engstrom, Corum & Dudley*, by: *Timothy O. Dudley* and *William R. Wilson, Jr.*, for appellant.

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

JOHN E. JENNINGS, Judge. Charles Starks was charged with one count of rape and one count of incest, offenses which the state alleged were committed on his minor stepdaughter. At trial the charge of rape was reduced to sexual abuse in the first degree. A jury found the appellant guilty of both offenses and he was sentenced to five years on each count, to be served consecutively.

The sole contention on appeal is that the trial court erred in denying appellant's motion to sever the offenses for trial. We find no error and affirm.

Appellant relies on *Teas* v. *State*, 266 Ark. 572, 587 S.W.2d 28 (1979), and on Ark. R. Crim. P. 22.2(a). That rule provides:

> Whenever two or more offenses have been joined for trial solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan, the defendant shall have a right to a severance of the offenses.

Here the trial court, in denying the motion to sever, stated:

> All right. I'm going to let the cases remain joined basically on judicial economy, where you've got the same witnesses, same evidence, same defenses. I can't see any prejudice to the Defendant. I could see more prejudice to the Defendant if they were severed. The state would in effect have two shots at Mr. Starks.

In *Teas* v. *State*, *supra*, the Arkansas Supreme Court reversed the trial judge's refusal to sever the offenses. In *Teas*, the defendant was charged with selling marijuana on December 5, 1977, and with the separate offense of selling morphine on December 14, 1977, to the same confidential informant. The supreme court said:

> The only connection we can find between the two sales is the fact that both were made to Steve Hicks. This showing alone is insufficient to connect the two sales by a single scheme or plan within the meaning of Criminal Rule 22.2 *supra*. It follows that the trial court erred in joining the two offenses for purpose of trial.

Although appellant contends that *Teas* is directly in point, we cannot agree. In the case at bar the appellant made a

statement to police officers which was introduced into evidence at trial. In that statement appellant said:

> Sometime in the last three years I started to fool around with Charolette who is my step-daughter. It started out I was just patting around on her. Most of the time it happened around the Hunting Lodge where I am employed. Charolette was about 12 years old when I first started messing with her. We spent a lot of time together and had grown real close. After about one year of the patting I started to have sex with her. This has gone on for about two years now. There were times when we may have had sex twice in the same week and then I think we both would feel guilty about it and it might be months before we would have sex again.

Our view is that appellant's statement by itself provides an adequate indication that the two offenses were part of a single scheme or plan.

Appellant contends that the purpose of Rule 22.2 is to give effect to the principle that the state cannot bolster its case against the accused by proving that he committed other similar offenses in the past, which was the view taken by Justice George Rose Smith in a concurring opinion in *Teas*. Assuming that this is the underlying purpose of the rule, that purpose would not be served by granting a severance in the case at bar because evidence of the earlier conduct would very likely be admissible in a prosecution for the later offense. *See Young* v. *State*, 296 Ark. 394, 757 S.W.2d 544 (1988); *Free* v. *State*, 293 Ark. 65, 732 S.W.2d 452 (1987).

Finally, we do not find it determinative that the trial judge stated that he was denying the motion for reasons "primarily of judicial economy." We do not reverse a correct decision merely because the reason given for it was the wrong one. *Hicks* v. *State*, 28 Ark. App. 268, 773 S.W.2d 113 (1989).

Affirmed.

CRACRAFT, C.J., and COOPER, J., agree.

Josiah HOLMES, a/k/a Joe Anthony Holmes *v.* STATE of Arkansas

CA CR 90-164 803 S.W.2d 563

Court of Appeals of Arkansas
Division I
Opinion delivered February 20, 1991.

John Joplin, for appellant.

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

ELIZABETH W. DANIELSON, Judge. The appellant, Josiah Holmes, entered a plea of guilty on July 20, 1988, to the offense of forgery and was sentenced to the Arkansas Department of Correction for five years with three years and eight months suspended.

A petition to revoke appellant's suspended sentence was filed on July 26, 1989, alleging that Holmes committed the offense of shoplifting. He was arrested on July 31, 1989, and posted a $1,500 bond. On August 9, 1989, Holmes appeared for his arraignment without an attorney, so his case was reset for August

16. Holmes failed to appear on August 16 and was arrested on a bench warrant September 2, 1989.

Holmes made a motion to dismiss for what he claims was a delay of more than 60 days from the time of his arrest until his revocation hearing. A hearing was held on October 16, 1989, the motion denied, and a judgment revoking Holmes's suspended sentence was entered the same day, sentencing him to three years in the Arkansas Department of Correction with one and one-half years suspended. We affirm.

Holmes's argument on appeal is that the trial court erred in denying his motion to dismiss the revocation of suspended sentence pursuant to Ark. Code Ann. § 5-4-310(b)(2) (1987). That statute states that the revocation hearing shall be conducted by the court that suspended imposition of sentence within a reasonable time, not to exceed 60 days after the defendant's arrest. The purpose of Ark. Code Ann. § 5-4-310(b)(2) is to assure that a defendant is not detained in jail for an unreasonable time awaiting his revocation hearing. *Felix* v. *State*, 20 Ark. App. 44, 723 S.W.2d 839 (1987).

The statutory 60-day limitation for a revocation hearing begins to run from a defendant's arrest for violation of terms of the suspension, not from his arrest for other charges. *Boone* v. *State*, 270 Ark. 83, 603 S.W.2d 410 (1980); *Walker* v. *State*, 262 Ark. 215, 555 S.W.2d 228 (1977); *Blake* v. *State*, 262 Ark. 301, 556 S.W.2d 427 (1977); *Lincoln* v. *State*, 262 Ark. 511, 558 S.W.2d 146 (1977).

Ark. R. Crim. P. 28.3(h) states that periods of delay for good cause should be excluded in computing the time for trial. The period from August 9 until August 16 should be excluded under this rule, as the trial court, upon Holmes's request, postponed his hearing so that he could obtain private counsel.

Ark. R. Crim. P. 28.3(e) states that the period of delay resulting from the absence or unavailability of the defendant shall be excluded in computing the time for trial. A defendant shall be considered absent when his whereabouts are unknown, or when his whereabouts are known but his presence for trial cannot be obtained. Holmes did not appear at the August 16 hearing and had to be served with a bench warrant on September 2 in order to

assure his appearance in court for arraignment on September 6.

Because of the delays caused by the appellant, the time between August 9 and September 2 is excluded in computing the time for trial. Thus, we find that Holmes's revocation hearing was held within 60 days of his arrest as required by Ark. Code Ann. § 5-4-310(b)(2) (1987).

Affirmed.

ROGERS, J. agrees.

MAYFIELD, J., concurs.

MELVIN MAYFIELD, Judge, concurring. I agree with the majority opinion and its application of Ark. R. Crim. P. 28 to this case. *See Lark* v. *State*, 276 Ark. 441, 637 S.W.2d 529 (1982) (proper to look to Rule 28.3 for guidance in computing excludable periods in revocation cases). In addition, I agree with the trial court's statement that the 60-day limitation period should not start to run until the date the appellant was rearrested on September 2, 1989. The court said it was not going to count any time before September 2 because it was appellant's own conduct that caused the delay.

