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Ella M. SIMMONS, a/k/a/ Janice Simmons, Individually and as Administratrix of the Estate of H. B. Hummel *v.* Lois BUCHANAN

CA 90-178 803 S.W.2d 950

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

Phillip A. Moon, for appellant.

Jeff R. Conner, for appellee.

ELIZABETH W. DANIELSON, Judge. This appeal involves the validity and effective delivery of a warranty deed signed by the grantor, H.B. Hummel, which had not been notarized or acknowledged prior to his death and was found in his safe after his death. The deed conveyed certain property to his sisters, Dott Lewis and Lois Buchanan, and reserved a life estate in the grantor. Dott Lewis died prior to the scheduled trial date below and is not a party to this appeal.

Appellee, Lois Buchanan, brought an action seeking to quiet title to the property and reformation of the property description in the deed. Appellant, Janice Simmons, individually and as administratrix of the estate of H.B. Hummel, brought a counterclaim to have title to the property vested in her. The trial court found the deed was effectively delivered to the appellee and granted reformation of the deed to reflect the correct legal description of the property. We affirm.

Appellee testified that the grantor had on previous occasions discussed his intention of leaving his farm to her and their sister Dott. According to appellee, in late April of 1987, the grantor handed her a deed to the farm, saying it was "a passing of hands to make it legal." The deed was then placed in the safe in the grantor's home. Appellee also testified that the grantor told her the location of the combination to this safe and instructed her to record the deed if anything happened to him.

The evening of the grantor's death, appellee located the combination to the safe and unsuccessfully tried to open it. The next day a locksmith was employed and, using the combination appellee gave him, opened the safe. The day after that, appellee attempted to record the deed but could not because the notary's seal had not been affixed. She testified that the clerk helped her decipher the name signed on the notary public line as that of Charles E. Davis, an attorney. Appellee says she took the deed to Mr. Davis's office and, when told Mr. Davis was not in, left it there. When she returned later that day, she was given the

properly sealed deed. Appellee testified that she did not see Mr. Davis on either of her visits to his office that day. Appellant proffered testimony by Mr. Davis that he did meet with appellee, that he had not previously signed or dated the deed, but that he did so that day at her request.

After appellee retrieved the deed from the attorney's office, she properly recorded it. She subsequently filed a petition to quiet title, and, after discovering an error in the legal description of the property (Range 32 had been inserted in the property description rather than Range 29), filed an amended petition for reformation.

Appellant contends there was no effective delivery since the deed was found in the grantor's safe after his death. Although it must ordinarily be shown that a grantor relinquished dominion and control over the instrument, where the language of the deed reserves a life estate in the grantor, different rules apply. The fact that a deed is found among the effects of the grantor at his death raises no presumption against delivery if the grantor has reserved an interest in the property and therefore has an interest in the preservation of the deed. *Cribbs* v. *Walker*, 74 Ark. 104, 85 S.W. 244 (1905). Since H. B. Hummel had the intention of retaining possession of the property until his death, he had the right to retain the deed to effectuate this purpose. The failure to have the deed recorded was not fatal to the delivery, nor did the continued possession and control by the grantor nullify the apparent intention of delivery. *Johnson* v. *Young Men's Bldg. & Loan Ass'n*, 187 Ark. 430, 60 S.W.2d 925 (1933).

There was conflicting testimony as to whether the grantor had intended his sisters or his daughter to have the property in question. There is also conflicting testimony as to whether the deed was executed prior to the grantor's death. It is the province of the trier of fact to determine the credibility of witnesses and resolve conflicting testimony, *Jones* v. *Jones*, 29 Ark. App. 133, 777 S.W.2d 873 (1989), and we cannot say the chancellor's finding that there was an effective delivery of the deed was clearly erroneous.

Appellant's second contention is that the testimony of the attorney regarding the notarization and acknowledgment of the deed was relevant to establish the grantor's lack of intent to pass title to the property and should have been admitted. An

unacknowledged deed, if otherwise valid, passes title as between the parties. *Grimmett* v. *Estate of Beasley*, 29 Ark. App. 88, 777 S.W.2d 588 (1989). The trial court was not clearly erroneous in finding that the testimony of the attorney was immaterial.

Appellant also contends that appellee failed to establish a basis for reformation of the legal description in the deed. The chancellor found that H.B. Hummel intended to deed the property in question to his sisters and that he owned no property in Range 32 that could be confused with the property involved here. The chancellor's finding that the discrepancy in the range number was a scrivener's error and the description in the deed should be reformed was not clearly erroneous.

Affirmed.

MAYFIELD and ROGERS, JJ., agree.

Dwight JACKSON *v.* STATE of Arkansas

CA CR 90-137 804 S.W.2d 735

Court of Appeals of Arkansas
Opinion delivered March 6, 1991

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

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

for appellee.

MELVIN MAYFIELD, Judge. On May 21, 1987, appellant pleaded guilty to a charge of burglary and imposition of sentence was withheld for a period of five years conditioned upon compliance with certain conditions, one of which was to refrain from violating any law punishable by imprisonment. On October 18, 1989, a petition to revoke was filed which alleged appellant had violated the terms of his suspended imposition of sentence by possessing a controlled substance (crack cocaine), and on that same date an information was filed charging appellant with violating the statute prohibiting possession of such a substance.

On January 16, 1990, the court, by agreement, heard the revocation petition and the possession charge together using the same evidence for each case. At the conclusion of the hearing, the court revoked the suspended imposition of sentence and sentenced appellant to six years in the Arkansas Department of Correction. Appellant was also found guilty of possession of a controlled substance and was sentenced to three years on that conviction, to be served consecutively to the six-year sentence.

On appeal, appellant argues that the trial court erred in its failure to suppress as evidence the crack cocaine contained in a matchbox which was found in the appellant's jacket pocket as a result of a "pat down" made by a policeman. It is appellant's contention that this evidence was seized as a result of an illegal search. Specifically, it is contended that the officer did not have grounds to form a "reasonable suspicion" that appellant was involved in criminal activity; therefore, the officer's stop of appellant was unlawful and the cocaine should have been suppressed as evidence.

We first note that the exclusionary rule is generally not applicable to revocation proceedings. *Dabney* v. *State*, 278 Ark. 375, 646 S.W.2d 4 (1983); *Queen* v. *State*, 271 Ark. 929, 612 S.W.2d 95 (1981); *McGhee* v. *State*, 25 Ark. App. 132, 752 S.W.2d 303 (1988). Based upon the authority of these cases, we think the trial court's revocation should be affirmed under the circumstances of the instant case. However, we do not think the trial court erred in refusing to suppress the cocaine as evidence in this case, therefore, we also affirm the conviction for possession.

At trial, Mark Johnson testified that he had been working for fifteen months as a patrol officer for the North Little Rock Police Department. He said he first came in contact with the appellant on May 11, 1989, at approximately 9:30 to 9:45 p.m. while making an extra patrol through the Dixie Addition. Officer Johnson testified that this is basically a residential area, and "we get more calls there than other places in the city." He also testified that at roll call at the start of his shift, it is pointed out where extra patrol might be needed and "things to be on the lookout for," and in May of 1989, the police department was getting complaints, several times a week, about drug trafficking in the Dixie Addition, and at roll call these complaints were talked about.

On the night of May 11, Officer Johnson had been through the Dixie Addition one time and several male subjects ran from him. Because of that, two more units were called, and when they went back through the area, the appellant and three or four other males were standing in front of the abandoned grocery store located in the 800 block of E Street. The officers had received information about drug trafficking at the corner of Ninth and E Streets. So, the officers approached the men in front of the abandoned building to see what they were doing and asked them for identification. While the officers were approaching, one of the men walked away. The officers then patted down the other individuals to check for weapons. Johnson said this was for the officers' own protection because he had on several occasions arrested people in this area who had guns on them.

Johnson patted down the appellant and felt something hard in his right jacket pocket. Johnson then reached into the pocket and found two matchboxes. One was empty and the other contained three rocks of what the officer thought was crack cocaine, so he arrested the appellant. It was stipulated that a chemist would testify that the substance in the box tested positive for cocaine.

The appellant correctly argues that stopping and detaining a person is controlled by Ark. R. Crim. P. 3.1 which provides in pertinent part:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has

> committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct.

Also, as appellant points out, the meaning of the term "reasonably suspects" as used in Ark. R. Crim. P. 3.1, *supra*, is defined in Ark. R. Crim. P. 2.1 as "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." The appellant also recognizes that we are dealing with an area of the law which has been greatly influenced by the United States Supreme Court decision of *Terry* v. *Ohio*, 392 U.S. 1 (1968). In fact, the Commentary following Ark. R. Crim. P. 2.1 points out that Rules 2 and 3 of our Rules of Criminal Procedure are characteristic of those generated by the *Terry* v. *Ohio* decision. These rules were discussed at length by the Arkansas Supreme Court in *Hill* v. *State*, 275 Ark. 71, 80, 628 S.W.2d 284 (1982), *cert. denied*, 459 U.S. 882 (1982), where it was said:

> The courts have used various terms to describe how much cause or suspicion is necessary or reasonable in order to stop a person or vehicle. The common thread which runs through the decisions makes it clear that the justification for the investigative stops 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. *U.S.* v. *Cortez*, 449 U.S. 411 (1981); *Michigan* v. *Summers*, 452 U.S. 692, 101 S.Ct. 2587 (1981); *Terry* v. *Ohio*, 392 U.S. 1 (1968).

The appellant contends, however, that in the instant case "Officer Johnson's stop failed the 'reasonable suspicion' test as there were not specific, particularized, and articulable reasons indicating involvement by the appellant in criminal activity." Since we do not agree, rather than attempting to compare the facts in various cases with the facts in this case, we will discuss the

general principles we think the cases on this point teach.

To start with, we point out that in reviewing a trial judge's decision on a motion to suppress, this court makes an independent determination based upon the totality of the circumstances but will reverse the trial court's ruling only if that ruling was clearly against the preponderance of the evidence. *Campbell* v. *State*, 294 Ark. 639, 642, 746 S.W.2d 37 (1988); *Dees* v. *State*, 30 Ark. App. 124, 128, 783 S.W.2d 372 (1990).

The United States Supreme Court has said that the Fourth Amendment bars only unreasonable searches and seizures and in determining reasonableness, "we have balanced the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Maryland* v. *Buie*, 494 U.S. ___, 108 L.Ed. 2d 276, 284, 110 S.Ct. 1093, 1096 (1990). In *United States* v. *Cortez*, 449 U.S. 411, 417 (1981), the Court said that terms like "articulable reasons" are not self-defining and "fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—the whole picture—must be taken into account." The Court also said:

> The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.
>
> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behaviour; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis

> by scholars, but as understood by those versed in the field of law enforcement.

449 U.S. at 418. And in *Tillman* v. *State*, 275 Ark. 275, 280, 630 S.W.2d 5 (1982), the Arkansas Supreme Court stated:

> In *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), the court dealt with the problem of the United States Border Patrol's authority to stop automobiles near the Mexican border. Referring to *Terry* v. *Ohio*, the court said:
>
> > The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response . . . *A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.* (Emphasis supplied.)

Although the appellant in the instant case primarily contends that the police officer's stop was unlawful, the appellant does state that the officer's search was "far more extensive" than was reasonably necessary. Ark. R. Crim. P. 3.4 provides that when a law enforcement officer has detained a person under Ark. R. Crim. P. 3.1 whom the officer "reasonably suspects" is armed and presently dangerous to the officer or others, the officer may "search the outer clothing of such person" and may seize any "weapon or other dangerous thing" which may be used against the officer or others. The rule also provides that "in no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer or others." In *Hill* v. *State*, *supra*, the Arkansas Supreme Court quoted with approval the following from *Terry* v. *Ohio*:

> We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is

> not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.

275 Ark. at 81. In *United States* v. *Alvarez*, 899 F.2d 833, 839 (9th Cir. 1990), the court said:

> The decision to frisk Alvarez for weapons was similarly justified. "Police are entitled to take steps to assure that the person stopped is not armed." *Greene*, 783 F.2d at 1368. "The purpose of the *Terry* frisk is 'to allow the officer to pursue his investigation without fear of violence.' " *United States* v. *Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982).

In *United States* v. *Laing*, 889 F.2d 281 (D.C. Cir. 1989), the court made the following statements in discussing the stop and weapon-search permissible in a *Terry* v. *Ohio* situation:

> The amount of force used to carry out the stop and search must be reasonable, but may include using handcuffs or forcing the detainee to lie down to prevent flight, *United States* v. *Taylor*, 716 F.2d 701, 708-09 (9th Cir. 1983) or drawing guns where law officers reasonably believe they are necessary for their protection. *E.g.*, *United States* v. *Merritt*, 695 F.2d 1263, 1272-74 (10th Cir. 1982) *cert. denied*, 461 U.S. 916, 103 S.Ct. 1898, 77 L.Ed. 2d 286 (1983). Factors that may justify an investigative stop, a search for weapons, or the escalated use of force include the time of day, the "high-crime" nature of the area, an informant's tips that persons might be armed, furtive hand movements, flight or attempted flight by the person sought to be detained, and a pressing need for immediate action. *Adams*, 407 U.S. at 147-48, 92 S.Ct. at 1924; *White*, 648 F.2d at 39-40, 43.

889 F.2d at 285-86.

■ Applying our Rules of Criminal Procedure and the general principles of the above cases to the evidence in this case, we believe the trial court could find that Officer Johnson reasonably suspected that the men in front of the abandoned building were engaging in drug use or traffic. Johnson's testimony dis-

closes specific, particularized, and articulable reasons for his suspicion. This is especially true when we consider that Johnson had fifteen months' experience as a patrol officer, much of which was in the Dixie Addition, and that he had information and reports from the police department which, as the Court said in *United States* v. *Cortez*, *supra*, should be weighed "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." We also believe the trial court could find from the evidence in this case that under our Rules of Criminal Procedure and the principles of the above cases, Officer Johnson, in the Dixie Addition after dark, performing the job he was assigned to do, was justified in patting the appellant down to determine whether he was carrying a weapon. And when we consider that the Fourth Amendment, by which the law in this case is guided, only bars unreasonable searches and seizures, we think it clear that promotion of the legitimate governmental interests in preventing crime outweighs any intrusion on the appellant's Fourth Amendment rights in this case. *Maryland* v. *Buie*, *supra*; *Miller* v. *State*, 21 Ark. App. 10, 727 S.W.2d 393 (1987). The fact that the conduct observed by the officer is consistent with innocence will not preclude a legitimate stop. *See United States* v. *Price*, 599 Fed. 2d 494, 502 (2nd Cir. 1979) ("It must be rare indeed that an officer observes behavior consistent only with guilt and incapable of innocent interpretation."). In the instant case, we cannot say the trial judge's decision was clearly against the preponderance of the evidence.

Although our inquiry might end here, we briefly discuss one other point. We have in our conference discussed whether Officer Johnson legally opened the matchbox found in appellant's pocket. While it seems clear that an ordinary gun or weapon would not fit into a matchbox, this does not mean that the officer did not have the right to open the matchbox. Under Ark. R. Crim. P. 3.4, he was authorized to seize "any weapon or other dangerous thing" which "may" be used against the officer. The matchbox was not part of the record filed in this court; therefore, we do not know its size, but even a "penny" matchbox could hold a razor blade. Moreover, it occurs to us that the trial court would be in a better position than we are to judge whether a "dangerous thing" could fit into the matchbox. One court has upheld the taking of a shotgun shell from a defendant's pocket because it could be used

as a weapon as it could be detonated by any sharp object. *People* v. *Atmore*, 13 Cal. App. 3d 244, 91 Cal. Rptr. 311 (1970). And in *Webb* v. *State*, 269 Ark. 415, 601 S.W.2d 848 (1980), our supreme court held that a controlled substance found in a bottle which was in a sack in the appellant's pant's pocket was admissible as evidence when the bottle was found during a *Terry* v. *Ohio* pat-down search. The court also cited as authority a Kansas case "where marijuana concealed in the defendant's socks was admitted in evidence because weapons are often concealed in a defendant's socks."

However, even if the officer could not open the matchbox because he could not reasonably suspect it contained "any weapon or other dangerous thing," he could certainly know from its sound and feel that it did not contain matches. And it surely must be true that, under all the circumstances shown by the evidence in this case, the officer would have reasonable cause to believe the box contained a controlled substance of some type. An officer may arrest a person without a warrant if he has reasonable cause to believe the person has committed a felony. *Johnson* v. *State*, 21 Ark. App. 211, 730 S.W.2d 517 (1987). *See also* Ark. R. Crim. P. 4.1(a)(i).

> Reasonable cause exists where facts and circumstances, within the arresting officer's knowledge and of which he has reasonably trustworthy information, are sufficient within themselves to warrant a man of reasonable caution to believe that an offense has been committed by the person to be arrested.

Johnson, 21 Ark. App. at 213. With the matchbox lawfully in his hand and with reasonable cause to believe it contained a controlled substance, Officer Johnson could arrest the appellant and, as incident to the arrest, he could seize the contraband in the matchbox. Id. at 214. In *Horton* v. *State*, 262 Ark. 211, 555 S.W.2d 226 (1977), the appellant was arrested upon probable cause based upon the information of a reliable informer that appellant had in his possession a matchbox containing 20 papers of heroin. The box was retrieved by the arresting officers, and they opened the box and removed the heroin. Both the arrest and seizure were held valid. *See also Holmes* v. *State*, 262 Ark. 683, 561 S.W.2d 56 (1978).

Affirmed.

CRACRAFT, C.J., JENNINGS and ROGERS, JJ., concur in part and dissent in part.

GEORGE K. CRACRAFT, Chief Judge, concurring in part; and dissenting in part. I dissent from that part of the prevailing opinion holding that the trial court did not err in refusing to suppress the cocaine as evidence during appellant's prosecution for possession.

I have no real problem, under the facts of this case, accepting that the officer had a right to investigate the gathering of persons in front of the abandoned store. As part of his investigation, he could inquire of appellant as to his activity and would be authorized to perform a limited, pat-down search of appellant's person for his own protection.

Where I depart from the prevailing opinion is its holding that the officer then had the right to look inside the matchbox. First, there is nothing in the record even suggesting that the officer's motive in doing so was the possibility that it may have contained some dangerous weapon or threat to his safety. Nor do I think that this intrusion can be justified on the theory that the officer had probable cause to believe that the matchbox contained a controlled substance. Even considering that this was a high-crime area, in the absence of some other evidence, the mere fact that a matchbox contains something other than matches cannot be said to amount to probable cause to believe that it, therefore, contains a controlled substance. While the officer may have suspected as much, neither a mere suspicion nor even a "strong reason to suspect" will suffice. *See Roderick* v. *State*, 288 Ark. 360, 705 S.W.2d 433 (1986).

ROGERS, J., joins in this dissent.

JOHN E. JENNINGS, Judge, concurring in part; and dissenting in part. The majority is correct in its holding that, as to the revocation proceeding, the constitutional validity of the "frisk" is immaterial because the exclusionary rule does not apply, and I therefore concur in that portion of the opinion which affirms the trial court's judgment revoking appellant's probation. I do not agree, however, that the search of the appellant was constitutionally valid.

As the majority recognizes, the "stop and frisk" exception to the fourth amendment right of freedom from unreasonable searches and seizures was established in *Terry* v. *Ohio*, 392 U.S. 1 (1968). In discussing that right the Supreme Court in *Terry* said:

> This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized, "No right is held more sacred, or is more carefully guarded, by the common law, then the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co.* v. *Botsford*, 141 U.S. 250 (1891).

392 U.S. at 9.

In discussing the anticipated effect of the decision, the *Terry* court said:

> Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.

392 U.S. at 15.

In addressing the nature of the intrusion the court stated:

> It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great

> indignity and arouse strong resentment, and it is not to be undertaken lightly.

392 U.S. at 16.

Finally, in discussing the standard to be applied the *Terry* Court held:

> And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rationale inferences from those facts, reasonably warrant that intrusion. . . . Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this court has consistently refused to sanction.

392 U.S. at 21, 22 (citations omitted).

Cases such as *Hill* v. *State*, 275 Ark. 71, 628 S.W.2d 285 (1982), *United States* v. *Alvarez*, 898 F.2d 833 (9th Cir. 1990), and *United States* v. *Laing*, 889 F.2d 281 (D.C. Cir. 1989), are very different factually from the case at bar. In each of those cases the police officers had specific, particularized information that the defendant was armed. Hill was a murder suspect described in a radio dispatch as "armed and extremely dangerous." The authorities had information that Alvarez was going to rob a bank and had dynamite with him. In *Laing*, the police had a valid search warrant and the affidavit described the occupants of the apartment to be searched as being armed with automatic weapons.

The case at bar cannot be successfully distinguished from *Ybarra* v. *Illinois*, 444 U.S. 85 (1979). There, police officers had a valid warrant to search a tavern in Aurora, Illinois, and its bartender, who they suspected was selling heroin. When the officers entered the tavern they found approximately ten customers present, including Ybarra, and immediately conducted a pat down search for weapons. In frisking Ybarra the officers found a cigarette pack containing several tinfoil packets of heroin.

The United States Supreme Court ruled that the search was constitutionally impermissible:

> The initial frisk of Ybarra was simply not supported by a

> reasonable belief that he was armed and presently dangerous, a belief which this court has invariably held must form the predicate to a patdown of a person for weapons. . . .
>
> . . . The "narrow scope" of the Terry exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotic search is taking place.

The dissenting justices in *Ybarra* took the view that the search could be sustained because the officers were operating pursuant to a valid search warrant, a factor which is not present in the case at bar.

Finally, while like the Court in *Ybarra* I would not reach the issue, the retrieval of and search into the matchbox clearly violates Ark. R. Crim. P. 3.1

For the foregoing reasons I respectfully dissent from the majority's holding that the search of the appellant was constitutionally permissible.

SILVICRAFT, INC. *v.* SOUTHEAST TIMBER CO., Inc., First State Bank of Gould, Ar., Kenneth Berzent Blagg, and Mable Sue Blagg, His Wife

CA 90-163 805 S.W.2d 84

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

Gibson & Hashem, by: *Hani W. Hashem*, for appellant.

Arnold, Grobmyer, & Haley, by: *Ben F. Arnold* and *David H. Pennington*; and *R. Victor Harper*, for appellee.

MELVIN MAYFIELD, Judge. Appellant Silvicraft, Inc. appeals a decision of the Lincoln County Chancery Court refusing to hold that deeds from appellee First State Bank of Gould to appellee Blagg, and from Blagg to appellee Southeast Timber Co., are void.

The evidence showed that Kenneth Berzent Blagg and his wife Mabel Sue (Blagg) declared Chapter 12 bankruptcy. On November 16, 1988, as part of the bankruptcy settlement, Blagg

executed a warranty deed to 600 acres of property to First State Bank of Gould (bank) and retained a thirty-day right of first refusal (option to repurchase) at a price equal to any offer from a third party to the bank. On February 15, 1989, the bank offered the property for sale at auction and appellant Silvicraft, a timber company, was the high bidder, offering $121,000.00 for the 600 acres. The bank and Silvicraft executed a contract of sale subject to the right of Blagg to exercise his option to repurchase by the stated date of March 21, 1989.