We held in *Phillips* v. *State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986), that a defendant could waive the 60-day limitation period. To hold otherwise, under the circumstances of this case, would allow defendants to cause the 60-day limitation period to run simply by not showing up for preliminary hearing dates in consecutive order, if the court allowed them to stay free on bond. For example, suppose a hearing is set for 30 days from the initial arrest; that defendant does not appear; and that he is arrested the second time. Then suppose that another hearing is set for 20 days after this second arrest but the defendant again fails to appear. Assume he is arrested again; hearing is set 10 days later; and defendant again fails to appear. If the 60-day limitation period does not start from this third arrest, the period would have run—simply because the defendant failed to appear each time. Therefore, I do not believe that the 60-day limitation period should start to run in this case until September 2, 1989.

UNION NATIONAL BANK of Little Rock *v.*
Mary DANESHVAR

CA 90-185 803 S.W.2d 567

Court of Appeals of Arkansas
Division I
Opinion delivered February 20, 1991.
[Rehearing denied March 20, 1991.]

Michael S. McCrary, for appellant.

Stephen K. Cuffman, for appellee.

ELIZABETH W. DANIELSON, Judge. Appellee, Mary Daneshvar, brought an action against the appellant, Union National Bank, to recover funds paid from her account as a result

of two forged checks totalling $12,000. Judgment was for the appellee in the full amount of damages requested, plus prejudgment interest and attorneys' fees.

Appellant asserts three points of error on appeal: (1) the trial court erred in refusing to grant appellant's motion for a directed verdict, (2) the trial court erred in refusing to give a jury instruction that if appellee had received the benefit of the funds, the bank's liability should be reduced accordingly, and (3) the trial court erred in refusing to instruct the jury on comparative fault. Because we agree with the appellant that there was sufficient evidence to justify the submission of the question of appellee's negligence to the jury, we reverse and remand. We also address the other issues to the extent that they are likely to arise on retrial.

Appellee opened a checking account with the appellant bank in March 1984. She was the only person authorized to draw checks on the account. Appellee testified that on February 24, 1987, she discovered two checks were missing from her checkbook. She reported the missing checks to the bank, and a few days later she went to the bank to inquire about her balance. At that time, she learned the missing checks had been paid and the balance of her account was $12,000 less than it should have been. She was advised by the branch manager that she needed to sign an affidavit so the bank could pursue the matter. At that time she told the manager she suspected her husband had taken the money, but that she wanted to think about it further before signing the affidavit because her husband had threatened her in the past. Subsequently, she questioned her husband, but he denied having taken the money from her account.

On March 3, 1987, appellee's husband gave her a letter from Superior Federal stating that the balance in that account was $10,541.48. This account at Superior Federal was a joint account to which both parties had access. Appellee testified to having written several checks on this account in the past. Appellee's husband told her he borrowed the money that was in this account from a friend in order to establish proof of funding which she needed for citizenship purposes. The day after she received the letter she went to Superior Federal to get copies of the letter and found out all but $351.48 had been withdrawn. Appellee learned

later that the Superior account reflected that the entire proceeds from the forged checks had been deposited in early February into that account, though they were subsequently withdrawn.

Later in March or April, appellee's husband admitted taking the money from her Union account. She signed the affidavit required by the bank on April 9, 1987, five to six weeks after she discovered the missing checks and the $12,000 reduction in her account. The affidavit was signed over a month after she got the letter from Superior Federal stating their joint account had a balance of approximately $10,500.

On April 13, 1987, appellee filed for divorce. The divorce decree, rendered August 3, 1987, states that the parties entered into a property settlement agreement and recites the items divided between the parties. The decree is silent as to the proceeds of the forged checks. As part of the property settlement agreement, appellee signed an affidavit certifying that she had in her possession all items of personal property to which she was entitled.

Appellant first contends that the trial court should have granted its motion for a directed verdict because the appellee either received the benefits of the forged instruments through the property settlement or ratified the unauthorized signatures by signing the property settlement agreement. When presented with a motion for directed verdict, the trial court must view the evidence, with all reasonable inferences, in the light most favorable to the party opposing the motion, giving the evidence its highest and strongest probative value. *Arkansas Valley Electric* v. *Davis*, 304 Ark. 70, 800 S.W.2d 420 (1990). The trial court noted that it could find no evidence to trace the funds from the forged instruments to the property settlement agreement. The property settlement agreement and the affidavit were silent as to the disposition of any monetary funds. Because the jury could, on the evidence presented, reasonably find that the appellee did not receive the benefit of the forged checks or ratify the unauthorized signatures, the denial of the directed verdict will not be reversed.

Appellant next contends that the trial court erred in refusing to instruct the jury that if appellee had received the benefits from the forged checks, the appellant's liability must be reduced accordingly. There was no evidence presented from

which the benefits from the forged checks could be traced to the property settlement agreement. Instructions should be based on the evidence in the case, and instructions submitting matters on which there is no evidence should not be given. *Newman* v. *Crawford Constr. Co.*, 303 Ark. 641, 799 S.W.2d 531 (1990).

Appellant's third argument is that the trial court improperly refused to instruct the jury on comparative fault. Appellant submitted an instruction pursuant to Ark. Code Ann. § 4-3-406(2) (Supp. 1989), which states:

> In all actions between banks . . . and their customers where it is contended that both parties' conduct contributed to or caused the loss, their respective fault in causing the loss shall be compared under Arkansas law of comparative fault, § 16-64-122.

The trial court stated it did not believe there was any evidence of negligence on the part of appellee. We agree there was no evidence of any negligence in the making of the unauthorized signatures and that no instruction on this point was warranted. However, under the facts and circumstances of this case, we find there was sufficient evidence to justify submitting to the jury the question of whether appellee's conduct after the forgery contributed to her loss.

The trial court erroneously denied the instruction based on Ark. Code Ann. § 4-3-406(2) (Supp. 1989), which would allow the jurors to compare the respective fault of the parties in causing the loss. Accordingly, we reverse and remand for proceedings not inconsistent with this opinion.

Reversed and remanded.

MAYFIELD and ROGERS, JJ., agree.

Nancy MUDDIMAN *v.* Nettie WALL and Marium Burks

CA 90-241 803 S.W.2d 945

Court of Appeals of Arkansas
Division II
Opinion delivered February 20, 1991
[Rehearing denied March 13, 1991.]

Walker, Roaf, Campbell, Ivory & Dunklin, by: *Andree L. Roaf*, for appellant.

Laser, Sharp, Mayes, Wilson, Bufford & Watts, by: *Richard N. Watts*, for appellee.

JUDITH ROGERS, Judge. This appeal is from a summary judgment granted to appellees dismissing appellant's claim for damages for personal injuries, which she alleged she received while attempting to extinguish a fire on appellees' property. Because we find that issues of fact remained to be decided, we hold that the award of summary judgment was clearly erroneous and reverse.

In her complaint, appellant contends that, on January 9, appellees negligently dumped hot ashes into their yard causing a

fire and that, while attempting to extinguish this fire, she fell and was seriously injured. Appellees answered, admitting that an accident occurred on January 9 but generally denied that they were negligent in any manner. They further alleged that appellant was chargeable with contributory negligence which was the proximate cause of the incident and any damages she sustained.

Appellees moved for summary judgment, contending there were no factual issues in dispute and that appellant could not meet her burden of proof. In support of their motion, they attached their discovery deposition of appellant and the affidavits of Donald Moore and James Corley. In her deposition, appellant stated at one point that she did not actually see dumped ashes at the time of the fire but, at another point, stated that she did. She also stated that Donald Moore and James Corley saw the dumped ashes on the ground. The affidavits of Moore and Corley each contain the following statement: "I do not know how the fire started."