On March 20, 1989, Blagg executed a contract to sell his option to repurchase to Southeast Timber Company, Inc. (Southeast). By this contract Southeast guaranteed to cut a minimum of $97,000.00 worth of timber from the property and agreed that when it had completed harvesting the timber Blagg would have an option to repurchase the property from Southeast. However, the bank refused to deed the property directly to Southeast because that would not comply with the bankruptcy agreement. Blagg then exercised his option to repurchase from the bank and on March 21, 1989, the bank deeded the property to Blagg for $121,000.00, and Blagg immediately executed a warranty deed to Southeast.

Silvicraft then filed suit against Southeast and the bank seeking a temporary restraining order to prevent Southeast from harvesting any timber from the property; to set aside the conveyance from the bank to Blagg and the conveyance from Blagg to Southeast and to have the deeds declared null and void; and for an order requiring the bank to specifically perform its contract to convey the property to Silvicraft at the price it bid at the auction. The Blaggs, necessary parties to the suit, were joined in a subsequent amended complaint when they were released from the protection of the bankruptcy court. The trial court denied the temporary restraining order and subsequently refused to set aside the conveyance from the bank to Blagg or the conveyance from Blagg to Southeast or to require the bank to convey the property to the appellant.

On appeal, appellant contends that in order for Blagg's option to repurchase from the bank to be valid it must not violate the rule against perpetuities; that to avoid violating the rule against perpetuities, the option, which has no expiration date,

would have to be personal to Blagg, thereby expiring at his death; that therefore the option, if personal to Blagg, could not be sold by him, and consequently, the contract to sell the option to Southeast was void.

The rule against perpetuities prohibits the creation of future interest or estates which by possibility may not become vested within the life or lives in being, plus 21 years, from the time of the creation of the interest. This is a rule of property in Arkansas. *Hendriksen* v. *Cubage*, 225 Ark. 1049, 1055, 288 S.W.2d 608 (1956). In *Roemhild* v. *Jones*, 239 F.2d 492 (8th Cir. 1957), it was held that an option to repurchase which contained no language extending the option beyond the specific grantor and grantee was personal and did not violate the rule against perpetuities. 239 F.2d at 496. In *Broach* v. *City of Hampton*, 283 Ark. 496, 677 S.W.2d 851 (1984), the Arkansas Supreme Court held that where there was no language in a deed which extended a repurchase option to the heirs or assigns of the holder of the option, or did not otherwise indicate the option extended beyond the life of the holder, the rule against perpetuities was not violated. 283 Ark. at 499. *See also Estate of Johnson* v. *Carr*, 286 Ark. 369, 691 S.W.2d 161 (1985).

In the case at bar, there is nothing to suggest that the Blagg option to repurchase from the bank extended to the Blagg heirs or assigns, or that it was binding beyond the lives of the Blaggs. Paragraph 4.09 of the Second Amended and Substituted Debtors Chapter 12 Plan provided in pertinent part:

> *First State Bank of Gould, Arkansas (Class IX).* Debtors and secured creditor have also agreed that Debtors will deed this property to this Class IX fully secured creditor for a credit of $200,000 which will pay in full Note No. 19692 . . . . As part of this deedback arrangement, Debtors will have a right of first refusal in connection with the ultimate disposition of Tract VI. Debtors shall have thirty (30) days after actual notice of the terms of said offer is communicated to them to match any offer of purchase which this secured creditor voted to accept.

Clearly, this option was personal to Blagg and did not violate the rule against perpetuities. Thus appellant is correct in its reasoning that Blagg could not sell his option to repurchase from the

bank to appellee Southeast.

Appellant then argues that because Southeast furnished the money which Blagg used to exercise his option to repurchase from the bank, and because Blagg then deeded the property to Southeast, both deeds are void and the bank should be ordered to specifically perform its real estate contract with the appellant. As part of this argument, the appellant contends that the trial court violated the parol evidence rule by allowing Blagg and certain representatives of Southeast to testify that their intent was to transfer only the timber rights to Southeast and for Blagg to retain the land.

Appellant points out that the parol evidence rule excludes testimony regarding prior or contemporaneous agreements which would vary the terms of the express written agreement of the parties, *City of Crossett* v. *Riles*, 261 Ark. 522, 549 S.W.2d 800 (1977); *Prudential Insurance Company of America* v. *Stratton*, 14 Ark. App. 145, 685 S.W.2d 818 (1985); *Sterling* v. *Landis*, 9 Ark. App. 290, 658 S.W.2d 429 (1983); and argues that, although the court correctly ruled that the agreement by Blagg to sell his option to repurchase to Southeast was void, the court erred in allowing testimony that the warranty deed from Blagg to Southeast was actually a timber deed whereby Blagg retained ownership of the land.

However, we do not think this testimony violated the parol evidence rule as far as the appellant was concerned because it was a stranger to the agreement. This is clearly the holding in *Sterling* v. *Landis*, *supra*, and this is the holding in the following cases cited by the appellees: *American Bank* v. *Wegener*, 776 S.W.2d 922 (Mo. App. 1989) (rule excluding extrinsic evidence sought to be introduced for purpose of affecting a written instrument is applied only where the controversy is between the parties to the instrument or their privies); *Denha* v. *Jacob*, 446 N.W.2d 303 (Mich. App. 1989) (parol evidence rule cannot be invoked either by or against a stranger to the contract); *Tropicana Products, Inc.* v. *Shirley*, 530 So.2d 493 (Fla. App. 1988) (one not a party to the agreement cannot argue that parol evidence to interpret the agreement is incompetent); *Green* v. *Grant*, 635 P.2d 236 (Colo. App. 1981) (parol evidence can be used to vary a contract when the litigation is between a party to the contract and a stranger

thereto).

Moreover, we think the testimony complained of was irrelevant. When Blagg exercised his option with the bank and repurchased the property, appellant lost any interest it had in the property. Even if Blagg's agreement to sell or transfer the option to repurchase the property was void, the record contains a warranty deed from the bank to Blagg and a warranty deed from Blagg to Southeast. Blagg's Chapter 12 bankruptcy plan did not require Blagg to exercise the option to repurchase from the bank in any particular manner. There was no requirement with regard to Blagg's method of financing his repurchase. There was no prohibition concerning to whom Blagg could sell the property after he had exercised his option to repurchase it. Apparently, the appellant wants us to hold that because Blagg first contracted to sell his option to Southeast, and because Southeast arranged financing which enabled Blagg to exercise his option to repurchase, Blagg's sale to Southeast was really a sale of Blagg's option to repurchase and therefore void. The trial judge did not make such a finding and we do not think his decision was clearly against the preponderance of the evidence.

It is true that the trial court held that "the parties' testimony made clear that . . . the intention of the parties was that Mr. Blagg would have the land and Southeast would have the timber." But if this finding was based upon inadmissible parol evidence, there is still ample evidence in the record that Southeast got a deed from Blagg which conveyed legal title to the land that Blagg got from the bank by virtue of Blagg's option to repurchase. We will sustain the trial judge's decision if it is right, even though he gives the wrong reason. *Broach* v. *City of Hampton*, 283 Ark. 496, 677 S.W.2d 851 (1984); *Moose* v. *Gregory*, 267 Ark. 86, 590 S.W.2d 662 (1979); *Morgan* v. *Downs*, 245 Ark. 328, 432 S.W.2d 454 (1968).

Appellant also argues that the trial court erred in failing to exclude hearsay evidence. Most of the evidence appellant regards as hearsay came in at some point without objection. Primarily, the appellant complains that the trial judge was mistaken in holding that all statements by all parties are admissible. Appellant points to Ark. R. Evid. 802(d)(2) and says that admissions by a party opponent are not hearsay but that the

statement must first be made by a party-opponent and then be offered *against* the party, not on his behalf. Although appellant is correct in theory, we do not see any real way to single out the hearsay statements that were objected to that are not part of—or in response to—statements that are not hearsay. Furthermore, we do not think appellant was prejudiced by any hearsay evidence heard by the trial judge in this case. We do not reverse for error that is not prejudicial. *Hibbs* v. *City of Jacksonville*, 24 Ark. App. 111, 749 S.W.2d 350 (1989).

Affirmed.

DANIELSON, J., not participating.

Lee GOSTON *v.* Freddie Ray CRAIG

CA 90-306 805 S.W.2d 92

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

Allen & O'Hern, by: *Tom O'Hern*, for appellant.

Horace A. Walker and *Bennie O'Neil*, for appellee.

JUDITH ROGERS, Judge. This appeal is from a default judgment granted by the Pulaski County Circuit Court. Lee Goston, appellant, contends that the trial court erred in denying his motion for dismissal and granting default judgment, in refusing to set the default judgment aside, and in refusing him a hearing in support of his motion. We find no error and affirm.

In 1988, Freddie Craig, appellee; Lee Goston, appellant; and a third party, Angela Mull, were involved in an automobile accident while driving separate vehicles. As a result of his accident, both Goston and Craig were given citations for traffic violations. In September 1988, Angela Mull filed a civil action, *Mull* v. *Goston*, 88-6934, against Goston seeking damages for the injuries she sustained as a result of the accident. There is no

evidence to show that Craig was also made a party to Ms. Mull's suit. On December 26, Goston was served with another complaint in a separate lawsuit filed by Craig in which Craig sought damages for his injuries from the accident. Goston answered Ms. Mull's complaint and, on January 5, 1989, cross-claimed against Craig in Mull's lawsuit contending Craig was liable for any damages Ms. Mull had sustained. Goston, however, failed to answer the lawsuit filed by Craig, and on January 23, 1989, Craig moved for entry of default judgment against Goston. Goston then filed a motion to dismiss Craig's complaint on January 25, 1989, contending Craig's lawsuit should be dismissed because a cause of action was pending between the same parties in the *Mull* v. *Goston* lawsuit which had been filed prior to Craig's.

A hearing was held on Craig's default judgment motion, and Goston appeared by his attorney. The court held that Craig was entitled to default judgment because a responsive pleading had not been filed by Goston within the time prescribed by law. The court, however, allowed Goston until March 22, 1989, to file a motion to set aside the judgment and also set a March 22 hearing date for Craig to present evidence of his damages. Because Goston waited until March 22 to file his motion to vacate and set aside the default judgment and Craig had not had time to respond to this motion, the court, at the March 22 hearing, reserved making a decision as to whether the default judgment should be set aside but allowed Craig to present evidence of his damages. Eleven months later, on February 14, 1990, the court entered an order refusing to set aside the default judgment, finding that Goston had not shown sufficient grounds for his failure to file a timely response and awarded Craig judgment against Goston in the amount of $15,000.00. Goston then filed another motion to set aside the judgment or, in the alternative, new trial or, in the alternative, for an additional hearing and specific findings of fact; however, an order was never entered by the court in response to this motion.

On appeal, Goston raises a number of arguments for reversal; however, we find they can be reduced to two issues: whether the trial court erred in granting default judgment and whether the trial court abused its discretion in failing to set the default judgment aside.

The supreme court has been strict in its interpretation of Ark. R. Civ. P. 55 in holding that a default judgment is required where there has been a failure to make any sort of timely filing or appearance in a trial court within twenty days. *Allstate Ins. Co.* v. *Bourland*, 296 Ark. 488, 493, 758 S.W.2d 700, 702 (1988). The failure to file an answer according to the rules requires that the trial court shall enter a default judgment unless there is excusable neglect, unavoidable casualty, or other just cause, and it is an abuse of discretion for the trial court to refuse to grant default judgment after the period for an answer has expired in the absence of those conditions. *Lewis* v. *Crowe*, 296 Ark. 175, 178, 752 S.W.2d 280, 282 (1988).

It is undisputed that Goston did not file any type of response to Craig's complaint until more than thirty days had lapsed after he was served with Craig's complaint. Goston contends, however, that his cross-complaint against Craig in *Mull* v. *Goston* was pending at the time Craig filed his lawsuit against him and, therefore, his motion to dismiss Craig's complaint should have been granted pursuant to Ark. R. Civ. P. 12(b)(8), which provides that a defense based on the pendency of another action between the same parties based on the same occurrence may be raised by a motion to dismiss. We disagree that this motion was proper, however, because the evidence refutes Goston's contention that his cross-complaint was pending at the time Craig filed his lawsuit. Craig's complaint was file-marked December 19, 1988; although Goston has not included a copy of his cross-claim against Craig in his appendix, he states in his brief that it was not filed until January 5, 1989. Furthermore, Goston's motion for dismissal was not timely filed. A motion to dismiss arising out of the pendency of another action between the same parties must be filed within twenty days after service of process. *See Inmon Truck Sales, Inc.* v. *Wright*, 294 Ark. 397, 398, 743 S.W.2d 793, 794 (1988).

We also find no error in the court's refusal to set aside the default judgment based upon his assertions of excusable neglect, unavoidable casualty, other just cause, or to avoid a miscarriage of justice. In order to have a judgment set aside under Rule 55, 60(b), or 60(c) of the Arkansas Rules of Civil Procedure, a party is required to show in its motion that it has a meritorious defense. *Hendrix* v. *Hendrix*, 26 Ark. App. 283, 285, 764 S.W.2d

472, 473 (1989). A meritorious defense is evidence, not allegations, sufficient to justify the refusal to grant a directed verdict against the party required to show a meritorious defense, and the motion itself must assert the defense. *Id.*; *Bunker* v. *Bunker*, 17 Ark. App. 7, 11, 701 S.W.2d 709, 711; *Meisch* v. *Brady*, 270 Ark. 652, 658, 606 S.W.2d 112, 115 (Ark. App. 1980). Here, Goston asserts in his motion to set aside the default judgment that he has a meritorious defense but presents no evidence of such a defense. Therefore, he is not entitled to have the judgment set aside.

Goston also contends that, because Craig's summons did not contain the address of Craig's attorney as required by Ark. R. Civ. P. 4(b), the judgment should be set aside. In *Tucker* v. *Johnson*, 275 Ark. 61, 66, 628 S.W.2d 281, 283 (1982), the supreme court held that a default judgment based on valid service of a defective summons is voidable. Assuming without acknowledging that the judgment here was voidable, there still needed to be a showing of a valid or a meritorious defense by Goston in order to have the judgment set aside, and no such showing was made. *See Id.*; *Bunker*, 17 Ark. App. at 10, 701 S.W.2d at 710-11.

Goston finally argues that the trial court erred in denying his motion to vacate the judgment without first allowing him a hearing on his motion. We disagree that he was denied a hearing. The court held a hearing on February 6 prior to granting Craig's motion for a default judgment, at which time Goston's counsel was present and had an opportunity to present any defenses Goston had for failing to make a timely appearance. Goston's motion to set aside the default judgment was not filed until the date of the March 22 hearing, and there is no evidence that Goston made any further attempt to obtain a hearing after this date until after the court rendered its decision in February 1990. Based on these facts, we find no abuse.

Affirmed.

DANIELSON and MAYFIELD, JJ., agree.

SUGARLOAF DEVELOPMENT CO., INC. *v.* HEBER SPRINGS SEWER IMPROVEMENT DISTRICT, et al.

CA 90-229 805 S.W.2d 88

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

Lightle, Beebe, Raney, Bell & Hudgins, by: *Donald P. Raney*, for appellant.

Reed, Irwin & Tilley, by: *Leon Reed and R. Bryan Tilley*, for appellee.

JUDITH ROGERS, Judge. The appellant, Sugarloaf Development Co., Inc. [hereinafter "Sugarloaf"], appeals from an adverse decision in the Cleburne County Chancery Court in an action in which it sought a reduction in its sewer betterment assessment. On appeal, Sugarloaf contends that the chancellor erred in finding that no material physical change had occurred on

the property so as to warrant a reduction in its assessed value, and that the chancellor erred in denying its motion for a new trial. We find merit in both issues raised, and reverse and remand.

In August of 1973, Sugarloaf platted for development a forty-nine acre tract of land into eighty-one lots. The subdivision, located in Heber Springs, Arkansas, was named Cedarglades No. 2 [hereinafter "Cedarglades"], and was to be developed for residential purposes. Sometime in the late 1970's or early 1980's, the appellee sewer improvement district was formed, and after litigation, the property was assessed in 1985 in the amount of $184,183. Since its inception, only two lots have been sold in the subdivision and on December 23, 1986, Sugarloaf obtained an order from the county court reverting the property from lots and blocks to raw agricultural acreage. In the subsequent years, no reassessment was made by the district, and Sugarloaf filed this lawsuit against the district and its commissioners after receiving no response from the district to communications requesting a reduction in its assessment. In its complaint, filed on July 21, 1989, Sugarloaf contended that its betterment assessment for Cedarglades was presently excessive in light of the reversion to acreage, and asked that it be reduced. In his letter opinion of January 2, 1990, the chancellor agreed with Sugarloaf that the assessment was excessive, but denied relief partially on a finding that there had been no physical change in the property. As its first issue, Sugarloaf contests this finding made by the chancellor.

On appeal from a chancery court case, the appellate court considers the evidence *de novo*, and it will not reverse unless it is shown that the lower court's decision is clearly contrary to a preponderance of the evidence. *Kerby* v. *Kerby*, 31 Ark. App. 260, 792 S.W.2d 364 (1990). A finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Duckworth* v. *Poland*, 30 Ark. App. 281, 785 S.W.2d 472 (1990).

We agree with the chancellor that an assessment cannot be revised unless there is a material physical change in the property. This requirement is not statutory, but is found in the applicable case law. In *Street Improvement District No. 74* v. *Goslee*, 183 Ark. 539, 36 S.W.2d 960 (1931), the supreme court held that assessments cannot be increased or diminished except

for some physical change in the property since the original assessment. *See also Paving District No. 2 of Harrison* v. *Johnson*, 186 Ark. 1033, 57 S.W.2d 558 (1933). We disagree, however, with the chancellor's application of this law to the facts of this case.

Carl Foust, president of Sugarloaf, testified that the company was formed to develop Cedarglades and other real estate. With regard to this subdivision, he said that initially roads were cut on the property, and that sewer lines had been constructed by the district on the western and eastern boundaries, leaving the central portion unserved. Mr. Foust testified, however, that the development had not been successful, citing the inability to sell but two of the eighty-one lots, despite heavy advertising, and the expense of development. He said that the property remained unimproved, as the roads were never paved, nor were utilities ever run into the subdivision. He also said that the subdivision was reverted to acreage, excepting the two lots that were sold and one road, due to the failure of the project and that Sugarloaf had been attempting to sell the property in two or three tracts, or as a whole. He stated that Sugarloaf's annual assessment was $6,078.04 and that he had twice written the district asking for a reduction in the overall assessment since the reversion, and that he had received no response. He acknowledged that the property had derived some benefit from the placement of the sewer lines, but stated that the property was still being assessed as a subdivision, which no longer exists. Finally, Mr. Foust related that the ad valorem taxes on the property had been decreased by fifty percent.

Warren Christopher, a local realtor, testified that he and his company had a listing at one time to sell the property. Mr. Christopher described the land as being unimproved, and "rough" and "rocky." He related that of the two lots sold, one had a house situated on it with no services except city water. He said the difficulty in selling lots in the subdivision was due to the absence of streets and utilities. Noting what he deemed the "prohibitive" costs required to make this an ongoing subdivision, he said that they were unable to find a purchaser to develop the property. He said that the property ranged in value from $67,000 to $75,000.

Sugarloaf also presented the testimony of Ray Owen, Jr.,

who said that he had worked with thirty to thirty-five improvement districts both as an assessor and an attorney. He testified that a betterment assessment is arrived at by taking the difference of the before and after value of the property with the improvement. He related that numerous factors are considered in assessing the benefit accruing to property including the proximity to the sewer, the size and use of the land, topography, accessibility to public highways and whether there are improvements on the land. He said that generally it was normal for assessments to increase with development and growth or in the case of a split-off, just as it would decrease if an improvement were destroyed, such as if a house burned. He explained that annual assessments would pick up on these changes in property, and that he believed that the reversion of a subdivision to agricultural acreage was a factor that would be considered, and should work to lower the betterment assessment. As examples, Owen explained that a tract of land platted into lots was treated differently upon assessment than a tract without lots. He said that when property is subdivided, each lot is assessed separately, increasing the assessment from that which it was as a whole. When a portion of a tract is sold, called a split-off, he said that the total assessed benefits for the two tracts would be greater than it was as a single tract.

Mr. Owen further stated he was "surprised" at the current assessment, amounting to $3,760 an acre, as compared to similar property in the area. He testified that, for instance, the Wolford tract, which is adjacent to Cedarglades and consists of sixty-one acres, is valued at $84,498 by the county tax assessor with an assessed benefit of $22,000, or $369 an acre; the Stark tract, which is twenty acres and includes a residence, is valued at $75,420, the betterment assessment being $12,772 or $639 an acre; the twelve and a half acre Ogelsby tract, also including a residence, is valued at $96,105 and is assessed $11,713, for $938 an acre; and the Kelly tract, twenty acres, is valued at $27,500 with an assessment of $10,000, or $500 an acre. Owen placed the value of the land at $67,348 based on the county tax assessor's figure, and opined that it was worth $82,000 with the improvement, yielding an assessment of $14,642.

Through its witnesses, the district maintained that it was without authority to reduce the assessment as no physical change had occurred. In this regard, the district asserted that the

reversion was a change on paper only, and that the property, as far as physical outlay, was in the same condition as when the assessment was originally made.[1]

Under Ark. Code Ann. § 14-90-602 (1987), assessments may be revised by an improvement district on an annual basis, either increasing or diminishing the assessment against particular pieces of property as justice may require.[2] We think the record supports the chancellor's view that the assessment here is currently excessive, but we also believe that the evidence reflects a material physical change in the property which would allow a reduction in the assessment.

Assessments are founded upon the special benefit conferred upon property by the improvement, and an assessment cannot be sustained if the amount is in excess of the benefits in the enhancement of the value of the property received by the owner from the improvement. *See Kelley Trust Co.* v. *Paving District No. 46 of Fort Smith*, 184 Ark. 408, 43 S.W.2d 71 (1931). In this case, the property was subdivided based on the intent that development would occur, and the original assessment was premised on the higher value of a subdivision, rather than acreage. However, in the past sixteen years only two lots have been sold, and the property remains unimproved with no real prospect for development. Due to the reversion to acreage, the subdivision no longer exists in its original form, thus materially changing the character of the property. If, as revealed by the testimony, assessments increase with growth and development, we fail to see why the converse would not apply when anticipated improvements never come to fruition. Under the particular circumstances of this case, we are persuaded that the reversion to

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[1] Although the district argues that Ark. Code Ann. § 14-90-602 (1987) speaks in permissive terms, in that it may but is not required to revise assessments, we note that the district cannot insulate itself from inaction, as an excessive assessment results in a prohibited taking of property without just compensation. *See Kelley Trust Co.* v. *Paving Improvement District No. 47 of Fort Smith*, 185 Ark. 397, 47 S.W.2d 569 (1932).

[2] Arkansas Code Annotated § 14-86-602 (1987) provides that where any improvement district shall have issued bonds or incurred indebtedness, the total amount of the assessed benefits shall never be reduced upon reassessment. There was evidence that the total amount of assessments for the district beginning in 1985 was $4,297,985 which had increased to $4,616,364 in 1989, leaving a difference of $318,399.

acreage, as affecting the value of the land and the benefits accruing to it, constitutes a material physical change. We hold then that the chancellor's finding to the contrary is clearly erroneous, yet we do note that the chancellor was clearly disturbed by this ruling since he had also found that the assessment exceeded the benefit to the property.

Sugarloaf next argues that the chancellor erred in denying its motion for a new trial. In this lawsuit, Sugarloaf was proceeding under Ark. Code Ann. § 14-90-604(a)(2) (1987), which provides:

> If on the hearing it appears that all outstanding bonds, interest coupons, and other indebtedness of the district have been fully paid, *or that to facilitate the liquidation of the district all of its bonds, coupons and other indebtedness have been acquired and are held by a trustee or by the commissioners of the district exclusively in trust for the property owners of the district*, and if it further appears that the assessment is excessive and should be reduced, it shall be the duty of the court to reduce the assessment as equity and good conscience may require, taking into consideration the market value of the property involved, the benefits accruing to the property by reason of the improvement, the assessments against similar property in the district, the amount of other taxes and assessments against the property in other districts in which the land may be, and any other pertinent facts.

(Emphasis ours.) In his letter opinion, the chancellor concluded that in any event he was without authority to reduce the assessment based on testimony at trial that there was an outstanding bond indebtedness. Appellant filed a motion for a new trial, pointing to the disjunctive phrase emphasized above, and asking that the record be reopened for the taking of testimony on this issue. The trial court denied the motion. In oral argument, counsel for Sugarloaf conceded that evidence on this issue had inadvertently been omitted at trial, but urges that "in equity and good conscience" the chancellor should have allowed the reopening of the record for proof on this question. We agree.

The instant case is not unlike that of *Bobo* v. *First Nat'l Bank of Hope*, 244 Ark. 448, 425 S.W.2d 521 (1968). There, the

supreme court reversed the chancellor's finding of a fraudulent conveyance because the record contained no evidence that the transferor and transferee of the property were related in order to support the presumption of fraud. The court, however, also reversed on cross-appeal the chancellor's denial of the appellee's request to reopen the record for the introduction of testimony showing them to be mother and son.

A trial court has the discretionary authority to reopen the record for the presentation of important evidence which, through inadvertence, was not placed before the trier of fact. *See H & M Realty Co.* v. *Union Mechling Corp.*, 268 Ark. 592, 595 S.W.2d 232 (1980). The principle involved is that evidence should be reopened where to do so would serve the interests of justice and cause no undue disruption of the proceedings or unfairness to the party not seeking to have it reopened. *Id.* As observed by the supreme court in *Midwest Lime Co.* v. *Independence County Chancery Court*, 261 Ark. 695, 551 S.W.2d 537 (1977):

> However, a chancellor has the power to allow defects in proof to be supplied at any time. Such action is in his discretion and is not subject to review here except where his action is arbitrary, and the rights of some of the parties are improperly affected. When, in the judgment of the chancellor, the ends of justice will be served, this Court has said that it is his plain duty to allow further proof to come in.

Id. at 706, 551 S.W.2d at 542 (quoting *Bradford* v. *Eutaw Savings Bank of Baltimore*, 186 Md. 127, 46 A.2d 284 (1946) (citations omitted). Both below and on appeal, the parties have assumed that evidence on this point is necessary to appellant's request for relief. Under the circumstances, we believe the chancellor abused his discretion in not reopening the record for the presentation of proof on this issue.

Reversed and remanded.

DANIELSON and MAYFIELD, JJ., agree.

Charles NEWSOME *v.* UNION 76 TRUCK STOP, et al.

CA 90-257 805 S.W.2d 98

Court of Appeals of Arkansas
Division II
Opinion delivered March 13, 1991

Philip M. Wilson, for appellant.

Friday, Eldredge & Clark, by: *H. Charles Gschwend, Jr.*, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Charles Newsome appeals from an order of the Arkansas Workers' Compensation Commission holding that his claim was barred by the so-called *Shippers Transport* doctrine. He contends that the evidence in this case does not support application of that doctrine. We find no error and affirm the order of the Commission.

In *Shippers Transport of Georgia* v. *Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979), the supreme court recognized that public policy places an obligation on an employee to give truthful answers to a prospective employer's questions about his pre-employment health condition. The court held that a false representation on an employment application will bar recovery under our workers' compensation act if the following test is met by the employer:

> (1) the employee must have knowingly and willfully made a false representation as to his physical condition;
>
> (2) the employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring; and
>
> (3) there must have been a causal connection between the false representation and the injury.

Here, the record shows, and appellant admits, that in January 1986 he injured his back while working for Kenworth Trucking Company, was awarded compensation benefits equal to ten-percent permanent partial disability to the body as a whole, and subsequently received $16,000.00 pursuant to a lump-sum settlement agreement of his workers' compensation claim. On February 3, 1988, however, appellant submitted to appellee an

employment application, on which appeared the following questions and appellant's answers:

> Q. Have you ever received workers' compensation or disability income?
>
> A. No.
>
> Q. If yes, for what reason did you receive workers' compensation or disability income?
>
> A. None.

Appellant was hired to do heavy-lifting work in appellee's shop on the same day that the employment application was submitted.

On February 22, 1988, appellant reinjured his back while working for appellee and sought benefits therefor. Appellee denied appellant's claim for workers' compensation benefits and asserted the *Shippers Transport* defense. The Commission found that appellee had proven all three of the requirements outlined in *Shippers* and denied benefits.

On appeal, appellant challenges the Commission's findings only with respect to whether appellant knowingly and willfully made a false representation as to his physical condition and whether appellee relied upon the false representation. Whether or not those factors existed were questions of fact for the Commission to resolve. Therefore, we will not disturb the Commission's findings unless we find that they are not supported by substantial evidence. In making this review, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the appellee. *Mack* v. *Tyson Foods, Inc.*, 28 Ark. App. 229, 771 S.W.2d 794 (1989).

Appellant first contends that appellee could not have relied upon the information contained in the employment application because appellant had been hired before the written application was submitted to the employer. We cannot agree.

William L. Landers testified that he was general manager of the appellee company and the person who had actually hired appellant. He stated that he first examined the written application and then called appellant's references listed therein. When he completed this, Landers informed appellant

that he was hired and could report to work for the three o'clock shift that afternoon. Landers testified that the answers given in the application played a very substantial part in his determination to hire appellant, as the job for which appellant was being considered involved the lifting of heavy tires and equipment weighing as much as 200 pounds. He stated that, due to the nature of the work, had he known that appellant had previously suffered a disabling work-related back injury, he would not have hired appellant for this job. He also stated that he had declined in the past to employ persons who had the same type of back injury. On conflicting evidence, the Commission found that the employer had relied upon appellant's representations in the employment application, and we cannot conclude that that finding is not supported by substantial evidence.

Appellant next contends that his answers were not knowingly and willfully false. He testified that he had incorrectly answered the questions about prior workers' compensation claims and the reasons therefor because he misunderstood them and was in a hurry to fill out the application. As we said in *Knight* v. *Industrial Electric Co.*, 28 Ark. App. 224, 771 S.W.2d 797 (1989), however, such questions are neither hard to understand nor difficult to answer. Moreover, the Commission was not bound to accept appellant's testimony. *Shock* v. *Wheeling Pipe Line*, 270 Ark. 57, 603 S.W.2d 446 (Ark. App. 1980). On the record before us, we cannot conclude that the Commission erred in finding that appellant's false responses were, in fact, knowingly and willfully given.

Appellant finally contends that, in any event, the questions contained in the application were insufficient to support the *Shippers Transport* defense, in that they did not call for factual information regarding appellant's "physical condition" or "health history." We cannot agree.

In *Shippers Transport*, *supra*, the supreme court held that, as our workers' compensation act requires an employer to take an employee as it finds him, it is only fair that the employer have a right to determine a prospective employee's health history before hiring him. It is true that in *Knight* v. *Industrial Electric Co.*, *supra*, we reversed the Commission's denial of benefits, holding that questions calling for self-diagnosis or opinions of one's

health, as opposed to those that seek to ascertain factual information about one's health history, are too broad and general to support the *Shippers Transport* defense. There, however, the Commission had denied benefits based upon the claimant's negative response to the following question: "Do you have any physical condition which may limit your ability to perform the job applied for?"

Here, on the other hand, appellant was asked whether he had ever received workers' compensation benefits and, if so, for what reason. Had he truthfully answered these two questions, appellee would have known that appellant had previously suffered a work-related back injury that caused disability. It seems clear to us that questions such as those asked here seek factual information that, as clearly demonstrated by the facts in this case, bears directly on one's health history. *See Shippers Transport of Georgia* v. *Stepp, supra*; *Baldwin* v. *Club Products Co.*, 270 Ark. 155, 604 S.W.2d 568 (Ark. App. 1980). *See also Knight* v. *Industrial Electric Co., supra.*

Affirmed.

JENNINGS and COOPER, JJ., agree.

Joseph M. THORNE *v.* Benny W. MAGNESS and Janie Magness, His Wife

CA 90-220 805 S.W.2d 95

Court of Appeals of Arkansas
Division II
Opinion delivered March 13, 1991

Christopher Carter, for appellant.

Frank H. Bailey, for appellants.

GEORGE K. CRACRAFT, Chief Judge. Joseph M. Thorne appeals from a decree of the Baxter County Chancery Court quieting title to a tract of land in Benny and Janie Magness. The chancellor found that appellant's tax deed was void and that appellees were the owners of the property. Appellant contends that the trial court erred in setting the tax sale aside because appellees lacked standing to attack it; in not holding that appellees had not acted in good faith and were barred from maintaining the action under the doctrine of clean hands; and in failing to grant his motion for a new trial or to amend the judgment and increase the award of damages. We find no error and affirm.

On November 24, 1982, appellant obtained a certificate of purchase on a tract of property at a collector's tax sale. Although appellant received the certificate of purchase on that date, he did not receive a deed from the county clerk until November 23, 1987. His deed was recorded on that same day. Appellant thereafter made improvements on the property.

On August 3, 1989, appellees filed their petition to quiet title against appellant alleging that they were the owners of the property; that they acquired title by virtue of a quitclaim deed from First National Bank & Trust Company of Mountain Home; that they and their predecessors had adversely possessed the property for more than seven years; and that the tax deed conveying the property to appellant was void because of the clerk's failure to comply with the statutes governing the forfeiture and sale of lands delinquent for nonpayment of taxes. Appellant answered denying the allegation and alleging that, because appellees had received their deed from First National Bank & Trust Company on March 13, 1989, but had not recorded it until after this suit was brought, they were without clean hands to seek quiet-title relief. Appellant counterclaimed seeking to have title confirmed and quieted in him.

The chancellor found a number of fatal irregularities in the tax sale and set aside the deed from the county clerk to appellant. In quieting title in appellees, the chancellor found that they had

acquired title by virtue of a quitclaim deed, dated March 13, 1989, and that they and their predecessors had adversely possessed the property for over seven years. The chancellor awarded appellant damages in the amount of $1750.00 for improvements made to the property under color of title, as provided in Ark. Code Ann. § 18-60-213 (1987), and $291.06 as reimbursement for taxes paid on the property since the date of the collector's sale.

Appellant does not deny that the tax sale was defective and void. He contends that the chancellor erred in setting it aside because appellees lacked standing under Ark. Code Ann. § 26-38-107(b) (1987) to challenge its validity in that they did not acquire record title to the property until 1989, did not prove their chain of title, and had not paid taxes on the property for at least seven years. We disagree.

Arkansas Code Annotated § 26-38-107(b) provides:

> No person shall be permitted to question the title acquired by a deed of the county clerk without first showing that he, or the person under whom he claims title to the property, had title thereto, at the time of the sale, or that title was obtained from the United States, or this state, after the sale, and that all taxes due upon the property have been paid by such person, or the person under whom he claims title as aforesaid.

Although appellees did not acquire their deed from their immediate predecessor until March 1989, appellees did prove that their predecessors in title had legal title to the property at the time of the tax sale as required by the statute. The clear wording of the statute requires only that the persons under whom appellees claim had title at the time of the sale.

The record discloses that, at the time the sale was held the property taxes had been assessed in the name of "Steakhouse Marketing Company." Appellees introduced into evidence an abstract of title to the property in question which deraigned appellees' title from an original source to Steakhouse Marketing Company, in whose name the forfeiture occurred. They further deraigned their title from Steakhouse Marketing Company to the First National Bank & Trust Company, from whom appellees acquired title in 1989. These exhibits were admitted without

objection, and we find no evidence that disputes their validity. Appellees satisfied the requirements of the statute. *See Fine* v. *Bucha*, 247 Ark. 1074, 449 S.W.2d 406 (1970); *Davis* v. *Stonecipher*, 218 Ark. 962, 293 S.W.2d 756 (1951).

Nor do we find merit in the argument that appellees lacked standing because the record showed that they had not paid taxes on the property. The court specifically found that the clerk had failed to append his certificate to the list of delinquent lands prior to the tax sale. In *Standard Securities Co.* v. *Republic Mining and Manufacturing Co*, 207 Ark. 335, 180 S.W.2d 575 (1944), the court held that this is a "meritorious defense" that could not be cut off by the legislature. *See also Cooper* v. *Freeman Lumber Co.*, 61 Ark. 36, 31 S.W. 981 (1895).

Appellant next contends that, because appellees' deed from the bank was not filed until after the petition was filed, they had come into court with unclean hands. This maxim bars relief only to those guilty of improper conduct in the matter as to which they seek relief. *Merchants & Planters Bank & Trust Co.* v. *Massey*, 302 Ark. 421, 790 S.W.2d 889 (1990). The fact that appellees' deed had not been recorded does not constitute evidence of improper conduct calling that maxim into play.

Relying on Ark. Code Ann. § 14-15-404(b) (1987), appellant contends that, because his deed from the county clerk was recorded prior to the time appellees' deed was recorded, they cannot maintain this suit. That section gives priority to the first recording only as between purchasers deriving their interest from a common grantor. *Taylor* v. *Scott*, 285 Ark. 102, 685 S.W.2d 160 (1985); *Richardson* v. *Fisher*, 236 Ark. 612, 367 S.W.2d 440 (1963). It has no application to an intervening tax deed obtained from a county clerk.

Appellant also argues that, even if his tax deed is void, it still constituted color of title and, because he paid taxes on the property for seven years under color of title, his title has ripened into good title under Ark. Code Ann. § 18-11-102 (1987), which provides that unimproved and unenclosed lands will be deemed to have been held in the possession of a person who pays the taxes on its under color of title for at least seven years in succession. Reliance on this section is misplaced. Although appellant purchased the property at the tax sale and was issued a certificate of

purchase in November 1982, he did not receive his deed until 1987. A certificate of purchase issued at a tax sale is not color of title. *Broadhead* v. *McEntire*, 19 Ark. App. 259, 720 S.W.2d 313 (1986). He therefore claimed under color of title for less than a year before the suit was filed.

While we agree with appellant that the evidence does not support the chancellor's finding that appellees had been in adverse possession for seven years preceding the filing of the action, for reasons previously discussed, we affirm his action in quieting title in appellees on proof that they were the holders of the record title. The decree is modified accordingly.

There was testimony that appellees first acquired their interest in the property at a foreclosure sale from the Small Business Administration and First National Bank & Trust Company in the late 1970's or early 1980's, but had not recorded the deed and did not know what happened to it. Appellee Benny Magness testified that he obtained the 1989 deed from the bank in order to clear up that interest and to obtain the remainder of the land that had belonged to the bank. Appellant contends that the chancellor erred in denying his motion for new trial, arguing that because appellees' petition failed to assert ownership of the property prior to March 1989, other than by adverse possession, he was surprised by this testimony and, therefore, was deprived of the affirmative defense of laches. We cannot agree.

Rule 59(a) of the Arkansas Rules of Civil Procedure provides that a new trial can be granted where there is proof of "accident or surprise which ordinary prudence could not have prevented." The trial judge has broad discretion in determining whether or not to grant a new trial, and his determination will not be disturbed on appeal absent a showing of abuse. *First State Bank* v. *Gramble*, 14 Ark. App. 53, 685 S.W.2d 173 (1985). Here, appellant did not request a continuance or move to amend his answer to assert the defense of laches, and the evidence he complains of was received without objection, as was appellees' deraignment of legal title. One who is surprised by his adversary's testimony is not entitled to a new trial on that ground if, rather than asking for a postponement to secure necessary evidence, he reserves his plea of surprise as a "masked battery in the effort for a new trial." *Sellers* v. *Harvey*, 220 Ark. 541, 249 S.W.2d 120

(1952). *See also Liggett* v. *Church of Nazarene*, 291 Ark. 298, 724 S.W.2d 170 (1987).

Appellant also contends that he should have the judgment reopened in order to produce additional evidence of his damages for improvements made on the property under color of title. As we have stated, appellant did not request a continuance at trial nor has he included in his brief any indication of what additional evidence he was prevented from producing at trial. We conclude there was no abuse of discretion in failure to reopen or in failing to grant a new trial.

Affirmed and modified.

COOPER and JENNINGS, JJ., agree.

ARKANSAS POULTRY FEDERATION INSURANCE TRUST *v.* Larry LAWRENCE and Arkansas Blue Cross and Blue Shield, a Mutual Insurance Co.

CA 90-161 805 S.W.2d 653

Court of Appeals of Arkansas
Division II
Opinion delivered March 13, 1991.
[Rehearing denied April 17, 1991.]

[redacted]

Skokos, Coleman, and Rainwater, by: *Randy Coleman*, for appellant.

The McMath Law Firm, by: *Winslow Drummond*, for appellee.

JUDITH ROGERS, Judge. This case involves a dispute between two health insurance carriers. The insured, appellee Larry Lawrence, underwent a heart transplant on March 3, 1986. In 1978, Lawrence began working as a truck driver for Caldwell

Milling Company in Rosebud, an egg production, grading and distribution operation. As a full-time employee, Lawrence was eligible for coverage, and was covered, under a group health insurance plan with appellant Arkansas Poultry Federation Insurance Trust (hereinafter "Trust"). In June of 1979, Lawrence stopped working for Caldwell Milling on a full-time basis, and resumed being an independent producer for the company as he had been before his employment. As a producer, Lawrence remained eligible for health insurance coverage with the Trust under a different plan, but his coverage was never formally converted. Nevertheless, Lawrence continued to pay premiums, and claims were submitted and accepted by the Trust on his behalf. Since his employment with Atlas Carriers in 1984, Lawrence was covered under a group insurance plan for employees with appellee Arkansas Blue Cross and Blue Shield (hereinafter "Blue Cross").

Prior to surgery, Lawrence first contacted the Trust about benefits, but was informed by its acknowledged third-party administrator, Fewell & Associates, Inc., that a heart transplant was considered an experimental procedure, and was thus excluded from coverage under the plan. Blue Cross paid benefits in the amount of $103,727.41, and thereafter filed this lawsuit, joined by Lawrence, seeking contribution from the Trust, based on a coordination of benefits clause contained in the Trust's policy. The case was tried before the trial court sitting as the trier of fact. The trial court ruled in appellees' favor, finding that Lawrence remained covered under the Trust's plan as an employee, that each insurer extended primary coverage for the loss, and that the Trust would share equally in the loss up to the maximum limits of its liability of $50,000. The trial court also assessed a penalty and attorney's fees against the Trust.

The Trust appeals from this decision and raises four issues for reversal. We find merit in one of the issues raised, and affirm in part and reverse in part.

First, the Trust argues that the trial court erred in awarding judgment when Lawrence was not an eligible, covered employee pursuant to its written eligibility and termination provisions. Under the Trust's plan for employees, only full-time employees, those who work thirty hours a week, are eligible for coverage, and

by its terms coverage terminates when this eligibility requirement is no longer met. Thus, the Trust argues that its coverage effectively terminated when Lawrence ceased full-time employment with Caldwell Milling in June of 1979. Appellees do not question this eligibility requirement, but argue that the Trust is estopped from asserting this position based on certain events which followed the cessation of Lawrence's employment.

At trial, Lawrence testified that when he quit working for Caldwell Milling, he had discussions with Reta Caldwell, the company bookkeeper, about continuing his coverage with the Trust. He said that it was his understanding that his coverage would remain in effect. He testified that the premiums for the insurance were deducted from the payments made to him by Caldwell Milling as a producer, and that he continued to submit claims to the Trust. There is documentation in the record reflecting the submission and payment of numerous claims on behalf of Lawrence and his family from 1981 through 1985.

Reta Caldwell testified that in her conversations with Lawrence, he indicated that he wanted to maintain the insurance by switching over to the producer plan without a gap in coverage. She called this a "unique" situation, as she had never done a change-over before. She said that normally, a producer requesting coverage would fill out a form proving insurability, but that she felt that this form would not apply since Lawrence was already insured. She stated that because she was unsure as to how to proceed, she called Fewell & Associates for instruction. She said that in this conversation she advised that Lawrence was no longer an employee, but that he wanted to continue coverage as a producer. Ms. Caldwell testified that the woman she spoke to on the phone told her to "leave it as it is for the time being." She said that she did what she was told, and had Lawrence fill out a form authorizing the company to withhold premiums from his earnings. She further testified that she never heard anything more from Fewell & Associates about the matter.

Robert Alexander, staff counsel with Fewell & Associates, testified that there was no documentation in its files regarding a request to change Lawrence to the producer plan. He acknowledged, however, that Lawrence remained covered as an employee throughout this period of time. He stated that the difference in

coverage between employees and producers was slight, the differences being in maternity coverage, life insurance benefits and premiums.

Laura Lawrence, the administrator and underwriter at Fewell & Associates, testified that she was responsible for handling the Caldwell Milling account in 1979. She said that she recalled no conversations with Ms. Caldwell about changing plans for Lawrence, and that she never would have advised her to leave his coverage as that of an employee. She described a changeover as a "very simple process," involving the filling out of a request form.

The trial court made the following written findings on this issue:

> The only real dispute as to any essential facts is whether or not Ms. Caldwell advised Arkansas Poultry Federation Insurance Trust of Mr. Lawrence's leaving Caldwell's employment and his request to continue his insurance coverage. The Court is of the conviction that the evidence preponderates the accuracy of her testimony on that fact. That testimony is supported by these facts: (1) Mr. Lawrence paid the entire premiums required for the following several years; (2) The claims paid subsequent to that notice are consistent with his family's continuing need for medical insurance coverage; (3) a conversion form was signed by Lawrence at the direction of Ms. Caldwell; (4) Ms. Caldwell had never before experienced those requirements to change coverages from an employee to a producer. All of these factors support the concept that a notice and inquiry was made by Ms. Caldwell of the Federation through Fewell. If inquiry was made, logic dictates that directions were received and some efforts required to conform by these directions. Equally important was the lack of a motive for either Ms. Caldwell or Mr. Lawrence to fail to complete the conversion on the event of his employment termination. The Court has no way to determine whether Ms. Caldwell failed through misunderstanding to complete the instruction she received from Fewell, or Fewell neglected after receiving notice to follow through to completely inform Ms. Caldwell of those

additional stages required to complete the transfer of plans; however, in review of the procedures employed between Caldwell and Fewell, the billing originating with Fewell, the Court would conclude that Fewell neglected to remove Lawrence from one form of coverage and transfer him to the second.

Estoppel *in pais* is the doctrine by which a person may be precluded by his acts or conduct, or by failure to act or speak under circumstances where he should do so, from asserting a right which he otherwise would have had. *Daves* v. *Hartford Accident & Indemnity Co.*, 302 Ark. 242, 788 S.W.2d 733 (1990). The doctrine of estoppel can be applied to bar the defense of noncoverage in insurance cases. *See Time Insurance Co.* v. *Graves*, 21 Ark. App. 273, 734 S.W.2d 213 (1987) (substituted opinion on rehearing). Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that, by conformity thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop, and ought to estop, the company from insisting on a forfeiture, although it might be claimed under the express terms of the contract. *Home Mutual Fire Insurance Co.* v. *Riley*, 252 Ark. 750, 480 S.W.2d 957 (1972).