Appellant responded to appellees' motion but did not attach any affidavits or other evidence to her response. After reviewing the pleadings, interrogatories, appellees' deposition of appellant, and the affidavits attached to appellees motion, the circuit court granted appellees summary judgment, finding appellant had failed to meet proof with proof. This appeal followed.[1]

Summary judgment is an extreme remedy which should be allowed only when it is clear that there is no genuine issue of fact and the moving party is entitled to a judgment as a matter of law. *Mathews* v. *Garner*, 25 Ark. App. 27, 31, 751 S.W.2d 359, 361 (1988); Ark. R. Civ. P. 56(c). The burden of proving that there is no genuine issue of material fact is upon the party moving for summary judgment, and all proof submitted must be viewed in a

---

[1] In their brief, appellees contend that jurisdiction of this appeal belongs in the Arkansas Supreme Court, pursuant to Ark. Sup. Ct. R. 29(1)(o), as a case presenting a question in the law of torts. However, because the only issue involved in this appeal is whether the trial court properly granted summary judgment, the purpose of which is not to try issues, but to determine if there are issues of fact to be tried, we retain jurisdiction under Rule 29(1). *See Hensley* v. *White River Medical Center*, 28 Ark. 27, 770 S.W.2d 190 (1989); *see also Goodman* v. *Farmers & Merchants Bank*, 22 Ark. App. 41, 732 S.W.2d 866 (1987); *McLeroy* v. *Waller*, 21 Ark. App. 292, 731 S.W.2d 789 (1987).

light favorable to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Guthrie* v. *Kemp*, 303 Ark. 74, 76, 793 S.W.2d 782, 783 (1990); *McCaleb* v. *Nat'l Bank of Commerce*, 25 Ark. App. 53, 59, 752 S.W.2d 54, 57 (1988). In considering a motion for summary judgment, the court may consider pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, to determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to summary judgment. *Hallmark Cards, Inc.* v. *Peevy*, 293 Ark. 594, 599, 739 S.W.2d 691, 694 (1987).

Appellees argue that the trial court properly awarded summary judgment because appellant failed to attach any proof to her response to the summary judgment motion. Although appellees are correct in stating that, once a moving party makes a prima facie case that a summary judgment motion should be granted, the non-moving party then must come forward with proof showing there is a genuine question in dispute, *Mathews*, 25 Ark. App. at 31, 751 S.W.2d at 361, it does not automatically follow that the moving party is entitled to summary judgment simply because no affidavits were filed in response to a motion. *See Montgomery Ward & Co.* v. *Credit*, 274 Ark. 66, 68, 621 S.W.2d 855, 856 (1981).

It was not necessary for appellee to include additional evidence in support of her response to the summary judgment motion because her pleading and answers to appellees' discovery present proof of a genuine dispute as to an issue of fact. Appellant testified in her deposition that she and James Corley saw the dumped ashes on the ground and that Donald Moore also saw the ashes and a burn trail from the ashes to the fire. Appellant also responded to some interrogatories propounded by appellees in which she provided the names of James Corley, Bill Rice, and Donald Moore as witnesses who would testify as to their knowledge of the circumstances surrounding the fire, the presence of fireplace ashes in the burned area, and the appellees' propensity to throw fireplace ashes into their yard.

This evidence was sufficient to raise the issue of whether appellees negligently threw fireplace ashes into their yard causing a fire, and appellees did not offer any proof to refute this issue.

They did not deny that they threw ashes into their yard, and the affidavits of Moore and Corley merely state that they do not know the cause of the fire. Therefore, whether appellees were negligent remained a fact in issue, and it was not necessary for appellant to offer additional evidence to withstand their summary judgment motion. The object of summary judgment is not to try the issues but to determine if there are issues of fact to be tried; the burden is on the moving party and cannot be shifted when there is no offer of proof on a controverted issue. *Collyard* v. *American Home Assurance Co.*, 271 Ark. 228, 230, 607 S.W.2d 666, 668 (1980).

Our decision here is similar to the finding in *Collyard* v. *American Home*, *supra*, where the supreme court reversed a summary judgment in favor of the appellee defendant. There, the appellant sued the appellee, insurance carrier for the YMCA, for injuries she alleged resulted from a slip-and-fall at the YMCA, contending that the YMCA was negligent in permitting water to remain on the floor and such negligence caused her accident. The appellant filed a general denial and set up specifically the defense of contributory negligence and assumption of the risk. The appellee also moved for summary judgment. The only evidence the appellee produced in support of its motion was the deposition of the appellant. Relying on cases which hold that a slip-and-fall is not alone sufficient to prove negligence and that it must be proved that the substance was negligently placed there, the trial court found there was not a factual issue as to whether the YMCA acted negligently, because the appellant stated in her deposition that she did not know how the water got on the floor or how long it had been there. In reversing the award of summary judgment, the supreme court held that, while the trial court correctly stated the law in regard to slip-and-fall cases, it did not relate to whether a summary judgment should have been granted. The court stated:

> The trial judge ruled that since the appellant did not respond to the motion by a counter-affidavit or proof that the water had been negligently placed there or allowed to remain there, the fact was not in issue. Rules of Civil Procedure, Rule 56, was cited for this conclusion.
>
> Rule 56 makes no such requirement. The appellant alleged negligence on the part of the YMCA. The appellee

> never controverted this allegation by affidavit or other proof. It simply offered the deposition of Collyard that *she* did not know how the water got there or how long it had been there. The appellee and trial judge mistakenly presume that the burden was on Collyard to come forward with additional proof on this issue. . . .
>
> Whether the YMCA was negligent remained a fact in issue. If appellant had offered proof that the YMCA was not negligent, then Collyard would have had to produce a counter-affidavit or proof refuting the offer. But that was not the case. The appellee based its motion only on the deposition of Collyard, the plaintiff. The allegation in the complaint remained uncontroverted and Collyard should be permitted to present other evidence on that fact.

Collyard, 271 Ark. at 229-30, 607 S.W.2d at 668. Like *Collyard*, the appellees here offered no proof that they were not negligent; they simply offered proof that several witnesses did not know the cause of the fire.

Based on the foregoing, we find it was error to grant summary judgment.

Reversed and remanded.

CRACRAFT, C.J., and JENNINGS, J., agree.

Cassandra Kay ALFORD *v.* STATE of Arkansas

CA CR 90-175 804 S.W.2d 370

Court of Appeals of Arkansas
Opinion delivered February 27, 1991.

William R. Simpson, Jr., Public Defender, by: *Omar F. Greene II*, Deputy Public Defender, for appellant.

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

GEORGE K. CRACRAFT, Chief Judge. On September 13, 1989, Cassandra Kay Alford, appellant, pled guilty to theft of property for which imposition of sentence was suspended for a period of three years. On November 14, 1989, the State filed a petition to revoke, alleging that appellant had violated the terms of her suspended sentence by again committing theft of property on November 2, 1989, and filed an information charging her accordingly. By agreement, the petition to revoke and the theft charge were presented on the same evidence before the trial court sitting without a jury. Appellant was found guilty of theft of property and sentenced to a term of five years in the Arkansas Department of Correction. The trial court also revoked her prior suspension and sentenced her to a four-year term for the prior offense, with the two sentences to run consecutively. On appeal, appellant challenges the sufficiency of the evidence with regard to both the conviction for the November 1989 theft and the revocation. We find no error and affirm.