Our standard of review is well-settled. The findings of fact of a trial judge sitting as the finder of fact will not be disturbed on appeal unless, considering the evidence in the light most favorable to the appellee, the findings are clearly erroneous or clearly against the preponderance of the evidence, giving due regard to the opportunity of the trial court to assess the credibility of the witnesses. *Special Insurance Services, Inc.* v. *Adamson*, 20 Ark. App. 8, 722 S.W.2d 875 (1987).

Here, the trial court found credible Ms. Caldwell's testimony that she informed Fewell & Associates that Lawrence was no longer an employee, and that a request was made for the conversion of coverage. For seven years, there was reliance on the representation that Lawrence's coverage was continued. Premiums were paid and accepted, and claims were submitted and paid by the Trust. There is further evidence in the record that in connection with this claim in 1986, Fewell & Associates was again informed that Lawrence was not an employee and that he

had not been since 1979. Fewell & Associates advised that coverage would need to be changed to the producer plan, and there were assurances that no medical benefits would be lost. We are also mindful that Lawrence's claim was not initially denied on the ground asserted here, but was denied on the basis of an exclusion in the plan regarding experimental procedures. Under the circumstances of this case, we believe that the Trust is estopped from asserting the defense of noncoverage. Thus, we cannot say that the trial court's finding that Lawrence remained covered as an employee is clearly erroneous.

Next, the Trust argues that Fewell & Associates, the third-party administrator, had no authority to bind it or to extend or modify the terms of the plan. In this respect the Trust contends that there was no direct communication between it and Lawrence, as principals, and that it cannot be bound by the actions and representations of Fewell & Associates. We disagree.

A general agent is one who has authority to transact all business of the company of a particular kind and whose powers are coextensive to the business entrusted to its care. *Security Insurance Corp.* v. *Henley*, 19 Ark. App. 299, 720 S.W.2d 328 (1986). Apparent authority in an agent is such authority as the principal knowingly permits the agent to assume or which he holds the agent out as possessing. It is such authority as he appears to have by reason of the actual authority which he has and such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess. *See Hunt* v. *Pyramid Life Insurance Co.*, 21 Ark. App. 261, 732 S.W.2d 167 (1987). As stated in Applemen, *Insurance Law and Practice* § 7230 (1981):

> Where an agent is furnished with indicia of authority by the insurer, it may be bound by his acts. Certainly such authority would seem to be present where the agent issues and delivers policies of the company. Where the evidence shows a holding out or apparent authority, the company is bound, if, in fact, he is an agent of the company.

Our law is well-settled that an agent acting within the apparent scope of his authority, even though in violation of actual authority, may bind his principal if the one with whom he deals does not have notice of these restrictions. *Chadwell* v. *Pannell*, 27 Ark.

App. 59, 766 S.W.2d 38 (1989).

The record reflects that Fewell & Associates is entirely responsible for administering the Trust's plan. It drafts policies, accepts premiums, and furnishes claims forms, among other things, and the brochure directs all inquiries to it regarding claims and coverage. Although there is a procedure for appeal to the Trust, Fewell & Associates makes decisions concerning the denial and payment of claims. Furthermore, Ms. Caldwell testified that whenever she had questions about claims and procedures, she contacted Fewell & Associates for advice. It has been held that the employer is the employee's agent in connection with a group insurance policy. *Standard of America Life Insurance Co.* v. *Humphreys*, 257 Ark. 618, 519 S.W.2d 64 (1975).

The record as a whole suggests that Fewell & Associates is the general agent of the Trust, and has been clothed with either actual or apparent authority in dealing with matters of the kind involved here. And, the knowledge of an agent of the insurer, obtained while performing the duties of his agency, is imputed to the insurer. *Kansas City Fire & Marine Insurance Co.* v. *Kellum*, 221 Ark. 487, 254 S.W.2d 50 (1953). It follows that the Trust is bound by the actions, or inactions of Fewell & Associates in this case.

As its third point, the Trust argues that the trial court erred in requiring it to coordinate benefits, and in holding that both it and Blue Cross were primary insurers, sharing equally in the loss. In support of this contention, the Trust has referred us to Guideline 7 of Rule and Regulation 21 as adopted by the Arkansas Insurance Department. This guideline provides:

> *GUIDELINE 7: EXCESS COVERAGES (I.E. SELF-INSURANCE AND OTHER NON-REGULATED GROUP CONTRACTS).* Carriers shall use the following claims administration procedures when one health contract is "excess" to all other coverage and the other contract (group health) contains the COB provision:
>
> A group contract should pay first if it would be primary under the COB order of benefit determination. In those cases in which it would normally be considered secondary, the carrier should make an effort to coordinate

> in the secondary position with benefits available through such "excess" plans. The carrier should try to secure the necessary information from the "excess" plan, but if such plan is unwilling to provide the carrier with the necessary information, the carrier should assume the primary position because it has *no legal authority to do otherwise.*

(Emphasis the Trust's.) In our view, Blue Cross essentially complied with the guideline by the payment of benefits. We are not persuaded, however, that this guideline relieves the Trust of its obligation to provide coverage, which we have held it is estopped to deny, under its own contract of insurance.

The policies of both insurers in the instant case contain coordination of benefits clauses. Neither party has provided authority in point, and we can find no Arkansas law touching upon this particular matter. Our research reveals that the resolution of this issue depends upon an interpretation of the coordination of benefits clauses as stated in the respective contracts.

Coordination of benefits is a valid method to contain health care costs within reasonable limits by the prevention of duplication of payments in excess of actual medical charges. *Blue Cross & Blue Shield of Mississippi, Inc.* v. *Larson*, 485 So. 2d 1071 (Miss. 1986). As observed by one court:

> In modern American society, husbands and wives frequently both work outside the home with each being covered by his or her own employee health care group plan. Family coverage, in such circumstances, sets up the potential for duplication of benefits where one or both has family coverage under a plan. Duplication of benefits accomplishes none of the goals of such plans, serving only to run up the cost of the plans. Hassles, such as the one before us, increase the costs of administration of the plans and can delay payment of the medical bills (or reimbursement to the employees who have previously paid the bills).

Blue Cross & Blue Shield of Kansas, Inc. v. *Riverside Hospital*, 237 Kan. 829, 703 P.2d 1384, 1388-89 (1985). In order to avoid duplicate recovery by beneficiaries who are covered for the same benefits by multiple plans, the health insurance industry has

developed a double-recovery prevention technique called the coordination of benefits provision. *Starks* v. *Hospital Service Plan of N.J., Inc.*, 182 N.J. Super. 342, 440 A.2d 1353 (1981). As noted by the court in *American Family Life Assurance Co.* v. *Blue Cross & Blue Shield of Florida*, 346 F. Supp. 267, 268-269, (S.D. Fla. 1972), *aff'd* 486 F.2d 225 (5th Cir. 1973), *cert. den.* 416 U.S. 905 (1974):

> COB has as its primary characteristic a structure of priority of claim payments which enables broad risk accident and health insurance carriers to reduce the amount of premiums paid out by limiting the claimants to a single payment of benefits for a single medical risk. If two or more policies would result in payment of more than 100% of the expenses then, coordination of benefits is applied.

Id. COB is not, of course, the only industry approach to the duplicate coverage problem. Contracts covering all types of risks customarily contain some provision specifying or modifying the carrier's responsibility to its insured in the event that the risk insured against is covered by other insurance as well. *Starks* v. *Hospital Service Plan of N.J., Inc., supra.* These "other insurance" clauses generally fall into three categories: (1) *pro rata* clauses; (2) excess clauses; and (3) escape clauses. *William C. Brown Co.* v. *General American Life Insurance Co.*, 450 N.W.2d 867 (Iowa 1990). COB provisions are a fourth category. *Id.*

Typically, COB provisions prescribe rules to determine when the carrier's obligation to pay is primary or secondary. Primary means the carrier pays all medical expenses that qualify for payment under the policy or plan. Secondary means the carrier's obligation is excess to all other insurance covering the insured. *Id.*; *see also Starks* v. *Hospital Service Plan of N.J., Inc., supra.* The common approach in reconciling such clauses and determining the order of priority is stated as follows:

> In dealing with such problems, the judicial task is first to determine from the contracts themselves what obligations the respective obligors intended to assume and then to determine whether these intentions are compatible not only with the other but also with the insured's rights and expectations and with the controlling demands of public

policy.

Starks v. *Hospital Service Plan of N.J., Inc.*, 182 N.J. Super. at 351, 440 A.2d at 1358. *See also Northeast Department ILGWU Health and Welfare Fund* v. *Teamsters Local Union No.229 Welfare Fund*, 764 F.2d 147 (3rd Cir. 1985); *Blue Cross & Blue Shield of Mississippi, Inc.* v. *Larson, supra*; *Blue Cross & Blue Shield of Kansas, Inc.* v. *Riverside Hospital, supra.*

Applying this principle to the case at bar, Blue Cross clearly has undertaken a primary obligation with respect to this claim by stating in its COB clause that "[t]he subscriber's contract or policy will be considered primary." The clause in the Trust's policy provides:

> The benefits payable under the Plan for covered charges incurred will be coordinated with any group insurance and automobile insurance medical benefits from all of the following plans: 1) This plan, 2) any other group, blanket, or francise insurance coverage excluding any student school accident insurance coverage, 3) group practice and other group repayment coverage, 4) group service plans, 5) any coverage under labor management trustee plans, union welfare plans or employer organization plans, and 6) any coverage provided under governmental programs, and any coverage required or provided by statute, including any medical benefits required under automobile insurance policies. This coverage will not otherwise coordinate against your individual medical policies.
>
> The Trust may obtain or release any information necessary to carry out these provisions. You must declare your coverage under other plans. To expedite payment of claims that involve Coordination of Benefits, the Trust will make a appropriate full or partial payment within a reasonable period of time. This period of time will not exceed 90 days after receipt of complete claim forms that contain the information necessary to make a determination of the benefits that would be payable in the absence of this Coordination of Benefits provision. The Trust can recover from the insured amounts which are overpaid to him.

Noticeably absent from this provision is any overt expression of

the circumstances which will render its obligation primary and those which will render it secondary, as is characteristic of a COB clause. In its silence on this matter, which is the essence of these types of clauses, we detect an ambiguity in the order of benefits payable under its terms. As stated by the court in *Time Insurance Co.* v. *Sams*, 692 F. Supp. 663 (N.D. Miss. 1988):

> Because a coordination of benefits provision inures to the benefit of the insurer, the insurer usually drafts this clause of the contract. To assure that it obtains the desired result, however, the insurer must be careful in drafting its coordination of benefits provision because ambiguities in any clause of the insurance contract will be construed against the drafter.

Id. at 667. Keeping in mind that the insured here is the direct beneficiary of the Trust's policy, in which it agreed to cover the insured's loss within the limits of its liability, and absent any indication to the contrary, we hold that the Trust is also obligated as a primary insurer under its COB clause.

Having so determined that each insurer is primarily obligated, the question becomes what is the extent of their respective liabilities. In this regard, courts have found applicable and have resorted to the use of the general principles arising from "other insurance" litigation. *See Starks* v. *Hospital Service Plan of N.J., Inc., supra.*

In *Carriers Insurance Co.* v. *American Policyholders' Insurance Co.*, 404 A.2d 216 (Me. 1979), the court was confronted with competing "excess" clauses in the insurance contracts. The court found that both policies were to be considered primary. In apportioning liability, the court adopted what it called the minority approach, but which it said was finding acceptance in a growing number of courts. This method requires each company to contribute equally until the limits of the smaller policy are exhausted, with any remaining portion of the loss being paid from the larger policy up to its limits. In so holding, the court remarked "this Solomon-like approach comports with a most basic sense of justice."

We, too, are persuaded that this is a sensible approach, and note that there is some support for this view under Arkansas law.

See Calvert Fire Insurance Co. v. *Francis*, 259 Ark. 291, 532 S.W.2d 429 (1976); *Allstate Insurance Co.*, v. *Equity Mutual Insurance Co.*, 257 Ark. 341, 516 S.W.2d 389 (1974). This was essentially the holding of the court below; therefore we affirm the trial court's findings as to the nature and extent of the liabilities of the insurers in this case.

We do, however, agree with the Trust that the trial court erred in assessing a penalty and attorney's fees against it. Arkansas Code Annotated § 23-79-208(a) (1987) provides:

> In all cases where loss occurs and the cargo, fire, marine, casualty, fidelity, surety, cyclone, tornado, life, health, accident, medical, hospital, or surgical benefit insurance company and fraternal benefit society or farmers' mutual aid association liable therefor shall fail to pay the losses within the time specified in the policy, after demand made therefor, the person, firm, corporation, or association shall be liable to pay the holder of the policy or his assigns, in addition to the amount of the loss, twelve percent (12%) damages upon the amount of the loss, together with all reasonable attorneys' fees for the prosecution and collection of the loss.

However, pursuant to Ark. Code Ann. § 23-61-502(3) (1987), the health care plan of the Trust is specifically afforded an exemption from the provisions of the Insurance Code. Based on this exemption, the trial court erred by imposing the statutory penalty and attorney's fees, and we reverse on this point.

Affirmed in Part, Reversed in Part.

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

Billy BAKER, Administrator of the Estate of Willie Odell Baker, Deceased *v.* STATE FARM FIRE AND CASUALTY Company

CA 90-267 805 S.W.2d 665

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

Gary Eubanks & Associates, by: *James Gerard Schulze*, for appellant.

Huckabay, Munson, Rowlett, and Tilley, by: *Beverly A. Rowlett*, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Billy Baker, administrator of the estate of Willie Odell Baker, deceased, appeals from an order of the Hot Springs County Probate Court, contending that it erred in denying his petition that appellee State Farm Fire and Casualty Company, as subrogee, be assessed its proportionate share of the cost of collection of a wrongful death claim. We agree and reverse and remand for further proceedings.

Willie Odell Baker was killed when his automobile collided with a vehicle operated by Gary Murgberger. It is undisputed that, at the time of the collision, the deceased's vehicle was

covered by a policy of insurance issued by appellee, which contained no-fault coverage. Under the terms of the policy, appellee paid the sum of $3,836.50 to the decedent's estate.

Appellant was appointed personal representative of the estate and employed attorneys of his choice to pursue a claim for wrongful death against the tortfeasor. Appellant entered into a contract with said attorneys in which he agreed to pay a contingent fee of thirty-three and one-third percent of any recovery on the claim. The probate court thereafter authorized the personal representative to pursue the claim and approved the contract for legal services. Appellee notified the personal representative of its subrogation claim to the proceeds of any recovery in the tort action. We find nothing in the record showing that appellee or its attorney did anything further in pursuit of its claim.

Appellant's attorney negotiated a settlement with the tortfeasor for a total sum of $25,000.00. Appellant then filed a petition for court approval of the settlement and prayed that his attorneys be allowed their contingent fee and other expenses incurred in the negotiation of the settlement. Appellee intervened, demanding that it recover the full amount of its subrogation claim and arguing that appellant was not entitled to deduct from that amount a proportionate share of the cost of collection, including any portion of the attorney's fee allowed. The probate court found that the settlement was in the best interest of the estate and authorized appellant to enter into it. The court allowed appellant's attorneys one-third of the total proceeds as a reasonable fee for their services, along with reimbursement of other costs incurred by them in pursuing the claim. The probate court ordered that appellant pay appellee the total amount of its subrogation claim, and denied appellant's claim that appellee be required to reimburse him for its pro rata of the fees and costs incurred in procuring the settlement.

Appellant contends that the probate court erred in refusing to allow him to deduct costs of collection from the amount of subrogation due appellee. We agree.

Arkansas Code Annotated § 23-89-202 (Supp. 1989) requires that every automobile liability insurance policy covering any private passenger vehicle include medical and hospital,

income disability, and accidental death benefits in amounts specified in the statute. The policy issued in this case included coverage for medical and hospital benefits as provided in § 23-89-202(1). Section 23-89-207 provides as follows:

> (a) Whenever a recipient of [Ark. Code Ann.] § 23-89-202(1) and (2) benefits recovers in tort for injury, either by settlement or judgment, the insurer paying the benefits has a right of reimbursement and credit out of the tort recovery or settlement, less the cost of collection, as defined.
>
> (b) All cost of collection thereof shall be assessed against insurer and insured in the proportion each benefits from the recovery.
>
> (c) The insurer shall have a lien upon the recovery to the extent of its benefit payments.

The "cost of collection" includes reasonable attorney's fees. *Northwestern National Insurance Co.* v. *American States Insurance Co.*, 266 Ark. 432, 585 S.W.2d 925 (1979).

Arkansas Code Annotated § 16-62-102(b) (1987) provides that every wrongful death action shall be brought by and in the name of the personal representative of the deceased persons. It does not provide or create an individual right in any other beneficiary to bring an action, as the personal representative acts as trustee for all beneficiaries. When it appears to be in the best interest of the estate or the widow and next of kin, the personal representative may be authorized by the court to effect a compromise settlement of any tort claim. Ark. Code Ann. § 28-49-104 (1987). That section provides no other method for the approval of negotiated settlements in wrongful death actions. Accordingly, in *Brewer* v. *Lacefield*, 301 Ark. 358, 784 S.W.2d 156 (1990), the supreme court held that a beneficiary's attorney is not entitled to receive fees on the portion of the wrongful death proceeds due the beneficiary and that, even though a beneficiary may prefer to have independent counsel to protect his interest, he must bear the expense of his own counsel.

In *Daves* v. *Hartford Accident and Indemnity Co.*, 302 Ark. 242, 788 S.W.2d 733 (1990), the supreme court recognized an insurer's statutory lien on proceeds of its insured's tort settlement, but assessed costs of collection in proportion to the amount it

benefited. There, the appellant was injured in an automobile collision while insured by the appellee, who paid medical and wage-loss benefits to the appellant. The appellee's demand for reimbursement was refused by the tortfeasor's insurer. The appellant subsequently filed a personal injury action against the tortfeasor and negotiated a settlement. Prior to the settlement, the appellee had notified the tortfeasor's insurer of its subrogation claim for reimbursement. However, the appellee was not aware of the lawsuit until after the settlement had been effected. The appellee then filed suit and recovered from the appellant the full amount of its subrogation claim, without any deduction for the appellant's cost of collection. While the supreme court affirmed the judgment, it reduced the appellee's award by its proportionate share of the appellant's cost of collection:

> In this case, Daves did not notify Hartford of his suit against the tortfeasor so that Hartford could intervene to protect its interest and then refused to reimburse Hartford out of the settlement recovery, contrary to the dictates of § 23-89-207(a). As a result, Hartford was forced to bring a different action to enforce its claim, thereby incurring separate expenses and attorney's fees.
>
> Accordingly, Hartford contends that it has paid its share of the "costs" and thus the trial court did not err in refusing to reduce the amount of its judgment. However, Hartford's costs were not "costs of collection" of the tort settlement. Although the end result may be unjust, we must follow the code provision, which dictates that Hartford be assessed costs of collection in the proportion it benefited from the recovery by Daves.

302 Ark. at 251, 788 S.W.2d at 738.

Here, appellant, was the personal representative of the estate and authorized by the court to contract for legal services and pursue a wrongful death action against the tortfeasor. Appellee benefited from the tort settlement to the full extent of its subrogation claim. There is nothing in the record indicating that appellee assisted appellant in the procurement of the settlement. From our review of the record and the applicable law, we conclude that the trial court erred in not assessing against the amount of recovery payable to appellee its proportionate share of

the cost incurred by appellant in its pursuit of the tort settlement.

Reversed and remanded.

JENNINGS and DANIELSON, JJ., agree.

Tommie Elliott FREEMAN *v.* STATE of Arkansas

CA CR 90-169 806 S.W.2d 12

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

William C. McAuthur, for appellant.

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

GEORGE K. CRACRAFT, Chief Judge. Tommie Elliott Freeman appeals from his conviction of possession of a controlled substance with intent to deliver for which he was sentenced to fifteen years in the Arkansas Department of Correction. He contends that the trial court erred in refusing to suppress evidence seized during a search of his dwelling. We find no error and affirm.

In April 1989, the Little Rock Police Department received information from the Texas State Highway Patrol indicating that Texas officers had seized a large quantity of marijuana in which they found a piece of paper bearing the name "Tommie" and a Little Rock telephone number. Officer Debra Gray of the Little Rock Police Department investigated the matter and developed information that the person referred to as "Tommie" was appellant, who was on parole from the Arkansas Department of Correction. Officer Gray contacted Jim Lovette, appellant's parole officer, and asked him to check appellant's parole status. The parole officer reviewed appellant's file and found that appellant had missed several office visits with his former parole officer, although he was not currently delinquent, and that there had been a number of telephone calls to appellant when he could not be reached. He also found that appellant was delinquent in the payment of fees, which was ordered as a condition of his parole.

The parole officer testified that, from "bits and pieces" reflected in appellant's file, he determined that the information he

had received from Officer Gray regarding appellant's possible involvement in drug trafficking was "probably valid" and that he would investigate further. He contacted Officer Gray and asked her to accompany him to appellant's residence because it was believed that a female shared appellant's dwelling with him and he thought there might be trouble. The parole officer testified that, based on the information he had discovered in appellant's file, he intended to arrest him for a parole violation.

The two officers went to appellant's residence and knocked on the door. When appellant opened the door, the officers detected a strong smell of marijuana and observed a partially smoked marijuana cigarette in an ashtray on the table. Notwithstanding appellant's request that they not enter the house, the officers did so and thereafter discovered a large quantity of marijuana in unsealed boxes in a bedroom. The trial court denied appellant's motion to suppress the evidence obtained as a result of the search of his residence. Appellant thereafter entered a conditional plea of guilty pursuant to Ark. R. Crim. P. 24.3(b), and this appeal follows.

Appellant contends that the trial court erred in denying his motion to suppress, arguing that the officers' warrantless entry into his residence was in violation of his fourth amendment right against unreasonable search and seizure. We do not agree.

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 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).

At the suppression hearing, it was shown that at the time of his parole, appellant had signed a form, acknowledging that he was subject to a warrantless search of his person or property under his control by a parole officer when the officer has reasonable grounds for investigating whether appellant was in violation of the terms of his parole or had committed a crime. In *Cherry* v. *State*, 302 Ark. 462, 791 S.W.2d 354 (1990), our

supreme court held that such "consent-in-advance" is not violative of any constitutional rights of the parolee because the supervision of parolees and probationers is a special need of the State, permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large. *See also Griffin* v. *Wisconsin*, 389 U.S. 686 (1989). The court held that, in determining whether the search was carried out under the terms of the consent, two issues must be addressed: (1) were there reasonable grounds to investigate whether the appellant had violated the terms of his parole, and (2) was the search conducted by the parole officer?