The record indicates that on November 2, 1989, appellant arrived at a department store in a white jeep, accompanied by Shelly North, Ben Racy, and appellant's sister, Brenda Alford. All four entered the store together. Appellant and Racy went to the men's department; the other two women went to the ladies' department. The security guard observed Brenda Alford take merchandise and, while Shelly North diverted the clerk's attention, place it in her purse. He also observed Brenda place other merchandise in Shelly's purse. Meanwhile, another store employee observed Racy exit the store, walk to the jeep and get in it, and then return to the store. After Brenda and Shelly had concealed the merchandise, they walked toward the front of the store and appellant and Racy followed. The security guard stopped Brenda and Shelly, and a scuffle ensued. He grabbed the purses, both of which Brenda was holding. Brenda then attempted to hand one of the purses to appellant, who reached for it but could not get it.

When the commotion was over, Brenda and Shelly were taken to the store office and appellant and Racy left the store. The store manager continued to watch appellant and Racy and

observed them go behind a neighboring building occupied by a tune-up shop. On this information, a police officer went to the tune-up shop, where he observed appellant and Racy come from behind the building. He took them into custody and then found numerous items, which were identified as having been stolen from the department store, on the ground behind the tune-up shop. The officer returned to the department store and asked each of the four suspects if he or she had any knowledge of the white jeep. Appellant, as well as the others, denied any such knowledge. Appellant later handed the keys to the vehicle to the officer but denied knowing who had been driving it. Several articles, which were identified as having been stolen from the department store, were found in the vehicle.

Appellant first contends that the evidence was insufficient to support her conviction for theft of property, arguing that the State failed to prove that she acted as a principle or as an accomplice to the theft. We disagree. On review of criminal convictions by a court sitting without a jury, this court views the evidence and all permissible inferences to be drawn from it in the light most favorable to the State. The trial court's determination will be affirmed if it is supported by substantial evidence. *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 resorting to speculation or conjecture. *Booth* v. *State*, 26 Ark. App. 115, 761 S.W.2d 607 (1989). The fact that evidence is circumstantial does not render it insubstantial. *Sweat* v. *State*, 25 Ark. App. 60, 752 S.W.2d 49 (1988).

An accomplice is one who, with the purpose of promoting or facilitating an offense, solicits, advises, encourages, or coerces another to commit an offense, or aids, agrees to aid, or attempts to aid another in the planning or commission of an offense. Ark. Code Ann. § 5-2-403 (1987). The presence of the accused in the proximity of a crime, opportunity, and association with persons involved in a crime in a manner suggestive of joint participation are relevant factors in determining the connection of an accomplice with the crime. *Hooks* v. *State*, 303 Ark. 236, 795 S.W.2d 56 (1990); *Redman* v. *State*, 265 Ark. 774, 580 S.W.2d 945 (1979); *Ashley* v. *State*, 22 Ark. App. 73, 732 S.W.2d 872 (1987). 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. *Parker* v. *State*, 265 Ark. 315, 578 S.W.2d 206 (1976); *Booker* v. *State*, 32 Ark. App. 94, 96 S.W.2d 854 (1990). Purpose or intent is a state of mind that is not ordinarily capable of proof by direct evidence but may be inferred from the circumstances. *Heard* v. *State*, 284 Ark. 457, 683 S.W.2d 232 (1985).

Here, there was direct evidence that appellant arrived at the store with Brenda Alford, Shelly North, and Ben Racy; that Brenda and Shelly acted in concert in stealing merchandise; and that appellant reached for the purse containing the merchandise as all four suspects were attempting to leave the store. It was undisputed that the vehicle in which they had arrived at the scene contained other merchandise stolen from the store and that appellant had keys to that vehicle. There was also evidence that, when appellant and Racy left the store, they did not return to the jeep but were apprehended at a business across the street, in close to proximity to other goods established as having been stolen from the department store.

From our review of the record, especially those factors listed above, we cannot conclude that the trial court's finding that appellant was guilty of theft of property is not supported by substantial evidence.

Appellant also contends that the trial court erred in revoking her suspended sentence. We disagree. On the issue of the revocation, the standard of review is slightly different. In such cases, the trial court must find by a preponderance of the evidence that the defendant has failed to comply with the conditions of his suspension before it may be revoked. On appeal, we do not reverse the trial court's decision unless it is clearly against the preponderance of the evidence. *Brewer* v. *State*, 274 Ark. 38, 672 S.W.2d 698 (1981); *Jones* v. *State*, 31 Ark. App. 23, 786 S.W.2d 851 (1990). In light of the evidence outlined above, we cannot conclude that the trial court erred in revoking appellant's suspended sentence.

Affirmed.

JENNINGS and COOPER, JJ., agree.

Gilbert EVANS *v.* STATE of Arkansas

CA CR 90-180 804 S.W.2d 730

Court of Appeals of Arkansas
Opinion delivered February 27, 1991.

Wilson, Engstrom, Corum and Dudley, by: *William R. Wilson Jr.* and *Timothy O. Dudley*, for appellant.

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

GEORGE K. CRACRAFT, Chief Judge. Gilbert Evans appeals from his conviction of the crimes of manufacture of a controlled

substance and possession of drug paraphernalia, for which imposition of sentence was suspended for five years. Prior to the date set for trial, appellant filed a motion to suppress all evidence of contraband as the fruits of an illegal, warrantless search in violation of his rights under the fourth amendment to the United States Constitution. When his motion to suppress was denied, he entered a plea of *nolo contendere*, reserving his right to appeal from the adverse ruling on the motion to suppress, as provided in Ark. R. Crim. P. 24.3(b). On appeal, appellant contends that the trial court erred in denying his motion to suppress. We agree and reverse and remand.

The record indicates that, on the afternoon of April 20, 1989, the North Little Rock Police Department received a telephone call from a person identifying herself as Irene Smith, who stated that her daughter was being held at gunpoint in an apartment located at 1600 North Main Street. She advised that she had received this information from her son and furnished a telephone number where she could be reached. After communicating the report to a patrol unit, the dispatcher called Ms. Smith in an attempt to obtain more information regarding the location of the apartment and told her that no one was found at 1600 North Main. Ms. Smith informed him that the residence was a duplex across the street from the social security office and an antique shop and repeated that the address was 1600 North Main.

According to the tape recording of the dispatch, the following conversation occurred between two police officers who had arrived at the scene.

> Police (221): Would it be that one on the right over there you think or this one on the left?
>
> Police #2: *Probably on the left.*
>
> Police (221): I'm going to check this one *on the right* over here in front.
>
> Police #2: Ok. *I'll take 1600 here on the left.*

The officer who entered 1600 North Main advised that there was a man named John in an apartment there, apparently the name given to the police by Ms. Smith as the name of the man holding her daughter at gunpoint, but determined that no crime had

occurred there. At the same time, the other officer, Gary Canady, entered a dwelling at 1516 North Main, and reported:

> Police (221): 10-4. I got this uh, door open. It's not locked. It's open. I opened it up and nobody will answer inside. I'm gonna step inside and check.
>
> Dispatch: 221 — have you located her?
>
> Police (221): I'm checking this house. I've found quite a few marijuana plants in here.

After Officer Canady walked through the residence at 1516 North Main, he and the other officers involved gathered outside behind the house. Having observed the commotion from his neighboring office, appellant went next door to find out what was going on. In response to the officer's inquiry, appellant told them that he was the owner of the house. Officer Canady testified that he showed appellant the marijuana plants that could be viewed through the back porch window. He further testified that appellant told him that "the marijuana is mine." Another officer testified that appellant was advised that he could either consent to a search or "we could go get a search warrant." The record indicates that, at the time appellant consented to the search of his residence, he was in custody and in the presence of five uniformed officers. That search disclosed bags of marijuana, paraphernalia, and marijuana seeds, in addition to the marijuana plants, all of which were seized.

When reviewing a trial court's ruling on a motion to suppress, this court makes an independent determination based on the totality of the circumstances. We give great weight to the findings of the trial court in the resolution of evidentiary conflicts and defer to its superior position in passing upon the credibility of the witnesses. The decision of the trial court will not be reversed unless clearly erroneous. *Campbell* v. *State*, 27 Ark. App. 82, 766 S.W.2d 940 (1989); *Shamlin* v. *State*, 23 Ark. App. 39, 743 S.W.2d 1 (1988).

We first address the initial entry by the police officer into appellant's residence and conclude that it was in violation of the constitutional guarantees against unreasonable search and seizure. It is axiomatic that the physical entry into one's home is the chief evil against which the fourth amendment is directed,

and that all searches and seizures inside a home are presumptively unreasonable. The principal protection afforded by that amendment against unreasonable intrusion into the home is the requirement that a warrant be first obtained by one who enters a home for the purpose of search or seizure. *Welsh* v. *Wisconsin*, 466 U.S. 740 (1984); *Payton* v. *New York*, 445 U.S. 573 (1980). Consistent with these established principles, our courts have held that all warrantless entries into the home are prohibited by the fourth amendment, unless at the time of entry there exists probable cause and exigent circumstances. *Payton* v. *New York*, *supra*; *Mitchell* v. *State*, 294 Ark. 264, 742 S.W.2d 895 (1988).

"Probable cause" means more than bare suspicion. It exists where the facts and circumstances within the knowledge of the police officers, and of which they collectively have reasonably trustworthy information, are sufficient in themselves to warrant men of reasonable caution in the belief that an offense has been or is being committed. *Mitchell* v. *State*, *supra*; *Burks* v. *State*, 293 Ark. 374, 738 S.W.2d 399 (1987). In determining the existence of probable cause, our courts have adopted a totality of the circumstances test. *Mitchell* v. *State*, *supra*.

When we apply these principles, we must conclude that at the time the police officer made the initial entry into appellant's dwelling he did not have probable cause to believe a felony had been or was being committed there. The basis for the officer's intrusion was a telephone call from a person identifying herself as Irene Smith, informing the police that her son had informed her by telephone that her daughter was being held at gunpoint in an apartment at 1600 North Main. The officers dispatched to the scene apparently were uncertain that 1600 North Main was the place to which the caller intended to direct them. The dispatcher called Ms. Smith and she verified 1600 as the proper address.

Officer Canady testified at the hearing as follows:

> Q. Tell this Court what was told to you by the dispatch operator and what information you were acting on?
>
> A. I received a call, and at the time I didn't know if it was a black male or white male, holding a female at gunpoint in a duplex in the 1600 block of Main Street. I and Officer Bryant, my partner, and Officer Crutchfield proceeded to

> the area and in the 1500 block of Main Street there was a white house that looked like a duplex, and in the 1600 block was — Officer Bryant was to check the house in the 1600 block. I and Officer Crutchfield checked the house in the 1500 block.
>
> Q. What information were you receiving about the location of this house other than the street address?
>
> A. It was just a white house duplex in the 1500 or 1600 block of Main Street.

On cross-examination, the officer testified:

> Q. Did they direct you to 1500 or 1600 Main Street?
>
> A. Yes, sir. In the 1600 block, and a white duplex.

Officer Canady had no information indicating that a felony had been or was being committed at 1516 North Main and obtained no independent verification of that at the scene. Nor is it clear where appellant's house was located with reference to the social security building or the antique shop. On the other hand, it is clear that 1600 North Main is, in fact, across the street from an antique shop, which is at 1601 North Main, and across the street, catercornered, from the social security building. It is also clear that the officers did not know which house they were looking for and were making a random search of the immediate area. Furthermore, we find nothing in the record to verify the officers' statement that he had been informed that the dwelling in which the hostage allegedly was being held was white.

We agree with appellant that this case is controlled by the decision in *Mitchell* v. *State*, *supra*. In that case, the police received an anonymous telephone call that a person had been shot and killed at 3408 Short Wilma. An officer investigated and found no such address on Short Wilma. He then went to nearby Wilma Street, which did have a residence numbered "3408." The officer found the door unlocked and entered it. He discovered a body and other evidence connecting appellant to the crime of murder. The supreme court held that as the identity of the caller was anonymous, one could only speculate as to the reliability of the information, and that an unverified, anonymous telephone call could not provide probable cause.

The state argues that *Mitchell* is distinguishable because there the court emphasized that the call received by the police was "anonymous," while here the caller identified herself and gave a telephone number at which she could be reached. We find no substance in this distinction.

It is apparent from the cases cited in *Mitchell* that the court did not rely merely on the fact that the party did not identify himself. Its conclusion was based on the fact that the police had no way of verifying the trustworthiness of the information communicated to them by the unknown caller. The mere fact that Irene Smith identified herself in no way established her trustworthiness. Moreover, there is nothing in the record regarding the trustworthiness or even the name of Ms. Smith's son, the informant who gave her the information that she relayed to the police. In determining probable cause, the pivotal question is reliability of the information on which the officers rely. The record does not show that either Irene Smith or her son were known to the police officers or known by them to be trustworthy.

In *Burks* v. *State*, *supra*, and *Conor* v. *State*, 260 Ark. 172, 538 S.W.2d 304 (1976), an anonymous telephone call was insufficient to establish probable cause, because trustworthiness of the information was not established. In *Conor*, the court said:

> The pivotal question, however, is the reliability of the information upon which the officers acted. The identity of the anonymous caller remains unknown. In contrasting such an informant with one who discloses his identity the Supreme Court has said: "The informant was known to [the officer] personally and had provided him with information in the past. This is a stronger case than obtains in the case of an anonymous telephone tip." [Citation omitted.]

260 Ark. at 174, 538 S.W.2d at 305.

The basis for discounting the telephone call in *Mitchell* applies equally here, as there is nothing in this record to show that anyone knew who Ms. Smith's son was or that he was a trustworthy informant. Neither Ms. Smith's telephone call nor the officers' entry into a dwelling other than the one specified by Ms. Smith supports or contributes to a probable cause

determination.

Appellant also argues that his consent to the subsequent search of his residence was invalid. We agree. The analysis in this case is two-fold: (1) whether appellant's consent was a fruit of the prior illegal search under *Wong Sun* v. *United States*, 371 U.S. 471 (1963); and (2) whether his consent was "voluntary". First, the "fruit of the poisonous tree" doctrine provides that evidence obtained by the exploitation of a primary illegality must be excluded. *Wong Sun, supra.* On the facts of this case, we conclude that appellant's consent to search his residence and the evidence discovered as a result of that search were fruits of the initial illegal intrusion by the officers. The officers asked appellant if they could search his house only after they had illegally entered the dwelling and observed marijuana plants and drug paraphernalia.

We disagree with the State's alternative argument that the evidence of the crime was in plain view. Rule 14.4 of the Arkansas Rules of Criminal Procedure provides that an officer, during the course of an otherwise lawful activity, may seize such things that he reasonably believes to be subject to seizure. The fact that the officers' initial intrusion was unlawful takes the evidence seized outside the plain view exception. *See Johnson* v. *State*, 291 Ark. 260, 724 S.W.2d 160 (1987).