The term "reasonable grounds" has not been defined by our courts. However, in *Cherry* v. *State, supra*, the court held that this standard had been met on facts that were peculiarly similar to those here. In *Cherry*, the appellant's parole officer received information that the appellant had violated the terms of his parole by residing with another parolee, who was subject to the supervision of another parole officer. Both parole officers, accompanied by a police officer, went to the house where the two parties were said to be residing and, upon entering, discovered a number of firearms and evidence of marijuana use. After the appellant was placed under arrest, his parole officer obtained the assistance of the police officer, who opened appellant's vehicle with the use of a "slim-jim device." The parole officer then searched the vehicle and discovered a weapon, which became the basis of a first degree murder charge against the appellant.

■ Here, the condition of appellant's parole included that he pay certain monthly supervision fees, that he not have in his possession any narcotics except those prescribed by a licensed physician, and that he obey all federal and state laws. The parole officer had a right to inquire of appellant as to his compliance with these conditions. When appellant opened his door, the parole officer smelled the strong odor of marijuana and observed a partially smoked marijuana cigarette lying in plain view. We cannot conclude that the parole officer did not have reasonable grounds to investigate these violations.

■ Nor can we conclude that the search was not conducted by the parole officer. In *Cherry*, it was declared that a parole officer may enlist the aid of the police, and a police officer may act

at the direction of the parole officer without overreaching the scope of the search. *See also Griffin* v. *Wisconsin, supra.* Here, the parole officer asked Officer Gray to assist him in his investigation. Officer Gray testified that she was unaware of the authority of the parole officer to search appellant's residence without a warrant until she was asked to accompany the parole officer. The parole officer testified that he was the first person to discover the marijuana lying in an ashtray in the living room. He testified that both officers entered the bedroom where the quantity of contraband was discovered. We find no evidence that compels the conclusion that the parole officer was not conducting the investigation or that Officer Gray was doing more than assisting him.

From our review of the record, we cannot conclude from the totality of the circumstances that the trial court erred in denying appellant's motion to suppress.

Affirmed.

JENNINGS, and COOPER, JJ., agree.

Reynaldo MEEKINS *v.* STATE of Arkansas

CA CR 90-81 806 S.W.2d 9

Court of Appeals of Arkansas
En Banc
Opinion delivered March 20, 1991
[Supplemental Opinion on Denial of Rehearing April 10, 1991.]

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

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

GEORGE K. CRACRAFT, Chief Judge. Reynaldo Meekins appeals from his conviction of delivery of a controlled substance for which he was sentenced as a habitual offender to twenty years in the Arkansas Department of Correction. He contends that the trial court erred in refusing to grant a continuance and that he was denied effective assistance of counsel. We affirm.

Prior to trial, the prosecuting attorney advised the trial court that it had been brought to his attention that appellant possibly was intoxicated. The prosecutor stated that a breathalyzer test had just been conducted by two police officers and that appellant had registered .19 percent blood alcohol. The prosecutor indicated that he would object to a continuance because, based on his observations of appellant and appellant's conversations with the officers, appellant appeared to be coherent and able to assist attorney in his defense.

Appellant's counsel moved for a continuance, stating that since appellant registered .19 on the breathalyzer test, he was unable to help pick a jury or go through the rigors of a trial. Counsel admitted, however, that he had not spoken to appellant since the night before and "I fully defer to the [prosecuting attorney] and the police officers, if they say he can respond effectively, I'll go with that. But, I personally have no knowledge as to whether he can talk to me or aid me this morning."

The trial judge then called the two officers to the bench and they testified as follows:

> MR. VINES: Yes, sir, he run .19 percent on the breathalyzer. I've asked him his name and his address and his date of birth and he has responded to the four questions. He tells me he's fine and whatever, and he you know, and I asked him to bring — up here and let the Judge ask his name and address and date of birth, and he's give it probably right back to you. He has so far. His rights was read and he understood and did sign his rights for his breathalyzer at the City Police Department.
>
> [PROSECUTING ATTORNEY]: I'll ask Mr. Porter the same questions. Sir, were you involved in transportation of Mr. Meekins to and from the City for the breathalyzer test?
>
> MR. PORTER: Yes, sir, we gave him a breathalyzer. The lady hooked the breathalyzer up. She asked him the questions — name, address, how old he was, his date of birth, and he answered her fine. Didn't have any problem. *He acted coherently and knew what was going on.* Matter of fact wanted — there was a detective came in, he talked to him about that he'd remembered seeing him, his name on the subpoena list and all that stuff. *He knows what's going on. He's not out of it. He knows what's going on.*

In light of the officers' testimony, the court denied appellant's request for a continuance, finding that appellant was able to understand the proceedings. The court stated that "if at such time that the Court is convinced that the defendant is unable to understand the proceedings then the Court will take an appropriate action at that time."

Appellant contends that the trial court erred in refusing to grant a continuance, arguing that his sixth amendment rights were violated when he was forced to trial in an intoxicated condition. We agree that a person who is so intoxicated as to be unable to understand the proceedings or effectively participate in his defense ought not to be tried until that incapacity has been removed. *See Taffe* v. *State*, 23 Ark. 36 (1861); Ark. Code Ann. § 5-2-302 (1987). However, we cannot conclude from our review of the record that appellant was in such a condition.

The record reflects that the prosecuting attorney stated, when he first entered the courtroom, that he observed appellant reading a newspaper. Both police officers, who had closely observed appellant, opined that he was not incapacitated, but was coherent and in control of his faculties. Although appellant's counsel initially denied any knowledge of appellant's condition, he failed to renew his motion at any time during the trial, after he had full opportunity to observe and confer with his client.

The record also reflects that, after the State had offered its proof, appellant's counsel announced that, although he had advised appellant that it would not be in his best interest for him to take the witness stand in his own behalf, appellant refused to accept his counsel's advise. The court then questioned appellant to make sure that he knew of his right to remain silent, and appellant insisted that he wished to exercise his right to testify. From our review of the record, we find that appellant's testimony was clear, precise, and candid and that there was nothing to indicate that he was unable to assist in his own defense. Appellant has not pointed out to us, and we have been unable to find, anything in the record indicating action on the part of appellant that would require the trial court to continue the case or declare a mistrial.

We find no merit in appellant's argument that, because his blood alcohol level exceeded .10, we must conclude, based on Ark. Code Ann. § 5-65-103 (1987), that he was too intoxicated to stand trial. That section provides that it is unlawful for any person to operate a motor vehicle if his blood alcohol level is .10 percent or more. It does not declare or imply that a person in such condition is incompetent for any other purposes.

Nor do we find merit in appellant's argument that the

trial court should not have relied entirely on the testimony of the police officers and should have interrogated appellant in person. The trial court did conduct a hearing to determine whether appellant was competent to participate in the trial, interrogating those persons who purportedly had knowledge of appellant's condition and to whose judgment appellant's counsel deferred. Furthermore, the trial court had full opportunity to see and observe appellant throughout the trial. Whether to grant a continuance is within the sound discretion of the trial court and we will not reverse unless there has been an abuse of that discretion. *Parker* v. *State*, 292 Ark. 421, 731 S.W.2d 756 (1987). From our review of the record, we cannot conclude, under the circumstances of this case, that the trial court abused its discretion in refusing to grant a continuance.

Appellant also contends that he was denied effective assistance of counsel. We do not address that issue because it was not properly preserved for appeal by motion for a new trial on that ground. Ark. R. Crim. P. 36.4.

Affirmed.

ROGERS, J., dissents.

JUDITH ROGERS, Judge, dissenting. I respectfully dissent for two reasons. First, I depart with the majority's view that the record does not reflect that the appellant was so intoxicated that he was unable to stand trial. The appellant had registered .19 on a breathalyzer test just before the trial, which is an objective indication of appellant's intoxicated condition. Despite the officer's testimony, the fact that they were even prompted to test the appellant is particularly revealing on this question. I also cannot agree with the characterization of appellant's testimony as being "clear, precise and candid." In my view, his testimony reflects a high degree of confusion, and is replete with instances of contradiction, beyond that normally displayed by a defendant on trial and when subjected to the rigors of cross-examination. On the whole, his testimony was damaging to his defense, in which appellant claimed that the undercover officer had mistaken him for someone else. In this regard, the credibility of the appellant as opposed to that of the officer was crucial. While the majority does not deny that appellant was intoxicated, I believe the record objectively demonstrates that he was so impaired as to be unable

to fully understand the proceedings of or effectively participate in his defense, and that ultimately he was prejudiced by having to go forward with the trial. I cannot improve upon the eloquence of the supreme court in *Taffe* v. *State*, 23 Ark. 36 (1861), wherein it stated:

> If the intoxication of a juror be sufficient cause for discharging a jury: If a court, upon discovering the intoxication of a material witness, should adjourn it till the witness becomes sober, or if necessary, defer the trial a term, certainly the intoxication of a defendant on trial for his liberty should be deferred by the court, upon discovery of the fact during the trial; or if not brought to its notice till a verdict was rendered, that should be set aside.

Id. at 38. (citations omitted.)

Secondly, rather than relying on the subjective impressions of the police officers who testified, I believe that the better course for the trial court, when confronted with this question, would be to examine the defendant personally in order to evaluate his fitness to stand trial. To await the progress of trial for decision on this matter, without first addressing the defendant, is akin to putting the cart before the horse, so to speak. In sum, I believe that the trial court should have granted appellant's motion for a continuance, and that this cause should be reversed and remanded for a new trial.

SUPPLEMENTAL OPINION ON DENIAL ON REHEARING
APRIL 10, 1991

Darrell F. Brown and Assoc., by: *David O. Bowden*, for appellant.

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

PER CURIAM. Appellant has filed this petition for rehearing contending that our original opinion is flawed. He argues that we erred in holding that he had failed to preserve the issue of ineffective assistance of counsel since, he argues, "the record is devoid of any proceeding on the record indicating that the personal advisment [sic] of the appellant as to his right to allege ineffective assistance of counsel was ever carried out by the trial court." *See* Ark. R. Crim. P. 36.4. We deny the petition.

Initially, we note that appellant failed to raise any such alleged failure by the trial court in either his original brief or his reply brief, despite the State's contention in its brief that he had failed to preserve the issue of ineffective assistance.

In any event, we find that the record does show that appellant was informed of his rights under Rule 36.4. That rule requires that the admonition as to ineffective assistance of counsel be given at the time sentence is imposed. Here, the record furnished us ends with the reading of the jury's verdict. It does not contain a transcript of appellant's formal sentencing by the court. However, the judgment and commitment order recites that appellant appeared before the court personally and through his attorney and was informed of both his right to appeal and his right to assert ineffective assistance of counsel. Under these circumstances, in the absence of something in the record showing the contrary, it will be presumed that the court did its duty according to the rule and as recited in the order. *See Coleman* v. *State*, 257 Ark. 538, 518 S.W.2d 487 (1975).

Thelma Jean SMITH *v.* STATE of Arkansas

CA CR 90-135 805 S.W.2d 663

Court of Appeals of Arkansas
En Banc
Opinion delivered March 20, 1991
[Rehearing denied April 24, 1991.]

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

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

GEORGE K. CRACRAFT, Chief Judge. Thelma Jean Smith appeals from her conviction of delivery of a controlled substance for which she was sentenced to three years in the Arkansas Department of Correction and fined $10,000.00. The sole issue on appeal is whether the trial court erred in refusing to instruct the jury on the affirmative defense of entrapment. We find no error and affirm.

At trial, the State offered evidence that on two occasions Donnie Harris, a confidential informant operating with police officer Brad Bennett, obtained marijuana from appellant at her home in exchange for money. The officer testified that on both occasions he had searched Harris to make certain that he had no money or marijuana on his person prior to the controlled buy. He stated that on one occasion he gave Harris $25.00, drove him to the vicinity of the appellant's residence, and watched him enter the house, and that Harris returned without the $25.00 and delivered to him a bag of marijuana. He testified that on the

second occasion Harris was given $55.00 and the same procedure was followed. He testified that Harris went into appellant's house, returned without the $55.00, and delivered to him a bag of marijuana.

Harris testified that he first met appellant at a club in Russellville and that he saw several times thereafter before there was any conversation about drugs. He testified that the first time drugs were mentioned was when he was at appellant's residence and he asked appellant's friend if she knew where he could get some marijuana. Harris stated that appellant replied that she "could get it." Harris testified that he later returned with Officer Bennett and purchased some marijuana. He further testified that he had purchased some marijuana from appellant on a subsequent occasion for fifty or fifty-five dollars. He added that, on that occasion, appellant handed him a bag of marijuana from her refrigerator and he handed her the money. According to Harris, he had visited appellant's residence "a dozen times or so" and that they were just acquaintances.

Appellant testified and denied that she had sold marijuana to Harris. She stated that on one occasion she had given Harris some marijuana but that she did not receive any money in exchange for it. She testified that she had obtained the marijuana from her nephew many years before and that it had been in her freezer. Appellant stated: "I gave it to Mr. Harris. I did not take any money from him." She testified that on one occasion Harris had given her some money but that it was in payment of a debt and not in exchange for contraband. Appellant denied ever having given marijuana to Harris on any other occasion. Appellant further testified that she had seen Harris at least fifty times and that he had asked her to marry him. She stated that, although she did like Harris at first, they never had an affair and she was not interested in him.

The trial court refused to give appellant's proffered instruction on entrapment because appellant denied that she had received anything of value in exchange for the admitted delivery of marijuana and that she was involved in any other delivery. Appellant was found guilty of one count of delivery of a controlled substance.

Appellant contends that the trial court erred in refusing to

instruct the jury on the affirmative defense of entrapment. We do not agree. "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance in exchange for money or anything of value. Ark. Code Ann. § 5-64-101(f) (Supp. 1989). Arkansas Code Annotated § 5-2-209 (1987) provides that entrapment occurs when an officer, or any person acting in cooperation with him, induces the commission of an 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.

On several occasions our courts have had the opportunity to consider the affirmative defense of entrapment, and have held that when it is invoked it is necessarily assumed that the act charged was committed. *See Fight* v. *State*, 254 Ark. 927, 497 S.W.2d 262 (1973). Where a defendant insists that he did not commit the acts he is charged with, one of the bases of the entrapment defense is absent and he is not entitled to that defense. *Robinson* v. *State*, 255 Ark. 893, 503 S.W.2d 883 (1974); *Brown* v. *State*, 248 Ark. 561, 453 S.W.2d 50 (1970). As appellant denied that she accepted money or anything of value in exchange for the marijuana that she delivered to Harris, we cannot conclude that the trial court erred in refusing to give an entrapment instruction.

In *Morris* v. *State*, 300 Ark. 340, 779 S.W.2d 526 (1989), our supreme court recognized that the federal courts had adopted the rule that, even if a defendant denies one or more elements of the crime, he is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment. *See Mathews* v. *United States*, 485 U.S. 58 (1988). In *Morris*, the defendant denied that he had sold marijuana to an undercover agent and the trial court denied his requested instruction on entrapment. Affirming the trial court, the supreme court stated that it was not bound to follow *Mathews* because that case involved the construction of federal procedural law and that, in any event, there was no evidence from which the jury could have found entrapment. In dicta, the court in *Morris* stated:

> [W]e can think of at least two situations where our prior

> cases and *Mathews* would conflict: (1) when the accused denies committing the offense charged, but the prosecution's case-in-chief includes substantial evidence of entrapment; and
>
> (2) when the accused is charged with conspiracy, but denies being party to the conspiracy, and claims that any overt acts done by him were the result of entrapment. Neither of these cases are before us, and we will save the resolution of the issue until we have such a case.

300 Ark. at 342, 779 S.W.2d at 527.

Appellant argues that we should depart from the established law in *Robinson*, *Fight*, and *Brown* and follow *Mathews*. We decline to do so for two reasons. First, we are bound to follow the existing rule. Any such departure should be made by the supreme court rather than the court of appeals as we do not consider it within our province to do so. Secondly, neither of the two situations in which the court in *Morris* noted that our prior cases and *Mathews* would conflict are present here.

Affirmed.

JENNINGS and ROGERS, JJ., dissent.

JOHN E. JENNINGS, Judge, dissenting. From a reading of *Morris* v. *State*, 300 Ark. 340, 779 S.W.2d 526 (1989), it appears imminent that the Arkansas Supreme Court will elect to adopt the rule stated by the United States Supreme Court in *Mathews* v. *United States*, 485 U.S. 58 (1988), i.e., that a defendant may be entitled to an instruction on the defense of entrapment even if he denies one or more elements of the offense. In the case at bar it is unnecessary for us to decide whether to anticipate that change because even under prior law, on these facts, an instruction on entrapment should have been given. It is clear that a defendant need not plead guilty in order to obtain the instruction. *See Brown* v. *State*, 248 Ark. 561, 453 S.W.2d 50 (1970); *Rodriguez* v. *United States*, 227 F.2d 912 (5th Cir. 1955). The court in *Brown* did quote *Rodriguez* for the proposition that the defense on entrapment is unavailable to a defendant who denies the *acts* charged. *Brown*, 248 at 564. In *Brown* the defendant denied any connection with, or knowledge of, the drugs. In *Robinson* v. *State*, 255 Ark. 893, 503 S.W.2d 883 (1974), the defendant's only

witness testified that the material the defendant had given to the police officer was not cocaine, but merely aspirin.

The case at bar is substantially different. Appellant admitted giving marijuana to the confidential informant and admitted receiving money from him. In my view this was a sufficient admission of the "acts" charged to entitle the appellant to a jury instruction on entrapment, despite her contention that the money was not received in exchange for the marijuana. A judicial confession is not prerequisite to the giving of the instruction.

Finally, I agree with Justice Newbern's view that the giving of the instruction here could do no harm. *See Morris* v. *State*, 300 Ark. 340, 779 S.W.2d 526 (1989) (Newbern, J., concurring).

For these reasons, I respectfully dissent.

ROGERS, J., joins in this dissent.

HAMPTON AND CRAIN, and CNA INSURANCE COMPANIES *v.* Rex BLACK

CA 90-104 806 S.W.2d 21

Court of Appeals of Arkansas
En Banc
Opinion delivered March 20, 1991

Smith, Stroud, McClerkin, Dunn & Nutter, by: *R. David Freeze*, for appellant.

Robert David Trammell, for appellee.

JAMES R. COOPER, Judge. The employer in this workers' compensation case, Hampton and Crain, and its insurance carrier, CNA Insurance Companies, appeal from the Arkansas Workers' Compensation Commission finding that the appellee is entitled to a vocational rehabilitation evaluation. The appellants contend on appeal that the appellee is not entitled to the evaluation because he "has not shown that he is entitled to permanent disability benefits."

When reviewing a decision of the Workers' Compensation Commission, we must 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).

At a hearing held on May 24, 1989, the parties stipulated that a compensable injury occurred on June 25, 1987, and that maximum wage benefits applied. The appellee contended his injury triggered his entitlement to an evaluation as to the propriety of vocational rehabilitation; the appellants contended that the appellee had returned to work; that he did not have a permanent disability; and that he was not entitled to the rehabilitation evaluation.

Arkansas Code Annotated § 11-9-505(a) (1987) provides:

> In addition to benefits otherwise provided for by this chapter, an employee who is entitled to receive compensation benefits for permanent disability shall be paid reasonable expenses of travel and maintenance and other necessary costs of a program of vocational rehabilitation if the commission finds that the program is reasonable in relation to the disability sustained by the employee.

The appellee testified that he was a carpenter who primarily did finish work and cabinet building. He said he was cutting tie wires when a piece of steel hit him in the left eye, and he is no

longer able to do finish carpentry work although he can still do rough carpentry. He testified that he is left-handed and because of the injury to his left eye he "couldn't hit a nail or nothing else." He said he has blurred vision and the sun irritates his eyes; because of his poor eyesight, he leaves cracks in window casings "you could stick a match through"; he "miscuts" lumber and other materials: and he built one house three inches "out of plumb." The appellee said he was afraid Hampton and Crain would lay him off so he got a release from his doctor and went back to work; however, he "couldn't drive a nail, couldn't do nothing." So, he said he would have to wait until his eye got better. He insisted he was an expert carpenter before his injury but now "people don't come to me no more, you know, wanting me to do the work."

On cross-examination the appellee testified that prior to his injury he had made $11.00 or $12.00 an hour. Since the injury, he had worked in Shreveport and made $6.00 an hour building screened porches on each end of an old house; had made $10.00 an hour helping to build two houses; and had also worked at a chemical plant in El Dorado as a journeyman carpenter making union scale of $12.35 an hour.

In a letter dated August 10, 1987, Dr. John Williamson, an opthalmologist, reported:

> Mr. Black was seen on 6-26-87 with a history of sustaining an injury to his left eye.
>
> . . . .He had a large metallic foreign body located in the central portion of his left cornea which appeared to have been present for a number of days. The foreign body was removed without difficulty, however, there was a considerable amount of rust staining of the cornea stroma, the majority of which was removed. . . .
>
> He was last seen on 7-24-87, visual acuity was 20/25 and 20/30. He does have some scar related to the injury in his central cornea, however, no surgery is anticipated.

In another letter dated June 3, 1988, Dr. Williamson wrote:

> [Appellee] has some residual scarring and some continued complaints of photophobia, however, functionally his vi-

sion is quite good.

No other treatment is anticipated and since his vision is almost to normal he has not been carried as sustaining any permanent disability.

On July 6, 1988, Dr. Williamson wrote:

Mr. Black was back in the office on July 6, 1988, at your request.

His vision in the right eye is 20/15, vision in the left eye is 20/30. He continues to have a scar on his left cornea from his previous injury.

His disability is still quite small. I would not recommend a corneal transplant on the basis of the size of the scar and with 20/30 vision I think it would be ill advised to pursue any additional treatment at the present time.

If his vision should deteriorate in the left eye, then we can always hold in reserve the fact that he could have a corneal transplant but his vision should be substantially worse than 20/30 before that is indicated.

Subsequently, appellee was examined by another ophthalmologist, Dr. Cliff Clifton, who reported on December 8, 1988, as follows:

I saw Rex Black on December 5, 1988 with a history of having a foreign body removed form his left eye approximately one year ago.

On my examination his visual acuity was 20/15 in the right eye and 20/30 in the left eye. His examination revealed a corneal scar just in the inferior portion of the pupillary axis of the left eye.

I agree with Dr. John Williamson that this represents a very small decrease in his vision. However, it did occur to his left eye which is his dominant eye and makes it a more difficult adjustment. I do not feel that this defect will increase with time and I do not recommend corneal transplantation which would be the only treatment. It would be very difficult to attach a percentage of disability to this defect. However, I would estimate it at least less

than 5% of one eye.

We do not agree with the appellants' argument that the appellee is not entitled to a vocational rehabilitation evaluation because he is not entitled to permanent disability benefits. We first note that Ark. Code Ann. § 11-9-505(a), *supra*, does not require that permanent disability benefits be awarded a claimant before he can have vocational rehabilitation but only that he be "entitled to receive compensation benefits for a permanent disability." The opinion of the administrative law judge found:

> That the claimant has sustained vision loss in his left eye, as a result of the compensable injury, *as well as some degree of permanent impairment.*
>
> That the claimant is a finish carpenter by profession, left-handed and sustained vision loss in his dominant eye; and, as a consequence of his compensable injury and resulting vision loss as well as permanent partial impairment, claimant's job performance and employability has been adversely affected. [Emphasis added.]

The law judge's findings were adopted by the full Commission and we think there is substantial evidence to support the Commission's action. We also note that in *Smelser* v. *S.H.&J. Drilling Corp.*, 267 Ark. 996, 593 S.W.2d 61 (Ark. App. 1980), we said:

> Whether or not an injured employee can be retrained is a pertinent factor for the Commission to consider in determining the amount, if any, of wage earning loss. If no rehabilitative evaluation is made the Commission has no way of knowing whether the employee could have been retrained.