With regard to the second part of the analysis, the burden rests upon the State to prove that consent to a search was voluntary and not the product of duress or coercion. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973); *Alford* v. *Smith*, 291 Ark. 243, 724 S.W.2d 151 (1987). On appeal, this court makes an independent determination, considering that totality of the circumstances, as to whether the State has met that burden. *Guzman* v. *State*, 283 Ark. 112, 672 S.W.2d 656 (1984); *Smith* v. *State*, 265 Ark. 104, 576 S.W.2d 957 (1979); *Shamlin* v. *State*, *supra.*

From our review of the totality of the circumstances, we cannot conclude that appellant's consent was freely and voluntarily given and not the product of duress or coercion. In *Bumper* v. *North Carolina*, 391 U.S. 534 (1968), the Supreme Court held that mere acquiesence to a claim of lawful authority is not consent. Conduct that is questionable or clearly indicates

mere acquiesence to perceived police authority will not support a search based on the party's alleged consent, regardless of the lack of coercion. *Id.*; *Alford* v. *State*, *supra*. Here, at the time appellant's consent was obtained, he was confronted with the incriminating evidence and was told by the officers that, if he did not consent to the search, they could go get a search warrant. Although we decline to go so far as to say that either factor is coercive per se, we think that they are factors to be considered as part of the totality of the circumstances test.

In *Holloway* v. *Wolff*, 482 F.2d 110 (8th Cir. 1973), the consent to search the appellant's residence was obtained after a search had been carried out pursuant to an invalid warrant. The appellant was "face to face with the incriminating evidence and able to see that the police had firm control over her home." 482 F.2d at 115. The court, citing *Bumper* v. *North Carolina*, *supra*, held that the appellant's alleged consent constituted nothing more than acquiesence to a claim of lawful authority and, therefore, that the consent was invalid.

In *United States* v. *Boukater*, 409 F.2d 537 (5th Cir. 1969), the court considered the issue of whether a consent to a search was voluntary. The court recognized that, where an accused is in custody and an officer implies that he might as well consent because a warrant could be quickly obtained if he refused, the consent could be found to be involuntary. In *Bumper* v. *North Carolina*, *supra*, the court found coercion present when the officers falsely claimed to have a search warrant. While that is not the case here, it has been held that the intimidation that a warrant will automatically issue, as though it is merely ministerial, is as inherently coercive as the announcement of an invalid warrant. *See Dotson* v. *Somers*, 175 Conn. 614, 402 A.2d 790 (1978); *See also* 3 LaFave, *Search and Seizure*, § 8.2(c) (2d ed. 1987).

Based on both a fruit-of-the-poisonous-tree analysis and a voluntariness analysis, we conclude that appellant's consent to search his residence was invalid. From our review of the totality of the circumstances, we conclude that the trial court erred in denying appellant's motion to suppress.

Reversed and remanded.

MAYFIELD, J., concurs.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. I dissent from the majority's holding that the entry of the appellant's residence was unlawful. An entry is lawful where there are both exigent circumstances and probable cause. *Sanders* v. *State*, 262 Ark. 595, 559 S.W.2d 704 (1977). There is no doubt that the reported armed hostage situation in the case at bar provided the requisite exigent circumstances to support the entry. The only question remaining to me is whether the search was based on probable case.

Relying on *Mitchell* v. *State*, 294 Ark. 264, 742 S.W.2d 895 (1988), the majority concludes that probable cause to search the appellant's residence was not present. I disagree. In *Mitchell*, the police received an anonymous phone call informing them that there was a person who had been dead for some time in a house. The case at bar is clearly distinguishable: Here, the police were responding to a report from an identified caller who informed them that her daughter was being held at gunpoint. The element of immediacy which, as the *Mitchell* Court noted, is absent where there is no reason to believe that the victim might still be alive, was present in the case at bar. Moreover, the caller in the present case identified herself and her relation to the victim. Although the majority places this caller in the same category as an anonymous tipster, I submit that the willingness of a person to identify herself is a significant factor in determining trustworthiness; likewise, the fact that the caller in the case at bar telephoned the police reflects on her confidence in the information relayed to her by her son. Finally, I submit that the officer's uncertainty concerning the address of the residence to be searched is not fatal to a finding of probable cause. The evidence in support of probable cause is not be analyzed on the basis of rigid rules, but should instead be viewed from the standpoint of experienced law enforcement officers. *Mitchell*, *supra*. The determination does not deal with hard certainties, but instead with probabilities in the context of particular factual contexts. *Id.* I submit that the search in the case at bar, when viewed in light of the above factors, was supported by probable cause. I respectfully dissent.

Vicki KOROLKO (Kanady) *v.* Joseph KOROLKO

CA 90-245 803 S.W.2d 948

Court of Appeals of Arkansas
Division II
Opinion delivered February 27, 1991

Walters Law Firm, by: *Mike Hamby*, for appellant.

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, by: *Ronald D. Harrison* and *R. Ray Fulmer II*, for appellee.

JOHN E. JENNINGS, Judge. Appellant, Vicki Korolko, was divorced from the appellee, Joseph Korolko, Jr., who was subsequently awarded primary custody of the parties' young child, Sarah. On July 4, 1988, appellant took the child for a scheduled ten day visit. Instead of returning the child, appellant left the state and successfully concealed her whereabouts, and that of the child, until she was located in Corpus Christi, Texas, on February 9, 1990.

Appellant was cited for contempt, and after a hearing the chancellor found her in contempt and sentenced her to six months in the Sebastian County Jail. On appeal the appellant contends that the sentence was excessive and that the trial court failed to consider any mitigating factors; that the court applied the wrong burden of proof; and that the chancellor abused his discretion in failing to recuse. We find no error and affirm.

It is true as the appellant contends that we have the authority to reduce the punishment imposed for contempt in a proper case. *See, e.g.*, *Morrow* v. *Roberts*, 250 Ark. 822, 467 S.W.2d 393 (1971). In contending that the sentence here was excessive appellant relies on *Payne* v. *White*, 1 Ark. App. 271, 614 S.W.2d 684 (1981). In *Payne* the appellant picked up the child for visitation on December 26, 1979, and was to return the child to the appellee on January 2, 1980. On December 28, 1979, the appellant filed an action for change of custody in the State of California. The California court declined jurisdiction and on January 7, 1980, the child was apparently returned to the State of Arkansas forthwith. The chancellor found the appellant in contempt, fined her $1,500.00, and awarded attorneys' fees to the appellee.

There are obvious differences between that case and this one. In *Payne* the child was not secreted and the delay in returning the

child was less than a week. Here the appellee had no knowledge of the child's whereabouts for a year and a half. The case at bar more closely resembles *Smith* v. *Smith*, 28 Ark. App. 56, 770 S.W.2d 205 (1989), also cited by the appellant. There, the appellant failed to return the parties' children after visitation. The delay was sixty-four days and we affirmed the chancellor's sentence (as modified) of the appellant to sixty-four days imprisonment.

Appellant also argues that the chancellor erred in failing to consider mitigating factors. This argument must fail because no mitigating factors whatsoever were presented by either party at the contempt hearing. While the sentence imposed in this case was certainly substantial, we cannot say from our review of the record as a whole that it was excessive under the circumstances.

Appellant also contends that the court erred in not requiring proof of appellant's contempt beyond a reasonable doubt. The argument appears to be that because the chancellor did not expressly state the applicable burden of proof, we are to presume that he was unaware of it. No authority is cited for this proposition and we can find none. Nothing in the record indicates that the chancellor was unaware of the proper burden of proof in this criminal contempt proceeding.

Finally, appellant argues that the trial court abused its discretion in failing to recuse. The sole basis for this contention is a copy of a letter from the appellant's attorney dated January 4, 1990, addressed to the chancellor. The letter was attached as an exhibit to a motion for new trial filed by the appellant after the contempt hearing. The letter states:

> Dear Judge Kimbrough:
>
> I have filed a complaint against you with the Judicial Discipline & Disability Commission. I am not aware of whether or not you have been notified of this. Until such time as this matter is resolved I would request that you withdraw as judge from any contested case in which I serve as an attorney. If you are unwilling to do so then I will withdraw as attorney in any contested case where I represent a client before you. Please advise.
>
> With kind personal regards.

The record does not reflect whether the court received the letter. No motion for recusal was filed and no evidence relating to the issue was adduced.

Canon 3(C) of the Arkansas Code of Judicial Conduct requires that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. The canon applies even though there is no request to disqualify. *Adams* v. *State*, 269 Ark. 548, 601 S.W.2d 881 (1980).

On the other hand disqualification of a judge is discretionary with the judge himself and his decision in this regard will not be reversed absent an abuse of that discretion. *Woods* v. *State*, 278 Ark. 271, 644 S.W.2d 937 (1983); *Chancellor* v. *State*, 14 Ark. App. 64, 684 S.W.2d 831 (1985). Judges are presumed to be impartial and the party seeking disqualification bears a substantial burden proving otherwise. *Chancellor* v. *State*, *supra*. In *Smith* v. *State*, 296 Ark. 451, 757 S.W.2d 554 (1988), the appellant had threatened the trial judge with a class action lawsuit in federal court for failure to promptly arraign him and others. The supreme court held there was no abuse of discretion in the trial judge's failure to disqualify. In *Rush* v. *Wallace*, 23 Ark. App. 61, 742 S.W.2d 952 (1988), a case which also involved extended custody litigation, the appellant argued that the chancellor should have recused because the judge was to be called as a witness. We held that this was no more than an attempt to accomplish indirectly that which the appellant could not accomplish directly, and we found no error in the chancellor's failure to recuse. We specifically noted in *Rush* that the chancellor had conducted a number of hearings in the case and was familiar with the issues and the parties.

Similarly, in the case at bar we cannot say that the trial court erred in failing to recuse on its own motion.

For the reasons stated the judgment appealed from is affirmed.

Affirmed.

CRACRAFT, C.J., and COOPER, J., agree.

Charles W. DAVIS *v.* STATE of Arkansas

CA CR 90-118 804 S.W.2d 373

Court of Appeals of Arkansas
Division I
Opinion delivered February 27, 1991

Murrey L. Grider, for appellant.

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

JUDITH ROGERS, Judge. The appellant, Charles W. Davis, appeals his conviction of possession of a controlled substance (cocaine), a violation of Ark. Code Ann. § 5-64-401 (1987) and a class C felony, for which he was sentenced to three years in prison. Appellant raises three issues for reversal: (1) that the trial court erred in directing a verdict in favor of the state; (2) that the trial court erred in denying his motion to dismiss; and (3) that the trial court erred in failing to grant his motion to suppress evidence obtained in an unlawful search of his person. We find merit in the first issue raised, and reverse and remand.

This case comes to us from an unusual procedural standpoint. During his opening statement, counsel for the appellant remarked:

> There was this alleged cocaine that was found, it was .05 grams . . . And when brought to the station, you know he [appellant] admitted, I mean he made the statement that they claim he did.

After counsel had completed his opening statement, the trial court removed the jury from the courtroom and a discussion between court and counsel ensued, during which the trial court determined that counsel's comments constituted a judicial confession. Based on this conclusion, the trial court granted the state's motion for a directed verdict on the issue of guilt, and after a brief recess, the jury heard testimony only with regard to the sentence to be imposed. The trial court also granted the state's motion to dismiss the charge of possession of marijuana for which appellant was also being tried.

As his first issue, appellant contends that the trial court erred in directing a verdict of guilt. We agree.

In misdemeanor cases, where the punishment is by fine

only, the trial judge does have the power to direct a verdict of guilt where the facts are undisputed and where guilt from all the evidence is the only inference that can be drawn. *See Taylor* v. *City of Pine Bluff*, 226 Ark. 309, 289 S.W.2d 679 (1956); *Collins* v. *State*, 183 Ark. 425, 36 S.W.2d 75 (1931); *Huff* v. *State*, 164 Ark. 211, 261 S.W. 654 (1924). It is firmly established, however, under Arkansas law and the Federal Constitution, that a trial court has no authority to direct a verdict in favor of the state in a felony prosecution. *Rose* v. *Clark*, 478 U.S. 570 (1986); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977); *McKeown* v. *State*, 197 Ark. 454, 124 S.W.2d 19 (1939); *State* v. *Mills*, 160 Ark. 194, 254 S.W. 468 (1923); *Burton* v. *State*, 135 Ark. 164, 203 S.W. 1023 (1918); *Snead* v. *State*, 134 Ark. 303, 203 S.W. 703 (1918); *Wylie* v. *State*, 131 Ark. 572, 199 S.W. 905 (1917); *Parker* v. *State*, 130 Ark. 234, 197 S.W. 283 (1917); *Roberts* v. *State*, 84 Ark. 564, 106 S.W. 952 (1907). As stated by the supreme court in *Roberts* v. *State*, *supra*: "The judge is incompetent to convict one of a crime, even though he acknowledge it, except on a plea of guilty. The evidence is exclusively for the jury." In *Parker* v. *State*, *supra*, the supreme court spoke on this question as follows:

> Whatever may be the rule in relation to misdemeanors, the weight of authority is overwhelming to the effect that in a prosecution for felony where a plea of not guilty is interposed, it is not permissible for the court to direct a verdict of guilty or to pass on any question of fact unfavorable to the defendant. This is true even though the incriminating evidence is uncontradicted or conclusive.

Id. at 239, 197 S.W. at 285 (*quoting Shipp* v. *State*, 128 Tenn. 499, 161 S.W. 1017 (1913).

The reason behind this rule lies in the right to a jury trial, which is denied when a trial court directs a verdict against a defendant. *See Rose* v. *Clark*, *supra*; *Parker* v. *State*, *supra*.[1] It has been said that it is within the power of a jury to disregard the evidence and acquit persons whom the evidence show to be guilty,

---

[1] The fact that a different rule applies in misdemeanor cases can be explained in that there is no right to a jury trial in cases for petty offenses. *See generally Edwards* v. *City of Conway*, 300 Ark. 135, 777 S.W.2d 583 (1989).

Clark v. *State*, 169 Ark. 717, 276 S.W. 849 (1925), and that it is within the province of the jury to disbelieve the witnesses for the state. *Parker* v. *State*, *supra.*

In its brief, the state cites authority regarding the conclusive effect of a judicial confession, and also argues that counsel's statement, as a judicial confession, is the "functional equivalent" of a guilty plea, whereby the appellant forfeited his right to a jury trial. We need not decide these questions for the basic reason that we do not believe counsel's remarks constituted a confession. A statement amounts to a confession only if there is an admission of guilt as to the commission of a criminal act. *Snyder* v. *City of DeWitt*, 15 Ark. App. 277, 692 S.W.2d 273 (1985). *See also Bishop* v. *State*, 294 Ark. 303, 742 S.W.2d 911 (1988); *Workman* v. *State*, 267 Ark. 103, 589 S.W.2d 21 (1979). As argued by the appellant, the record reveals that appellant's counsel was responding to comments made by the state in its opening statement, regarding the evidence that was to be introduced at trial, and the "admissions" of counsel went only to what the evidence against the appellant might be. Furthermore, counsel later reminded the jury that the burden of proof was on the state to prove the elements of the offense beyond a reasonable doubt. We believe that counsel's remarks, when viewed in their entirety, fall short of admitting the commission of a criminal act, and thus was not a judicial confession. In sum, we hold that the trial court erred in directing a verdict against the appellant, not only because the trial court clearly has no power to do so, but also because we do not view counsel's statement as a judicial confession.