267 Ark. At 998. Also, in *Coosenberry* v. *McCroskey Sheet Metal*, 6 Ark. App. 177, 639 S.W.2d 518 (1982), we said that while Ark. Stat. Ann. § 81-1310 (now Ark. Code Ann. § 11-9-506) does not specifically mention evaluation reports, it does provide for the Commission to determine if a proposed program of vocational rehabilitation is reasonable in relation to the disability sustained by the employee, but "the Commission must first decide if the claimant is a candidate for rehabilitation."

In the present case, the appellee's loss of vision is a scheduled injury, and under Ark. Code Ann. § 11-9-521(f) (1987), he would be entitled to compensation for the proportionate loss of use of his injured eye. However, the benefits for scheduled injuries are not limited to the schedule if the injury renders the employee permanently and totally disabled. *Johnson Construction Co.* v. *Noble*, 257 Ark. 957, 521 S.W.2d 63 (1975). Therefore, we do not think the Commission erred in ordering the vocational rehabilitation examination. Even if the appellee is not totally disabled, he may be entitled to enter a program of vocational rehabilitation under the provisions of Ark. Code Ann. § 11-9-505 (1987), which allows rehabilitation where a claimant is entitled to benefits for permanent disability and the program is reasonable in relation to the disability sustained. Here, there is evidence that the appellee has not had steady work since his injury. As we said in *Smelser, supra*, without an evaluation the Commission has no way of knowing whether the appellee can be retrained.

Although the parties have not questioned whether the order here is appealable, this is a matter which arose in our conference. We may raise the issue on our own motion. *See Gina Marie Farms* v. *Jones*, 28 Ark. App. 90, 770 S.W.2d 680(1989). We will dismiss an appeal on our own motion in cases where we realize that there is no final, appealable order. *Gina Marie Farms* v. *Jones, supra*. For an order to be final, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy, putting the court's directive into execution and ending the litigation or a separable branch of it. *Id.* We think it significant that the Commission's order did not merely establish the appellee's right to a vocational rehabilitation examination: In addition, the appellee was awarded benefits under Ark. Code Ann. § 11-9-505(d) (1987), which provides that:

> In addition to the benefits previously enumerated in this section, an employee, if not working or receiving other weekly benefits under this chapter, shall be entitled to payment of his regular weekly benefit rate commencing on the date a request for a rehabilitation program is received by the commission, carrier, or employer and continuing during the period the parties are exploring rehabilitation

potential, the period not to exceed six (6) weeks.

While we express no opinion concerning the appealability of an order granting a vocational rehabilitation examination where benefits under § 11-9-505(d) are not awarded, we hold that an order granting both a rehabilitation examination and benefits under § 11-9-505(d) ends a separable branch of the litigation and is therefore appealable.

Affirmed.

MAYFIELD, J., concurs.

JENNINGS, J., dissents.

DANIELSON, J., not participating.

MELVIN MAYFIELD, Judge, concurring. All attorneys who practice workers' compensation law should take special note of this case, at least to the extent that it deals with what is an appealable order in cases sought to be appealed from the Commission. Suppose you represented one of the parties in the instant case and concluded, as the dissenting opinion does, that the Commission's order was not an appealable order. Would the majority of this court allow you to appeal the Commission's order at some later date?

As stated in my concurrence in *American Mutual Ins. Co.* v. *Argonaut Ins. Co.*, 33 Ark. App. 82, 801 S.W.2d 55 (1991), what is needed is a "bright-line" rule by which attorneys may determine whether an order of the Commission is or is not appealable. I thought this need might have been substantially met by that case, which was decided by the court en banc without a dissent. The majority opinion stated the "general rule" as follows: "To be final, the order must dismiss the parties from the court, discharge them from the action, or conclude their rights as to the subject matter in controversy." The opinion then made a significant contribution by stating, "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." 33 Ark. App. at 84. That *test* is the rule that *Gina Marie Farms* v. *Jones*, 28 Ark. App. 90, 770 S.W.2d 680 (1989), said should be added to the "general rule."

Today, however, even though the majority opinion in the instant case sets out a rule of finality which combines the general rule and the additional language used in *Gina Marie Farms*, the opinion clouds the matter by stating in the last paragraph that "we express no opinion concerning the appealability of an order granting a vocational rehabilitation examination where benefits under [Ark. Code Ann.] § 11-9-505(d) are not awarded." Moreover, the dissenting opinion appears to recede from the unanimous per curiam opinion in *Gina Marie Farms* and from the en banc opinion in *American Mutual Ins. Co.* v. *Argonaut Ins. Co.*, which was adopted without dissent.

As to the dissenting opinion in the instant case, I would point out that it overlooks the language in *Festinger* v. *Kantor*, 264 Ark. 275, 571 S.W.2d 82 (1978), where the Arkansas Supreme Court said:

> The test of finality, however, is not whether the order settles the issue of title as a question of law. To be final the decree must also put the court's directive into execution, ending the litigation or a separable branch of it. On this controlling point Chief Justice Cockrill's entire opinion in *Davie* v. *Davie*, 52 Ark. 224, 12 S.W. 558, 20 Am. St. Rep. 170 (1889), is applicable, . . .

264 Ark. at 277. We relied upon that language in *Gina Marie Farms* when we said:

> In *Festinger* v. *Kantor*, 264 Ark. 275, 571 S.W.2d 82 (1978), the court extracted from the early case of *Davie* v. *Davie*, 52 Ark. 224, 12 S.W. 558 (1889), the rule—"To be final the decree must also put the court's directive into execution, ending the litigation or a separable branch of it." 264 Ark. at 277.

28 Ark. App. at 94. Whether the dissent in the instant case makes a distinction between the words "severable" and "separable" is not clear; however, in *Festinger* our supreme court used the word "separable" in describing what is necessary for an order to be final and appealable. Also, the opinion in *Gina Marie Farms*, which relies upon the test of finality set out in *Festinger*, adequately explains, in my view, the cases discussed in *Gina Marie Farms*. Obviously, other explanations are possible. But I

believe this court should settle as nearly as possible on a rule or test that will serve as a bright-line for future guidance of the bar and any others interested in this issue. Therefore, I agree with the result reached by the majority on the issue before us, and I agree with the following rule stated by the majority opinion.

> For an order to be final, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy, putting the court's directive into execution and ending the litigation or a separable branch of it.

Of course, it is true that all judges on a multijudge court will not always agree on the application of any rule under all the different circumstances in which the issue may arise. Personally, I wish the majority opinion in this case had not stated that "we express no opinion concerning the appealability of an order granting a vocational rehabilitation examination where benefits under [Ark. Code Ann.] § 11-9-505(d) are not awarded." So, even if a majority of the members of this court are now in agreement with the rule or test of a final order as set out in today's majority opinion, this does not mean that a majority of the judges of this court will agree with the attorneys as to the finality of every order sought to be appealed. In *Stafford* v. *Diamond Construction Co.*, 31 Ark. App. 215, 793 S.W.2d 109 (1990), the attorneys on both sides thought the Commission's order was appealable but a majority of this court did not agree. I think this is an important point to remember. I know of no case which holds that the failure to appeal from an order because an attorney did not think it was appealable is a reason or excuse which will allow the appellate court to review the order at a latter date.

Therefore, I suggest it is better to have an appeal dismissed because there is no final, appealable order than to have an appeal dismissed because the appeal was not taken in time. In *Stafford*, the employer's insurance carrier filed a motion to dismiss the claimant's appeal even though the carrier thought the better rule was to allow the appeal. But the motion to dismiss was allowed and neither party had to file a brief on the merits of the appeal and neither party was foreclosed from raising the issue again after a final, appealable order has been entered.

JOHN E. JENNINGS, Judge, dissenting. While I have no

quarrel with the treatment of the substantive issues presented, I cannot agree that the order is appealable. The idea that an order ending a "severable branch" of the litigation is appealable began as dicta in *Davie* v. *Davie*, 52 Ark. 224, 12 S.W. 558 (1889). In *Parker* v. *Murray*, 221 Ark. 554, 254 S.W.2d 468 (1953), the supreme court held that an order was appealable "where a distinct and several branch of the case is finally determined, although the suit is not ended." (Quoting *Davie* v. *Davie, supra.*) While I do not disagree with the concept, I do not think that it will be very often helpful in determining the question of the appealability of an order. In the case at bar the question we are asked to determine is certainly a separate issue, but it is not, in my view, a severable branch of the litigation.

Workers' compensation cases are different from cases appealed from trial courts. Sometimes, appeals are allowed in workers' compensation cases even though the litigation before the Commission has not come to and end. *See, e.g., Bibler Brothers, Inc.* v. *Ingram*, 266 Ark. 969, 587 S.W.2d 841 (1979); *Luker* v. *Reynolds Metals Co.*, 244 Ark. 1088, 428 S.W.2d 45 (1968). These kinds of cases, in my view, can be better explained using other reasoning. The supreme court has held that a judgment is final and appealable if it, in form or effect, operates to divest some right so as to put it beyond the power of the court to place the parties in their former condition. *See Allred* v. *National Old Line Ins. Co.*, 245 Ark. 893, 435 S.W.2d 104 (1968). The court has also looked to see whether the appellant would suffer injury by awaiting the termination of the litigation. *Sennett* v. *Walker*, 92 Ark. 607, 123 S.W. 769 (1990). Appeals may be allowed to prevent irreparable injury pending suit. *See Orem* v. *Moore*, 224 Ark. 146, 272 S.W.2d 60 (1954).

When we permit the appeal of separate issues as the case below progresses we encourage piecemeal litigation. "Cases cannot be tried by piecemeal, and one cannot delay the final adjudication of a cause by appealing from the separate order of the court as the cause progresses." *H.E. McConnell & Son*, v. *Sadle*, 248 Ark. 1182, 455 S.W.2d 880 (1970) (quoting *McPherson* v. *Consolidated Casualty Co.*, 105 Ark. 324, 151 S.W. 283 (1912)). The reason for the general rule limiting the right of appeal to final judgments is to prevent the unnecessary expense and delay to the litigants of repeated appeals. *See State* v.

Greenville Stone & Gravel Co., 122 Ark. 151, 182 S.W. 555 (1916); *Davie* v. *Davie*, 52 Ark. 224, 12 S.W. 558 (1889).

I think we should heed our own admonition and follow the better practice of reviewing only orders of the Commission that are final. *See Gina Marie Farms* v. *Jones*, 28 Ark. App. 90, 770 S.W.2d 680 (1989).

I respectfully dissent.

INTERNATIONAL PAPER COMPANY *v.*
Samuel C. WILSON

CA 90-249 805 S.W.2d 668

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

Shackleford, Shackleford & Phillips, P. A., by: *Norwood Phillips*, for appellant.

Anderson & Swindoll, by: *Art Anderson*, for appellee.

JOHN E. JENNINGS, Judge. On April 24, 1984, appellee Samuel Wilson sustained an admittedly compensable injury while employed with International Paper Company. His leg was crushed in a paper machine manufactured by Beloit Corporation. The leg had to be amputated.

Wilson filed a workers' compensation claim and International Paper has paid more than $100,000.00 in benefits, including more than $60,000.00 for medical expenses. Wilson sued Beloit Corporation in federal court, alleging liability in tort. He joined International Paper as a defendant on the theory that it was negligent in misplacing some of the machine parts. Appellee and Beloit Corporation reached an agreement to settle their lawsuit for $50,000.00, and Wilson petitioned the Commission for approval of the settlement pursuant to Ark. Code Ann. § 11-9-410(c) (1987). International Paper opposed the settlement as inadequate.

The issue was submitted to the administrative law judge on a stipulation of facts along with affidavits from Wilson and Wilson's attorney. The parties also stipulated what the testimony of attorney Robert C. Compton would be were he to be called as a witness by International Paper. The ALJ approved the settlement and the full Commission affirmed and adopted his decision.

On appeal to this court International Paper contends that the Commission erred in considering the affidavit of Wilson's attorney and erred in approving the proposed settlement. We affirm the Commission's decision.

The stipulation of facts submitted to the administrative law judge stated the circumstances of the accident, the nature of the injury, and the amount of compensation benefits paid. It recited procedural facts relating to the action in federal court and stated that "[c]ertain machine parts . . . which resulted in this accident . . . are no longer available." The stipulation also noted that settlement would not effect the subrogation claim of International Paper against Beloit Corporation. The petition for approval of the settlement, signed by appellee's counsel, stated that approval of the petition would be in the best interest of the claimant, that Beloit Corporation was vigorously denying liability, and that there was a high probability that Wilson's claim against Beloit Corporation would not be successful, particularly in view of the missing physical evidence.

Samuel Wilson filed an affidavit in support of his petition. The affidavit stated in part:

> 4. I also filed a claim against my employer, the respondent International Paper Company, in the same federal court lawsuit, alleging that respondent destroyed, lost or misplaced parts of the machine that injured me.
>
> 5. My attorneys have informed me that the absence of the machine parts has damaged my case against Beloit Corporation.
>
> 6. My attorneys have investigated this case for several years and have employed the firm of Sene, Kelsey & Associates, St. Louis, Missouri, to examine the machine and offer expert opinion as to the feasibility or lack thereof of my case against Beloit Corporation.
>
> . . . .
>
> 8. Due to the absence of the machine parts because of International Paper Company's destruction, loss or misplacement of them, I concur that my case against Beloit Corporation has been irreparably damaged.
>
> 9. My attorneys have not exerted any influence over me to settle this case, but have advised me fully of the likelihood of not prevailing in my lawsuit against Beloit Corporation and have left any settlement decision com-

pletely to me. I have, of my own accord, decided that this settlement of $50,000.00 is what I want. I believe it is in my best interest, and I have instructed my attorneys to accept it for me.

10. I ask this Commission to approve my proposed settlement with Beloit Corporation, because I do believe that it is in my best interests.

The appellee's attorney, Art Anderson, also filed an affidavit which stated in pertinent part:

2. I have conducted extensive investigation and discovery concerning the feasibility of claimant's lawsuit against Beloit Corporation for the accident of April 24, 1984, which injured claimant. I have personally examined the machine in question on two occasions. I retained the services of the engineering firm of Sene, Kelsey & Associates, St. Louis, Missouri, to examine the machine and to offer expert opinion as to the feasibility or lack thereof of claimant's case against Beloit Corporation.

3. Based on the investigation and discovery I have conducted, I am now of the opinion, and have been for some time, that the federal court case against Beloit Corporation will most likely not be won if taken to trial.

4. I am of the opinion that the loss or destruction of the bolts by International Paper Company is a factor which weighs heavily against a successful outcome in this case in that the bolts in question constitute the component of the machine which experienced fatigue sufficient to cause their being fractured or sheared, which, in turn, resulted in claimant's injury.

5. I am of the opinion that a better case exists on behalf of claimant against International Paper Company for the loss of destruction of those bolts which constituted essential evidence in his case against Beloit Corporation.

6. I have fully discussed on numerous occasions with claimant and his wife the intricacies of the problems relating to the case against Beloit Corporation; and, after discussing all options and alternatives with claimant and

his wife in this regard, I have left the final decision in the matter up to them. They have decided to take the settlement; and I believe that to be a wise decision.

7. The settlement offer with Beloit Corporation that claimant has instructed me to accept is one arrived at after months of intermittent negotiation, and I believe this settlement is in the best interest of the claimant.

The parties stipulated that if Mr. Compton were called as a witness by International Paper, his testimony would be that in his opinion the loss of machine parts was immaterial, that a "good and valid cause of action" exists against Beloit Corporation, and that from his review of the medical data the proposed settlement would be inadequate.

Rule 3.7 of the Model Rules of Professional Conduct reads as follows:

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.

In this regard, the administrative law judge stated, in an opinion subsequently adopted by the full Commission:

> Both parties have adequately argued their respective positions regarding the affidavit of claimant's attorney being considered as a part of this record. After a thorough consideration of the arguments of the parties, I am persuaded that the admonition regarding attorney testimony is inapplicable in the instant cause. Specifically, it is noted that this is an administrative proceeding and not a matter involving a jury trial on the merits of tort cause. Additionally, with the exception of the claimant, claimant's attorney having investigated and worked up the case regarding the lawsuit, and who would be charged with presenting the suit is in the unique posture of knowing the weakness and strength of the claimant's lawsuit, and correspondingly in a posture to provide advice on which an

informed decision can be made by the claimant regarding the proposed settlement. Further, Model Rule of Professional Conduct 3.2 [sic] provides that a lawyer may act as an advocate at a trial in which he is likely to be called as a witness where the disqualification of the lawyer would work a substantial hardship on the client.

In *St. Paul Fire & Marine Ins. Co.* v. *Wood*, 242 Ark. 879, 416 S.W.2d 322 (1967), the Arkansas Supreme Court quoted the Minnesota Court in *Lang* v. *William Bros. Boiler & Mfg. Co.*, 250 Min. 521, 85 N.W.2d 412 (1957) in discussing the policy of the law to encourage compromise settlements:

> While both employer and employee face the risk that the result of the trial will not equal the amounts offered in settlement or the amount which must be paid in compensation, the employee's burden probably is greater than that of the employer in that ordinarily the employee has no great resources upon which to rely if the gamble of a trial fails, whereas the insurer not only has greater resources but the case as to it is only one of many.

It is therefore my opinion, after a thorough consideration of all of the evidence in this matter, that even if the affidavit of claimant's attorney, Mr. Art Anderson, is excluded, that the petition for approval of third-party settlement as amended to include release to all claim which preserves the rights of respondent to proceed against Beloit Corporation, is in the best interest of the claimant and should be approved.

Initially, we must agree with appellant that Rule 3.7 is generally applicable in workers' compensation proceedings. Rule 3.9 establishes certain minimal standard for lawyers representing clients before legislative or administrative tribunals in non-adjudicative proceedings. It does not appear that the rule prohibiting the lawyer from testifying applies in such proceedings. The negative implication of the rule is that the Model Rules are applicable in their entirety in an adjudicative hearing before an administrative agency. Of course, administrative agencies

perform functions associated with all three branches of state government, but in the case at bar the Commission was clearly performed an adjudicative or quasi-judicial function: it was deciding an issue in a case properly before it. The same policy reasons which forbid an attorney to testify in a courtroom trial are present when a lawyer testifies in a hearing before the Commission when the Commission is discharging its quasi-judicial responsibilities. *See generally Ford* v. *State*, 4 Ark. App. 135, 628 S.W.2d 340 (1982). The problem is not cured simply because the attorney testifies in affidavit form. *Bishop* v. *Linkway Stores, Inc.*, 280 Ark. 106, 655 S.W.2d 426 (1983).

Nevertheless, we affirm the Commission's decision. As the comment to Rule 3.7 states, it may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof. In *Liberty Mutual Ins. Co.* v. *Billingsley*, 256 Ark. 947, 511 S.W.2d 476 (1974), a workers' compensation claimant sought approval of a proposed settlement against a third-party tortfeasor. The supreme court noted that at the hearing the claimant's attorney explained the seriousness of his client's injuries, the possibility that his client might recover nothing if the case went to trial, and their desire to accept the settlement. This is essentially what counsel did in the case at bar: he was functioning more as an advocate than as a witness. To the extent that the affidavit touches on matters of fact, those facts do not seem to be contested. The affidavit expresses the lawyer's sense of the lawsuit's possible success. The administrative law judge also noted the exception in the Rule where disqualification would work a substantial hardship on the client. Balancing the claimant's interest against the potential prejudice to the opposing party, the ALJ's conclusion that disqualification was not warranted is supportable.

Appellant's second argument is that the Commission erred in approving the settlement. Clearly, the statute does not afford the carrier the right to veto any compromise not to its liking. *Liberty Mutual Ins. Co.* v. *Billingsley*, 256 Ark. 947, 511 S.W.2d 476 (1974). The issue here is whether the Commission's approval of the settlement constituted an abuse of its discretion. *New Hampshire Ins.* v. *Keller*, 3 Ark. App. 81, 622 S.W.2d 198 (1981). It is the policy of the law to encourage compromise settlements.

> The vice of preventing settlement at all without the consent of the employer or his insurer is that the employee may then be put in a position where, against his will, he must face the uncertainties of a trial.

St. Paul Fire & Marine Ins. Co. v. *Wood*, 242 Ark. 879, 888, 416 S.W.2d 322, 328 (1967) (quoting *Lang* v. *Williams Bros. Boiler & Mfg. Co.*, 250 Minn. 521, 85 N.W.2d 412 (1957)). Each case must be decided on its own facts. *Billingsley, supra.* On the facts of the case at bar we cannot say the Commission abused its discretion in approving a settlement.

Affirmed.

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

Lawrence R. FOX et ux *v.* Noel NALLY

CA 90-231 805 S.W.2d 661

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

Hixon, Cleveland, and Rush, by: *R.H. Buddy Hixon*, for appellants.

Gardner & Hardin, by: *Stephen C. Gardner*, for appellee.

ELIZABETH W. DANIELSON, Judge. The appellants, Lawrence and Betty Fox, executed an oil and gas lease to Diamond Shamrock Corporation, which was subsequently assigned to the appellee/cross-appellant, Noel Nally. The granting clause in the lease gave the appellee the right, among other things, to drill a well and lay pipelines. The appellants and the appellee also executed a "Surface Use Agreement and Damage Release" for the sum of $3,000.

Pursuant to the lease the appellee drilled a natural gas well and laid a pipeline from the well across the appellants' property. The appellants then refused to allow the appellee access to the well by blocking the road leading to the well site. The appellee filed suit to enjoin the appellants from blocking his access to the well. The appellants filed a counterclaim seeking damages for the pipeline construction.

The trial court would not allow evidence as to the permanent nature of the damages caused by the pipeline, but did allow evidence as to the cost of restoration of the land to its prior condition. At the close of the evidence, the court entered judgment for the appellants in the amount of $600.

The appellants contend on appeal they should have been allowed to put on evidence of the permanent damage to their property. The appellee, on cross-appeal, contends the trial court erred in allowing testimony as to the restoration costs since there was a surface use and damage release agreement signed by the parties. We find no error and affirm.

The appellants proffered evidence of the fair market value of their land before and after construction of the pipeline. While this is the correct measure of damages if an injury is permanent, *St. Louis-San Francisco Railway Co.* v. *Friddle*, 237

Ark. 695, 375 S.W.2d 373 (1964), it is not the measure for an injury that is temporary in nature. When injury to real property is temporary, the measure of damages is the cost of restoring the property to the same condition that it was in prior to the injury. *See C.R.T., Inc.* v. *Brown*, 269 Ark. 114, 602 S.W.2d 409 (1980); *Arkansas Western Gas Co.* v. *Foster*, 254 Ark. 14, 491 S.W.2d 380 (1973). Because the appellee's use of the pipeline is limited by the lease provisions and is subject to termination, the damage is temporary in nature and the trial court did not err in refusing to allow evidence of the before and after value of the land.

The appellee contends on cross-appeal that the appellants should not have been allowed to introduce evidence concerning the cost of restoration because the release signed by the parties covered the damages. The appellee had filled in the ditch resulting from the construction, but the appellants testified that the dirt along the pipeline had settled and they had to do additional restoration work at their own cost. The court found that the appellee had a responsibility to restore the property to substantially the same condition that it was in prior to the laying of the pipeline. The $600 award to the appellants for the additional restoration work, which was the responsibility of the appellee, is not an amount coming within the purview of the damages agreement. The court did not err in allowing evidence of the cost of restoration.

Affirmed.

MAYFIELD and ROGERS, JJ., agree.

J. W. STACY, Nan Stacy, and The Great Wall of China Restaurant, Inc. *v.* Hsi-Chi LIN

CA 90-188 806 S.W.2d 15

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

Lyons & Emerson, by: *Jim Lyons*, for appellants.

Barrett, Wheatley, Smith & Deacon, by: *Berl A. Smith*, for appellee.

MELVIN MAYFIELD, Judge. The appellants J.W. Stacy, Nan Stacy, and The Great Wall of China Restaurant, Inc. appeal a judgment of the chancery court that granted specific performance of a contract for the sale of The Great Wall of China Restaurant, Inc. for a price of $40,000.00, and awarded appellee Hsi-Chi Lin damages in the amount of $9,451.00 and attorneys fees.

On September 8, 1989, appellee filed a complaint alleging that on or about August 18, 1989, he entered into a contract with the appellants to purchase the business known as The Great Wall of China Restaurant; that pursuant to the contract, appellee paid appellants $2,000.00 earnest money; that the contract provided that the balance of $38,000.00 was to be paid on August 31 or September 1, 1989; and that on September 1, 1989, appellants refused to accept the balance owed and refused to consummate

the sale of the business. Appellee asked that the court grant specific performance of the contract and award damages for "incurred expense and damage as a result of defendants' failure to timely perform." Appellants answered denying that a binding contract existed between the parties, but alleging in the alternative that should the trial court find a binding agreement was executed it should be for $80,000.00. On September 20, 1989, appellee filed an amended complaint alleging that because of a lease assignment executed by appellants to the appellee on August 28, 1989, he was entitled to possession of the premises upon which the business was located.

There was evidence at trial that two sets of documents were executed by the parties concerning the sale of the business and that each set consisted of two separate documents, one in English and the other in Chinese. (Mr. Lin and Mrs. Stacy speak English and Chinese; Dr. Stacy speaks only English.) Mrs. Stacy testified that her husband wrote the initial document on August 18; that she copied it in Chinese; and that each document was signed on August 18. Under the terms of that agreement, the purchase price was $80,000.00. Dr. Stacy testified that when the appellee came to the house on August 18, it was clearly understood that the appellee was making an offer of $80,000.00 and that half would be paid "above the table" and half "under the table."

On August 27, 1989, the second set of documents was prepared and signed. The English version of the document, signed by Dr. J.W. Stacy, Nan Stacy, and Hsi-Chi Lin, was attached to appellant's complaint and introduced into evidence. It states as follows:

> BUSINESS:: The Great Wall of China Restaurant, Inc.
> Owners: Dr. J. W. Stacy and Mrs. Nan Stacy
> Location: 1509 Market Place, Jonesboro, AR 72401
> Buyer: Mr. Hsi-Chi Lin
>
> Today, August 18, 1989, Mr. Lin gives as ernest money $2,000.00 for purchase of the business for $40,000.00. The business consists of various equipment and fixtures recorded in a list. The purchase price excludes inventory on hand at date of sale.
>
> The deposit of ernest money will be forfeited by Mr. Lin if

> he decides not to buy the business. This deposit guarantees that the owners of the business will not sell the business to anyone other than Mr. Lin.
>
> The balance of $38,000.00 will be paid on August 31 and/ or Sept. 1, and at that time Mr. Lin will own the business completely.

The list of the various equipment and fixtures referred to above, signed by Dr. Stacy and the appellee, was not attached to the complaint but was introduced into evidence.

The appellee testified that the first set of documents represented an agreement to purchase the restaurant and an employee house for $80,000.00; but they changed the "deal" and the second set of documents constituted an agreement to purchase the business alone for $40,000.00. The appellants denied the house was included in either agreement and they testified the purchase price was always $80,000.00. Dr. Stacy testified the $40,000.00 agreement was written because he was afraid appellee might cause Mrs. Stacy to go through with a sale in which half of the purchase price was paid under the table, and he did not want appellee carrying around something which said the sale had been for $80,000.00; that would look bad to the "IRS."

On August 28, 1989, the appellants assigned to the appellee the lease of the land on which the restaurant was located. Dr. Victor Stepka, one of the owners of the land, testified that he, the appellants, and the appellee signed an addendum to the lease assigning it to the appellee. Stepka also testified he collected from the appellee for the September, October, and November rent. The record also contains a letter dated August 18, 1989, from Dr. Stacy to Dr. Stepka which states that "Nan has found a buyer for the restaurant"; that the last time the lease was renewed "we indicated that we would probably sell the restaurant before the lease expired"; and "we agreed that the buyer who assumed the duration of the lease would maintain continuity of the restaurant operation." The letter also stated that appellee had demonstrated he had enough operating capital to continue the restaurant operation without interruption; that appellee was familiar with the restaurant's operation because he worked "a stint here" two years ago; that appellee had arranged for support personnel to arrive in Jonesboro on September 1 to begin working in the

restaurant; and that appellee intends to retain the main chef.

Based upon the evidence and exhibits introduced at trial, and after reviewing briefs submitted by the parties, the trial court made specific findings of fact and conclusions of law in a letter opinion dated November 22, 1989, which was later incorporated by reference into the judgment of the trial court. The court specifically found that the original purchase price was for $80,000.00, which included a house that was appraised at $40,000.00, but that the price was reduced to $40,000.00 for the restaurant without the house. The court also found that the sale of the established and ongoing business constituted a sale subject to specific performance, and that the appellee was entitled to damages in the amount of $9,451.00.

The appellants first argue the trial court erred when it ordered specific performance of a contract for the sale of personal property. Appellants contend the subject matter of the alleged contract was the operational equipment of the business known as "The Great Wall of China Restaurant" and that there was no proof that it was unique.

Equity will not enforce by specific performance a contract relating to personalty unless special or peculiar reasons exist which make it impossible for the injured party to obtain relief by way of damages in an action at law. *Morris* v. *Sparrow*, 225 Ark. 1019, 287 S.W.2d 583 (1956). However, in *Chamber of Commerce of Hot Springs* v. *Barton*, 195 Ark. 274, 112 S.W.2d 619 (1937), the court held that specific performance for the sale of personal property may be decreed under proper conditions. The *Barton* case involved the sale of a radio station; specific performance was allowed by the trial court; and this was affirmed on appeal in an opinion which stated:

> A judgment for a bit of lumber from which a picture frame might be made and also for a small lot of tube paint and a yard of canvas would not compensate one who had purchased a great painting.
>
> By the same token Barton would not be adequately compensated by a judgment for a bit of wire, a steel tower or two, more or less, as the mere instrumentalities of KTHS when he has purchased an organized business,

> including these instrumentalities, worth perhaps not more than one-third of the purchase price. Moreover, he has also contracted for the good will of KTHS which is so intangible as to be incapable of delivery or estimation of value. So the property is unique in character and so far as the contract is capable of enforcement the vendee is entitled to relief.

195 Ark. at 286.

The appellee has also cited the case of *Cochrane* v. *Szpakowski*, 355 Pa. 357, 49 A.2d 692 (1946), which involved the sale of a restaurant and retail liquor business. In that case, the appellees argued that equity was without jurisdiction. The court affirmed the trial court's decree of specific performance on the following reasoning:

> In the instant case, it is obvious that equity does have jurisdiction because a similar restaurant and liquor business to the one in question could not be purchased in the market, and therefore could not be reproduced by money damages. In this connection, the learned chancellor properly said: "The contract involved here is one for the sale of a certain restaurant and liquor dispensing establishment at a definite location, and the possession of the premises on which the same is located. There are no other premises nor is there any other restaurant which is exactly like the one involved here, and it would, for all practical purpose, be impossible for * * * [appellee] to prove what money he would lose if * * * [appellant] were permitted to breach this contract* * *.

49A.2d at 694. *Se also Madariaga* v. *Morris*, 639 S.W.2d 709 (Tex. Ct. App. 1982) (specific performance allowed for sale of business that made and sold Albert's Famous Mexican Hot Sauce). And in 81 C.J.S. *Specific Performance* § 81(b) at 903 (1977) it is said:

> Specific performance of a contract of sale of personality may be available where the subject matter of the sale is a going business, such as an automobile agency, a dry cleaning business, a liquor business, or a restaurant business.

In the instant case, the parties executed a written contract to "purchase the business known as The Great Wall of China Restaurant located at 1509 Market Place Drive, Jonesboro, Arkansas." The contract states that the appellee gave earnest money for "purchase of the business" which deposit guaranteed that the owners would not sell "the business" to anyone else and after payment of the balance appellee will "own the business completely." Shortly after the contract was signed, the appellants executed an assignment to the appellee of the lease on the premises upon which the business was located, and the assignment (which was agreed to by the landlord) states appellee is "purchasing the business that operates on the leased premises." The testimony of Dr. Stacy refers to "the purchase of the restaurant" and buying "this business," and his letter to the landlord states that Mrs. Stacy has found a buyer for the restaurant who could continue it without interruption.

We first point out that the evidence clearly shows that the contract to sell the business in this case involved an agreement to assign the lease of the real property upon which the business was located. In *Dickinson* v. *McKenzie*, 197 Ark. 746, 126 S.W.2d 95 (1939), the court allowed specific performance of an option to extend the time to cut timber. The court said that where land or "any estate or interest in land" is the subject of an agreement, the right to specific performance is absolute. Secondly, even if the contract in the instant case did not involve the transfer of a leasehold interest, we think it would be putting form over substance to say it involved only "the operational equipment of the business." Although it states that "the business consists of various equipment and fixtures recorded in a list," it is clear that the contract—not written by an attorney—was intended to provide for the sale of a "going business." Appellants argue that the cases relied upon by the appellee involved businesses that were in some manner "special" or "unique." However, those cases involved a radio station, a restaurant and liquor business, and a hot sauce business. The general rule as stated in C.J.S., *supra*, indicates that the sale of a "going business" may be subject to specific performance. The cases relied upon by appellee show that specific performance has been granted where the agreement to sell a "going business" included its good will "which is so intangible as to be incapable of delivery or estimation of value,"

Barton, supra; where there was the sale of a business "the value of which cannot be accurately determined in an action at law," *Cochrane, supra*; and where the "plaintiff would not be adequately compensated . . . by an award of money," *Madariaga, supra.*

In the instant case, Dr. Stacy wrote a letter to the agent for the owners of the building in which the restaurant was located and reported that the appellee would "maintain continuity in the restaurant operation" and that appellee "intends to retain main chef, Mr. Wang, whose cooking is so popular here in Jonesboro, in order to insure continuity." Obviously, Dr. Stacy recognized that the sale involved the "good will" of the business. It is argued that the appellee did not testify that the business was unique, but it is not clear from the record that appellee really understood the meaning of the word "unique." However, he did say he wanted to buy the business because he knew it "pretty good." There was also a great deal of evidence introduced in regard to the income and profit of the restaurant. We believe, under all the circumstances, that whether the court should have ordered specific performance of this contract to sell the Great Wall of China Restaurant in Jonesboro, Arkansas, was a question of fact for the chancellor to decide. And when we consider that the contract involved a lease of real property, the continuation of a restaurant under the same name, with the same popular chef, at the same location, and (as we will discuss) that it would be difficult to fix damages for a breach of the contract, we cannot say the judge's decision to grant specific performance was clearly erroneous.

Appellants next argue that the trial court erred in awarding appellee damages in the amount of $5,000.00 for the delay in obtaining possession of the business. The court also allowed appellee $4,451.00 for the three months rent he had paid on the building lease which had been assigned to him. Appellants do not argue that the rent award was erroneous. The trial judge's reasoning with regard to the $5,000.00 award is explained in his letter opinion as follows:

> (5) Plaintiff argues that he is entitled to damages in the amount of $21,700.00. He testified that he paid the owner of the property three months rent or a total of $4,451.00. He then took the tax return of defendants for

> 1988 and calculated their net profit for that year and testified that by reason of being deprived of the business for the three months just past that he has lost $17,250.00 in profit. In making these calculations, plaintiff did not take into consideration a number of factors. . . . There are so many variables in the calculation of his damages for lost profits that the Court is simply unable to arrive at a conclusion based upon what he estimates his damages to be. Plaintiff is entitled to recover damages from defendants because the time of performance has passed and he was ready to pay them the balance due under the contract and they refused to perform. He is certainly entitled to receive the sum of $4,451.00 for rentals. . . . Rather than speculate upon the lost profits, the Court finds the prudent course to take is to award damages based upon a reasonable percentage of the profit less taxes as reflected in the 1988 return of defendants, P-19. The Court concludes that a reasonable amount is the sum of $5,000.00. Plaintiff is, therefore, entitled to recover as damages from defendants the sum of $9,451.00.

Appellants cite *First Service Corporation* v. *Schumacher*, 16 Ark. App. 282, 702 S.W.2d 412 (1985), where we said that a party seeking to recover lost profits must present proof sufficient to remove the question of profits from the realm of speculation and conjecture. In the instant case, appellants point to the trial judge's finding that there are so many variables in the calculation of appellee's damages for lost profits "that the Court is simply unable to arrive at a conclusion" based upon what appellee "estimates" those damages to be. Of course, the difficulty in assessing damages is a reason for granting specific performance. However, in *McCoy Farms, Inc.* v. *J & M McKee*, 263 Ark. 20, 563 S.W.2d 409 (1978), the court said:

> Although, strictly speaking, legal damages are not awarded when specific performance is decreed, a decree should, as nearly as possible, require performance in accordance with the terms of the contact, one of which is the date fixed by it for completion; and, when that date is past, the court, in order to relate the performance back to it, gives the complainant credit for any losses occasioned by the delay.

263 Ark. at 32-33. But in *Miller* v. *Estate of Dawson*, 14 Ark. App. 167, 686 S.W.2d 443 (1985), we said "the money payments to equalize losses occasioned by the delay have been referred to as 'equitable compensation,' and are to be distinguished from damages awarded for breach of contract." We cited *Loveless* v. *Diehl*, 236 Ark. 129, 364 S.W.2d 317 (1963), where, as in the instant case, the seller remained in possession of the premises during the period of delay in performance, and we summarized the holding in *Loveless* as follows:

> In ordering specific performance of the contract the chancellor awarded the purchaser the fair rental value of the land occupied by the seller during the period of delay. On appeal the Supreme Court declared that the chancellor was correct in charging the seller with the rental value of the land where he had retained possession beyond the closing date but should have gone further and charged the purchaser with interest at the legal rate upon the unpaid portion of the purchase price in the same period.

14 Ark. App. at 172.

We, therefore, believe that the trial court was in error in the instant case in attempting to award appellee damages based upon a percentage of lost profits. In both *Loveless* and *Miller*, it was held that where specific performance is granted the purchaser is entitled to damages for delay in obtaining possession of the premises based upon the fair rental value of the property; however, those cases also hold the purchaser must be charged with interest at the legal rate upon any unpaid portion of the purchase price. "To hold otherwise would give the purchaser the use of both the land and the money during the entire period of delay." *Miller*, 214 Ark. App. at 173. As was done in *Loveless* and *Miller*, we think the instant case must be remanded for the amounts of the rental value and interest to be determined "so that the account may be stated in accordance with this opinion and a final decree entered." *Id.*

Finally, appellants contend the trial court erred when it refused to allow Dr. Stacy to testify that appellee's attorney called Dr. Stacy on Tuesday, September 5, 1989, and said appellee would pay $80,000.00 for the restaurant. At trial, during direct examination, Dr. Stacy testified that on Friday afternoon,

just prior to September 5, appellee's attorney had called him and asked whether Dr. Stacy was willing to accept a cashier's check in the amount of $38,000.00 as payment for the restaurant. Dr. Stacy testified that his response was "categorically no"; that the price under discussion from the very beginning was $80,000.00, not $40,000.00. Dr. Stacy said that appellee's attorney then said he would get back with Dr. Stacy and that he had done so with the call that Stacy received on Tuesday, September 5.

At trial, appellants' counsel then asked Dr. Stacy:

> Okay. And, during that conversation tell us what he said concerning Mr. Lin's willingness to pay.

Appellee objected on the basis that the conversation was an offer to compromise and settle and was not admissible. The trial court sustained the objection. At that time appellants made the following proffer: When appellee's counsel called, counsel said appellee wanted "to go ahead and buy the restaurant for $80,000.00," and Dr. Stacy's response was that the probability of selling to the appellee was nearly zero because of the appellee's actions on Friday, September 1 in which appellee tried to get the restaurant for $40,000.00.

Appellants cite *Missouri Pacific Railroad Co.* v. *Arkansas Sheriff's Boys' Ranch*, 280 Ark. 53, 655 S.W.2d 389 (1983), and argue the trial court erred in not admitting this evidence because it was not an offer to compromise, but even so, (1) the evidence was admissible as relevant to the reasonableness of a $40,000.00 purchase price; and (2) was admissible for impeachment purposes to show appellee's claim that the parties agreed upon a value of $40,000.00 was false.

We first note that even if evidence is improperly excluded, error is no longer presumed prejudicial, and unless the appellant demonstrates prejudice accompanying error, we do not reverse. *Peoples Bank & Trust Co.* v. *Wallace*, 290 Ark. 589, 721 S.W.2d 659 (1986). *See also* Ark. R. Evid. Rule 103(a) (no error in admitting or excluding evidence unless a substantial right of a party is affected).

So, even if appellants are correct in the contention that the evidence was admissible to show that a $40,000.00 purchase price was unreasonable, we do not see what difference it makes

since inadequacy of consideration will not preclude a contract between the parties. *Landmark Savings Bank* v. *Weaver-Bailey Contractors, Inc.*, 22 Ark. App. 258, 739 S.W.2d 166 (1987). And as to impeachment, we cannot say that the statement made in appellants' proffer was inconsistent with any statement made by the appellee at trial. At trial appellee testified that the initial agreement for $80,000.00 included the restaurant and a house, and the later agreement for $40,000.00 was for the restaurant only. We simply do not know from appellants' proffer whether the offer to "go ahead and buy the restaurant for $80,000.00" included the house or not.

Therefore, on the record before us, we are satisfied that appellants were not prejudiced by the exclusion of the proffered testimony.

Affirmed as modified and remanded.

ROGERS and DANIELSON, JJ., agree.

CONAGRA FROZEN FOODS, INC. *v.* DIRECTOR OF LABOR, and Jerry Honaker, J.M. Honaker, Jan Honaker and William Reaves

E 89-50 806 S.W.2d 27

Court of Appeals of Arkansas
Division I
Opinion delivered March 27, 1991

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

Allan Pruitt, for appellee's.

MELVIN MAYFIELD, Judge. This is an appeal by ConAgra from a decision of the Arkansas Board of Review holding the appellee-claimants were entitled to unemployment compensation because they were, within the meaning of the Arkansas Employment Security Law, unemployed and not on vacation for the weeks ending June 25 and July 2, 1988.

At a consolidated hearing before the Appeal Tribunal, involving these claimants and 95 other similarly-situated claimants, the appellant's manager of human resources testified that every year since 1971, except for one, the appellant had designated a vacation period during the summer months to coincide with a shutdown of the plant's production. Appellant has the right to do this under its bargaining unit contract. The manager of human resources also testified that it is impossible to schedule individual vacations so the contract provides for a two-week vacation period during the summer to be fixed by appellant. On December 31, 1987, the appellant posted on the employee bulletin board a notice designating the period of June 20, 1988, through July 3, 1988, as the vacation period for 1988. Monday, July 4, 1988, was a paid holiday, therefore, no one returned to work on that day and appellant reopened for production on July 5. Appellees, who worked on the "enchilada line," were scheduled to return to work on July 6 because, according to the appellant, they worked in a preparation area and no enchilada dinners were scheduled for production on July 5.

In a telephone hearing conducted for the Board of Review for the claimants in this case, Jerry Honaker testified on behalf of all these claimants that the cooks must come in and "get us ready" before "my time can start"; that the cooks reported in on July 5 at 11:30 p.m.; and that the claimants started at 5:00 a.m. the next morning. Honaker testified further that they normally work from Monday through Friday, but "a lot of times" they do not come in until Tuesday due to the product that is being run on the line.

The Employment Security Division denied benefits and the Appeal Tribunal affirmed finding that appellees were not unemployed but were on vacation during the period from June 20, 1988, through July 2, 1988. On appeal to the Board of Review, the decision was reversed and appellees were awarded benefits. The Board concluded:

> The evidence does not establish that the first day the claimant was scheduled to return to work after the vacation period was the first work day the claimant would normally have worked after the vacation period. A finding that a claimant was to return to work the first work day that normally would be worked by that claimant after the vacation period ended is necessary to establish that the claimant was on vacation during the vacation period.

In the first place, we do not believe the first sentence of the above conclusion is supported by substantial evidence. The Board's review of the evidence states as to each of the claimants in this case, "A written statement in the record attributable to the claimant on a Claimant's Statement Concerning Vacation form indicates that the claimant was scheduled to report back to work on July 6." The evidence is undisputed that no one worked on Monday, July 4, because it was a holiday. Due to the holiday and the preparation which had to be made by the cooks on July 5, the first day the claimants could have worked was July 6. We see nothing unusual or abnormal about the claimants' return-to-work date. And in the second place, the second sentence of the Board's conclusion, set out above, is not a correct statement of the law. Actually, it is the Board's view of the law, as disclosed by the second statement, that caused the Board to make its first statement. This is shown by the conclusions of the Board, which

immediately follow the conclusions set out above:

> The evidence indicates that such a return is controlled by the employer's production requirements. Therefore, to determine a normal return day, the first day after a weekend should be a significant indication of a normal return day after a vacation period. Otherwise, a normal return day would be subject only to a varying production schedule of the employer.

To understand the Board's conclusions, we need to look at the Arkansas Employment Security Law. Ark. Code Ann. § 11-10-214 (Supp. 1989) provides in pertinent part:

> (a) As used in this chapter, unless the context clearly requires otherwise, an individual shall be deemed "unemployed" with respect to any week during which:
>
> (1) He performs no services; and
>
> (2) No wages are payable to him with respect to that week . . . ; and
>
> (3) He is not on vacation. A "vacation" shall be defined as a period of temporary suspension of regular work, the period having been scheduled by, or with the consent of, the employer solely for reasons of vacation during which time the employee is either receiving vacation pay, has been paid, or will be paid vacation pay for the period at a later date or would be entitled to vacation pay for the period if he had sufficient seniority or hours of work and he is not on layoff. However, an individual who, for the sole purpose of phasing down production, is placed on a short-term layoff of three of his work days, or less, duration immediately preceding a vacation as defined in this subdivision and who is to return to work the first work day that normally would be worked by that employee after the vacation period ends shall be considered to be on vacation during the vacation period.

Here there is evidence that appellant had designated the two-week period as the "designated vacation period" and that no production was scheduled for those two weeks. It is not contended that the claimants did not receive vacation pay for the

two-week period or that they did not receive holiday pay for July 4th. Nor is there any evidence that any of these claimants was placed on a "short-term layoff of three of his work days, or less, duration immediately preceding a vacation." The evidence shows that each of them fits squarely within the definition of being on "vacation" as that term is defined in the above statute. They were on "a period of temporary suspension of regular work, the period having been scheduled by, . . . the employer solely for reasons of vacation during which time the employee is . . . receiving vacation pay . . . and he is not on layoff."