As his next argument, appellant argues that the trial court erred in failing to grant his motion to dismiss. This motion was made after the trial court had ruled that a judicial confession had been made and after the verdict had been directed. In support of his motion, appellant argued that there was a failure of proof in that there was no evidence in the record corroborating the confession upon which the trial court had based its decision.

Arkansas Code Annotated § 16-89-111(d) (1987) provides that a confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the offense was committed. The trial court overruled

appellant's motion on the ground that appellant had judicially confessed in open court, which under the statute requires no corroboration. We note that the statute also implies and it has been held that such a confession is sufficient to sustain to conviction. *See Skaggs* v. *State*, 88 Ark. 62, 113 S.W. 346 (1908). However, this was not a judicial confession. And, statements and argument of counsel are not evidence. *Burkett* v. *State*, 32 Ark. App. 60, 796 S.W.2d 355 (1990).

In addressing this argument, we are not unaware of the attendant double jeopardy considerations. In *Burks* v. *United States*, 437 U.S. 1 (1978), the Supreme Court held that retrial, following an appellate reversal for insufficient evidence, is prohibited by the Double Jeopardy Clause. The Court noted, however, the distinction between reversal for evidentiary insufficiency and "trial error," holding that for the purposes of double jeopardy, the latter does not bar retrial for the same offense. *See also*, *Lockhart* v. *Nelson*. 488 U.S. 33 (1988). The Court in *Burks* explained:

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g. incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

Burks, 437 U.S. at 15.

We believe that the fundamental flaw in the trial of this case is founded upon the trial court's erroneous conclusion that counsel's remarks rose to the level of a judicial confession. And, based on this erroneous ruling, the trial court impermissibly directed a verdict in favor of the state, which dispensed with the necessity of presenting proof on the issue of guilt and effectively denied the appellant his right to a jury trial. We regard this compounding of error, as trial error, as having affected the

fundamental process through which appellant was convicted. Thus, we reverse and remand for a new trial.

It is necessary for us then to address the remaining argument advanced by the appellant, that being his contention that the trial court erred in denying his motion to suppress. A hearing was held on appellant's motion, and it was disclosed that he was stopped while driving his vehicle by Officer Bill Forsyth of the Hoxie Police Department on August 3, 1989, at 2:45 a.m. Officer Forsyth testified that he stopped appellant's vehicle for driving erratically, which he described as weaving across the center line. Forsyth said that appellant smelled strongly of intoxicants, and that appellant related that he was lost and had consumed three beers. The officer stated that appellant failed to satisfactorily perform field sobriety tests, whereupon appellant was arrested for driving while intoxicated.

Officer Forsyth further testified that he frisked the appellant before placing him in the patrol car, as he had noticed a bulge in the front pocket of appellant's pants. There, he found a .25 caliber automatic pistol, and also a knife in appellant's rear pocket. Forsyth said that in moving up the appellant's body, he detected another hard object in his shirt pocket, which he removed, finding two hard packages of cigarettes. On one of the packages, he observed a small, clear packet of what he believed to be cocaine placed between the cellophane and the cigarette package.

It is the appellant's contention that the officer should not have examined the cigarette packages once it was determined that there was no weapon. In reviewing the ruling of a trial court on a motion to suppress evidence on Fourth Amendment grounds, the appellate court makes an independent determination based on the totality of the circumstances and reverses only if the ruling is clearly against the preponderance of the evidence. *Thomas* v. *State*, 303 Ark. 210, 795 S.W.2d 917 (1990).

Pursuant to Rule 12.1 of the Arkansas Rules of Civil Procedure, an officer making a lawful arrest may, without a search warrant, conduct a search of the person or property of the accused to protect the officer, the accused and others. In *Wright* v. *State*, 300 Ark. 259, 778 S.W.2d 944 (1989), the court held that evidence discovered as the fruit of a reasonable and lawful pat-down search is properly admissible. Quoting from *Michigan* v.

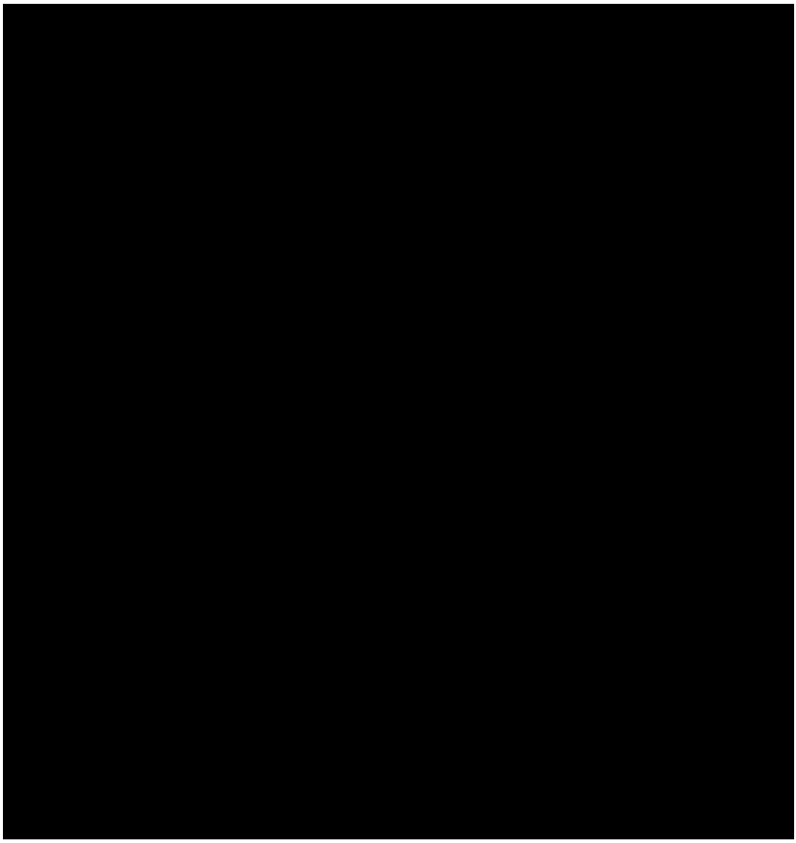
Long, 463 U.S. 1032 (1983), the court observed that "if the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression."

Here, the officer was lawfully conducting a pat-down search when appellant was arrested. Since the officer had already found two weapons, it was reasonable for him to remove the packages from the pocket, which he said felt like a hard object. Furthermore, the discovery of the contraband was inadvertent, as the cocaine was clearly visible as located on the outside of the package. Although the rule does limit the scope of the search, it does not limit what may be seized if discovered during the course of a permissible search. *See Folly* v. *State*, 28 Ark. App. 98, 771 S.W.2d 306 (1989). We find no error on this point.

Reversed and remanded.

DANIELSON and MAYFIELD, JJ., agree.

[redacted]

[redacted]

[redacted]