The conclusions to the contrary reached by the Board of Review are explained by the brief filed for the appellee-claimants by the Director of Labor. In that brief it is argued that the Employment Security Law was amended by Act 753 of 1987 to add the last sentence as above quoted from Ark. Code Ann. § 11-10-214, *supra*. The purpose of that sentence, the appellees' brief states, was to add a "phase down" provision. The brief also states:

> It is the Appellees' contention that had the legislature intended for the Employment Security Law to provide for a phase up it would have stated so in the law.

So, it is clear that the Board agreed with the view taken in appellees' brief and simply decided that the legislature intended by its silence that employees who return from vacation must be returned to work immediately without any "phase up" time. To reach this result, however, it is necessary to read language into the law that is not there. It is also necessary to find that the claimants in this case would have gone to work on Monday, July 5, if the plant had not been shut down for the vacation period and that is not supported by substantial evidence. We understand the argument in the appellees' brief that to allow a "phase up" period after a plant has been shut down for a vacation period might conceivably leave workers out of work for several days; however, that is not the situation under the evidence in this case.

The decision of the Board of Review is reversed and this case is remanded with directions for the Board to deny the appellees' claims for unemployment compensation.

Reversed and remanded.

COOPER and DANIELSON, JJ., agree.

Willie HUTCHERSON *v.* STATE of Arkansas

CA CR 90-191 806 S.W.2d 29

Court of Appeals of Arkansas
Division II
Opinion delivered March 27, 1991

William R. Simpson, Jr., Public Defender, *Thomas B. Devine III*, Deputy Public Defender, by: *Didi H. Sallings*, Deputy Public Defender, for appellant.

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

JUDITH ROGERS, Judge. This appeal arose from an incident occurring at Central High School in Little Rock, Arkansas. The appellant was charged by felony information on February 1, 1990, with the following offenses: battery in the first degree, Ark. Code Ann. § 5-13-201 (Supp. 1989); burglary, Ark. Code Ann. § 5-39-201 (1987); possession of a controlled substance (cocaine), Ark. Code Ann. § 5-64-401 (1987); and carrying a weapon, Ark. Code Ann. § 5-73-120 (Supp. 1989). By agreement of the parties and upon approval of the court at an omnibus hearing, the battery and burglary offenses, which are the subject of this appeal, were severed from the other charges. At trial on March 21, 1990, the jury returned verdicts of guilt for first degree battery and burglary, imposing sentences of twenty and ten years, respectively. As his sole point for reversal, the appellant argues that the trial court erred in failing to grant his motions for a

directed verdict. Finding no error in the trial court's decision, we affirm.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Salley* v. *State*, 303 Ark. 278, 796 S.W.2d 335 (1990). In a challenge to the sufficiency of the evidence, the appellate court reviews the evidence in the light most favorable to the appellee and sustains the conviction if there is any substantial evidence to support it. *See Abdullah* v. *State*, 301 Ark. 235, 783 S.W.2d 58 (1990). Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. *Williams* v. *State*, 298 Ark. 484, 768 S.W.2d 539 (1989). In reviewing the sufficiency of the evidence, we need only consider evidence in support of the conviction. *Id.* The fact that evidence is circumstantial does not render it insubstantial. *Small* v. *State*, 5 Ark. App. 87, 632 S.W.2d 448 (1982). When circumstantial evidence alone is relied upon, it must indicate the accused's guilt and exclude every other reasonable hypothesis; whether circumstantial evidence excludes every other reasonable hypothesis is usually a question of fact for the jury. *Murry* v. *State*, 276 Ark. 372, 635 S.W.2d 237 (1982). It is only when circumstantial evidence leaves the jury solely to speculation and conjecture that it is insufficient as a matter of law. *Deviney* v. *State*, 14 Ark. App. 70, 685 S.W.2d 179 (1985).

On appeal, the appellant posits error in the trial court's denial of the motions for a directed verdict only with regard to the burglary conviction. Arkansas Code Annotated § 5-39-201 (1987) provides that "[A] person commits burglary if he enters or remains unlawfully in an occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment." Since specific intent, as well as illegal entry, are both elements of the crime of burglary, the appellant argues that independent proof of each is required and that the existence of one cannot be presumed from the other. The appellant does not present an argument on appeal with regard to the illegality of his entry into the school, but contends that there is no evidence other than that of his entry into Central High School which establishes his intent to commit an offense punishable by imprisonment. We cannot agree.

The evidence discloses that at approximately 7:45 a.m. on the morning of January 2, 1990, Ellen Linton, an assistant principal at Central High School, sustained serious physical injuries as a result of a stabbing incident that occurred in her office. January 2nd was the first day of classes after the Christmas break and Linton testified that she arrived at the school at around 7:30 a.m. for "zero hour," otherwise known as advanced placement classes. Linton entered the school from Fourteenth Street by the library, the entrance designated as open for zero hour classes. She related that the only other entrance into the school at this hour was through the teachers' parking lot. Linton explained that there were signs affixed to the doors directing persons seeking admittance to the building to enter through the main entrance. Linton stated that other than school personnel, the only persons authorized to be in the school at that time were students attending zero hour classes.

Linton testified that she was on her way to the library for coffee when the appellant approached her, a modern biology book in hand, and asked for help in finding the definition of physiology. She related that the appellant also asked her to write it down on a piece of paper he provided, but before she could finish, the appellant approached her and said, "Don't make a sound!" Linton recalled that when she turned around she observed a knife in the appellant's right hand. Linton described the knife as "a bread knife, about a twelve inch blade with a wood handle that angles down to a point in the end." Linton remembered that the appellant pushed the door to, made her sit down and grimaced the entire time he was talking to her.

Linton testified that the appellant was jabbing her in the hand, and that as he got more irritated, she offered him money from her purse, but he was not interested. Linton determined that her only option to get out of the ordeal alive was to scream and possibly draw attention to herself from the students passing by her office. As she began to scream, the appellant came at her with the knife and stabbed her on the side of the head and face, while also beating and hitting her. Linton also related how the appellant got down on the floor on top of her and continued to stab her, this time in the back and left shoulder. When the appellant left her office she crawled to the phone and called for help.

Linton stated that after this incident she had an occasion to review the records of the students enrolled at Central High School. She explained that the appellant was not a student on this date. In fact, the appellant was withdrawn for nonattendance in November of 1989, and was supposed to re-register at Hall High School, but that he failed to do so. Linton concluded by stating that the appellant had no authority to be in the school on January 2nd at 7:45 a.m.

Maliaka Turner, an honor student, testified that she arrived at school early for an advanced placement class when she heard screaming, yelling and banging going on in Linton's office. Turner recalled that after trying to open the door several times, a man stepped outside Linton's office and attempted to shut it preventing her entrance. According to Turner, the man stated, "There's a lady in there — There's someone in there trying to hurt that lady." Turner said that she shoved the man away and the door opened, whereupon she observed hair and blood all over Linton's face. Turner stated that she had never seen the man before and that no other man was in the office other than the appellant. Turner identified the appellant at trial as the man leaving Linton's office.

The appellant relies on the decision in *Norton* v. *State*, 271 Ark. 451, 609 S.W.2d 1 (1980), in arguing that there is no evidence that he intended to commit a crime punishable by imprisonment when he entered the school. In *Norton*, a burglary conviction was reversed where the appellant was found standing inside the doorway of an office building, which he had illegally entered and from which nothing was taken, speaking to his friends passing by. In *Cristee* v. *State*, 25 Ark. App. 303, 757 S.W.2d 565 (1988), we observed:

> In *Norton* v. *State*, 271 Ark. 451, 609 S.W.2d 1 (1980), the court said that the United States Supreme Court's decisions in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), and *Patterson* v. *New York*, 432 U.S. 197 (1977), held that due process requires the prosecution to prove beyond a reasonable doubt every element of the crime charged. The *Norton* opinion also stated that specific criminal intent and illegal entry are both elements of the crime of burglary and that existence of the intent cannot be presumed from a mere

> showing of the illegal entry. . . . The existence of criminal intent or purpose is a question of fact for the jury when the evidence shows facts from which it may reasonably be inferred.

Id. at 307-09, 757 S.W.2d at 567-68. In *Cristee*, we affirmed the appellant's burglary conviction as there was other evidence, such as his flight from the scene, from which the jury could have found that the appellant intended to commit a crime.

We are not unmindful of decisions in which burglary convictions have been reversed on the specific issue before us. *See Wortham* v. *State*, 5 Ark. App. 161, 634 S.W.2d 141 (1982); *Norton* v. *State*, *supra*. However, in those cases, there was no evidence other than the appellant's illegal entry to sustain a conclusion that the entry was for the purpose of committing a punishable offense. In *Wortham*, the appellant was discovered standing in a doorway, but there was no proof offered that he had attempted to harm anyone, take anything or commit any other crime.

On the other hand, we have affirmed such convictions when there was evidence other than the appellant's illegal entry that supported a finding of the requisite intent. For instance, in *Oliver* v. *State*, 14 Ark. App. 240, 687 S.W.2d 850 (1985), we noted that the appellant had entered a building through a window that had been broken, wires had been cut and the appellant's bicycle was found near the broken window. *See also Cristee* v. *State*, *supra*; *Jimenez* v. *State*, 12 Ark. App. 315, 675 S.W.2d 853 (1984); *Golden* v. *State*, 10 Ark. App. 362, 664 S.W.2d 496 (1984).

Here, the appellant entered Central High School at a time when only zero hour classes were being held; he entered carrying a biology book and seeking help from the victim upon the pretense that he was a properly enrolled student; and, he was armed. Since intent is a state of mind which is not ordinarily capable of proof by direct evidence and may be inferred from the circumstances, it was permissible for the trier of fact to conclude that the appellant's entry in the school was for the purpose of committing a punishable offense. See *Henry* v. *State*, 18 Ark. App. 115, 710 S.W.2d 849 (1986).

Adhering to the proof requirements set forth in *Norton*,

supra, and considering the above testimony, there was substantial evidence from which the jury could have found that the appellant possessed a specific intent to commit an offense punishable by imprisonment.

Affirmed.

MAYFIELD and COOPER, JJ., agree.

Noneluna Enjambre WALDON *v.*
Ronald David WALDON

CA 90-86 806 S.W.2d 387

Court of Appeals of Arkansas
Division I
Opinion delivered March 27, 1991

J. F. Atkinson, Jr., for appellant.

Cravens & Cravens, by: *David R. Cravens*, for appellee.

JUDITH ROGERS, Judge. The parties in this post-decree action were divorced in October of 1979. They had a daughter, Jennifer, who was born with Downs Syndrome, and appellant,

Noneluna Waldon, was granted custody of the child. In addition to paying child support, appellee, Ronald Waldon, was ordered in the decree to be responsible for all extra-ordinary medical, dental and hospital bills, and all ordinary medical bills incurred by the child associated with Downs Syndrome. In this regard, the appellee was also ordered to provide medical insurance coverage for the child. In 1987, appellant obtained an increase in child support to $120 to be paid every two weeks.

Appellant filed the present action in February of 1989, seeking to further increase the amount of child support, and to hold appellee in contempt for the non-payment of medical bills. After a hearing on November 8, 1989, the chancellor declined to hold appellee in contempt, but ordered him to pay the six medical bills submitted. The chancellor increased child support to $85 per week, and ruled that each party would bear their own costs and attorneys' fees. It is from these findings that appellant brings this appeal. We affirm.

Appellant first argues that the chancellor erred by not citing appellee for contempt, and in not awarding her attorney's fees. On the issue of contempt, appellant testified that she had forwarded six bills totalling $544.40 for payment to the Veteran's Administration in Fort Worth, Texas, appellee's employer, through which he has medical insurance. She said that these bills were not paid. On cross-examination, it was pointed out that at the last hearing in 1987, appellant was directed to submit all claims to appellee at his home address, which was read into the record. Appellee testified that he had received bills from only two doctors, one for a general check-up, and two others from an eye clinic for glasses. Appellee stated that he was informed by his insurance carrier that the glasses were not covered, as nearsightedness was common to any child. He said that he believed that these three bills were for ordinary expenses unrelated to the condition of the child, and thus he thought that he was not responsible for them.

■ The refusal of a trial court to punish an alleged contemnor will be reviewed by an appellate court only to determine whether there has been an abuse of discretion. *Warren* v. *Robinson*, 288 Ark. 249, 704 S.W.2d 614 (1986). The chancellor found that the medical bills were routine expenses, but

nevertheless ordered appellee to pay them. We think the chancellor was in a better position to evaluate the willfullness of appellee's conduct, and we find no abuse of discretion on this record.

On appeal, appellant seems to make a further argument that the history of this case reveals a course of conduct of appellee's failure to inform appellant of his job and pay status, as ordered. As appellee points out, there is no current order requiring appellee to keep appellant apprised of these things. One cannot be held in contempt for the failure to do something which he or she has not been ordered to do. *See Dees* v. *Dees*, 28 Ark. App. 108, 771 S.W.2d 299 (1989).

Attorney's fees in divorce and support cases are not awarded as a matter of right, but rest within the chancellor's discretion, whose decision will not be disturbed unless that discretion is abused. *See Williford* v. *Williford*, 280 Ark. 71, 655 S.W.2d 398 (1983). There was testimony that appellee had travelled from Texas to appear at trial. Under the circumstances, we cannot say the chancellor abused his discretion in not awarding attorney's fees to appellant.

Under her second claim of error, appellant combines two arguments concerning the amount of increased child support set by the chancellor. First, she argues that the chancellor erred in calculating appellee's net income by including a deduction for appellee's retirement plan. Second, she contends that the chancellor improperly applied the chart by including as dependents appellee's two children of his present marriage. We address these contentions in the order in which they are stated.

In its *per curiam*, *In re: Guidelines for Child Support Enforcement*, 301 Ark. 627, 784 S.W.2d 589 (1990), the supreme court stated that weekly take home pay, as it relates to the Family Support Chart, refers to the definition of income in the federal income tax laws, less proper deductions for the following items: (1) Federal and state income tax; (2) Social security (FICA) or railroad retirement equivalent; (3) Medical insurance; and (4) Presently paid support for other dependents by Court order. The appellee's statement of earnings reflects that he is paid on a bi-weekly basis, and that $139.10 is withheld from each check for a retirement plan. Appellee testified that, as a

federal employee, he is not a participant in the general social security system, and that his participation in the federal retirement plan is mandatory, and is set at a minimum of seven percent of his gross earnings.

We agree with the chancellor that this was a proper deduction in calculating appellee's take home pay. Appellee's contribution to the retirement plan is involuntary, and can be likened to amounts automatically withheld from earnings as listed in categories one and two mentioned above. To have included this in appellee's take home pay would not have accurately reflected his disposable income. We find no error on this point.

In setting the amount of child support at $85 a week, the chancellor, noting that appellee had two other children, applied appellee's income to the chart based on three dependents. He then divided that amount by three, and added "a small amount for this child." Appellant contends that it was error for the chancellor to have included appellee's other children as dependents, and that appellee's income should have been applied to the chart for Jennifer alone.

Ordinarily, the amount of child support lies within the sound discretion of the chancellor. *Ross* v. *Ross*, 29 Ark. App. 64, 776 S.W.2d 834 (1989). Arkansas Code Annotated § 9-12-312(2) (Repl. 1991) provides:

> In determining a reasonable amount of support, initially or upon review to be paid by the noncustodial parent, the court shall refer to the most recent revision of the family support chart. It shall be a rebuttable presumption for the award of child support that the amount contained in the family support chart is the correct amount of child support to be awarded. Only upon a written finding or specific finding on the record that the application of the support chart would be unjust or inappropriate, as determined under established criteria set forth in the support chart, shall the presumption be rebutted.

Although the courts are required to refer to the family support chart, there are numerous matters which have a strong bearing in determining the amount of support. *Ross* v. *Ross*, *supra*. A

chancellor's finding as to support will not be disturbed on appeal unless it is shown that the chancellor abused his discretion. *Borden* v. *Borden*, 20 Ark. App. 52, 724 S.W.2d 181 (1987).

We agree with appellant that the chancellor should not have applied the chart based on three dependents. Although this may be a proper consideration bearing perhaps on a payor spouse's ability to pay, the chart should be applied to the child that is before the court. The result of applying the chart as the chancellor did here is that the amount of support for the one child was diluted, as the chart is structured so that the amount of support per child decreases in proportion to the number of added dependents.

While there is a rebuttable presumption that the amount of support according to the chart is correct, the chancellor in his discretion is not entirely precluded from adjusting the amount as deemed warranted under the facts of a particular case. As explained by the supreme court, the presumption may be overcome if the chancellor determines, upon consideration of all the relevant factors, that the chart amount is unjust or inappropriate. *See Scroggins* v. *Scroggins*, 302 Ark. 362, 790 S.W.2d 157 (1990). The relevant factors include food, shelter and utilities, clothing, medical and education expenses, accustomed standard of living, insurance and transportation expenses.[1] *Id. See also In re: Guidelines for Child Support Enforcement, supra.* However, when deviating from the chart, the chancellor must explain his or her reasoning by the entry of a written finding or by making a specific finding on the record. *See Scroggins* v. *Scroggins, supra*; Ark. Code Ann. § 9-12-312(2) (Repl. 1991).

By our calculations, the chart amount of support for one child was $97 per week. While the chancellor should not have determined the amount of support in the manner in which he did, we find no abuse of discretion in the amount of support he

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[1] Although there is no indication that the list is exhaustive, we note that other dependents of a payor spouse is not included. The *per curiam* does provide a deduction for "presently paid support for other dependents by *court order*," in arriving at the payor spouse's income to be applied to the chart. (Emphasis ours.) However, that is not the situation before us as the other dependents at issue here are the appellee's children by his current marriage.

ordered. In setting the amount, the chancellor explained that he was not only taking into account appellee's other children, but also appellee's considerable obligations relative to the medical expenses of this child, which, in addition to the payment of support, would continue beyond the age of majority. In this regard, appellee is required to maintain insurance coverage, and is responsible for payment of the deductible. Additionally, appellee is responsible for paying medical expenses that are not covered by insurance. Although it would have been preferable for the chancellor to have applied the chart based on one child before making any adjustments, the end result reached by the chancellor represents only a slight deviation from the correct chart amount. We believe the findings made by the chancellor on the record were sufficient to rebut the presumption, and we cannot say that he abused his discretion.

We note, however, that the chancellor relied on an unpublished opinion of this court as authority for considering the other children as dependents.[2] While appellant does not claim this as a predicate for error, we take this opportunity to again point out that citing, quoting or referring to unpublished opinions of this court is prohibited by Rule 21 of the Rules of the Arkansas Supreme Court and Court of Appeals. *See Yockey* v. *Yockey*, 24 Ark. App. 169, 750 S.W.2d 420 (1988); *Aaron* v. *Everett*, 6 Ark. App. 424, 644 S.W.2d 301 (1982).

Affirmed.

DANIELSON and MAYFIELD, JJ., agree.

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[2] We further note that the case referred to by the chancellor involved a reduction in child support based partially on the circumstance that custody of two of the parties four minor children was changed to the payor spouse, and is thus not directly supportive of the chancellor's ruling.

John Stephen HILL *v.* STATE of Arkansas

CA CR 90-292 806 S.W.2d 627

Court of Appeals of Arkansas
En Banc
Opinion delivered March 27, 1991

Jim Hamilton, for appellant.

Winston Bryant, Att'y Gen., by: *J. Brent Standridge*, Asst. Att'y Gen., for appellee.

PER CURIAM. John Stephen Hill has appealed from his conviction of two counts of possession of a controlled substance with intent to deliver, for which he was sentenced on July 19, 1990. At that time, Ark. R. Crim. P. 36.4 provided that when sentence was pronounced the trial judge had to personally advise the defendant of his right to assert ineffective assistance of counsel and the manner in which to do so.

The attorney general has filed this motion, stating that the record in this case fails to disclose that the trial court advised appellant of his rights with regard to the issue of ineffective assistance of counsel, and praying that the case be remanded with directions that the trial court now comply with the rule. In support of its motion, the State contends that *Looney* v. *State*, 32 Ark. App. 191, 798 S.W.2d 452 (1991), requires remand of all cases in which the trial court has failed to comply with that rule, so as to afford the accused an opportunity to assert a claim of

ineffective assistance if he so desires. We do not agree that *Looney* so held.

In *Looney*, the appellant was not advised of the manner in which the issue of ineffective assistance might be raised, but he attempted to raise that issue for the first time on appeal. Under those circumstances, we held that the failure to comply with Rule 36.4 required that the case be remanded to the trial court, where the appellant's claim of ineffective assistance could be asserted and disposed of as provided in that rule.

Here, on the other hand, appellant's brief raises only the issue of whether the trial court erred in denying his motion to suppress evidence. He does not contend that the trial court erred in failing to comply with the rule in question or assert that he was, in fact, denied effective assistance of counsel. Nor has he filed a motion seeking remand. In the absence of some showing that appellant wishes to raise the issue of ineffective assistance, there is no demonstration that the trial court's error resulted in prejudice.

Motion denied.

William A. GRAHAM *v.* STATE of Arkansas

CA CR 90-152 806 S.W.2d 32

Court of Appeals of Arkansas
Division II
Opinion delivered April 3, 1991

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

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

JAMES R. COOPER, Judge. The appellant in this criminal case was a Louisiana resident who was appointed executor of his deceased father's Arkansas estate on January 27, 1988. Follow-

ing his appointment as personal representative, the appellant moved the estate's tangible personal property to Louisiana and transferred the liquid assets to Louisiana financial institutions. On May 15, 1989, the appellant filed an accounting with the Arkansas Probate Court. On May 24, 1989, the appellant was removed as executor, was ordered to make a more complete accounting to the court or to his brother acting as substitute executor, and he was ordered to deliver the tangible personal property to his brother, the substitute executor. He did not comply with these orders and was thereafter charged with two counts of theft of property pursuant to Ark. Code Ann. § 5-36-103 (1987). A jury convicted him on both counts, fining him a total of $30,000.00 and sentencing him to twenty years in the Arkansas Department of Correction. From that conviction, comes this appeal.

The appellant advances two arguments on appeal. First, he argues that the trial court erred in failing to grant his motion to dismiss because the appellee failed to prove that the State of Arkansas had jurisdiction over the alleged crimes. Second, he argues that the trial court erred in failing to grant his motion for a mistrial. We do not address the appellant's second argument because our consideration of his first argument leads us to conclude that the case must be reversed and dismissed.

As to the appellant's argument that the State of Arkansas did not have jurisdiction over the alleged crimes, we recognize that the State is presumed to have jurisdiction over the cases it entertains, *Holt* v. *State*, 281 Ark. 210, 662 S.W.2d 882 (1984); *Glisson* v. *State*, 286 Ark. 329, 334, 692 S.W.2d 227 (1985); (*supp. op. on reh'g denied*, 286 Ark. 329, 695 S.W.2d 121 (1985)), and that pursuant to Ark. Code Ann. § 5-1-111(b) (1987), the State is not required to prove jurisdiction unless evidence is admitted which affirmatively shows that the court lacks jurisdiction. In this case we find that the evidence shows that the appellant, acting as executor, transferred liquid assets and personal property from Arkansas to Louisiana. He subsequently removed the money from the Louisiana banks and has apparently retained those funds as well as the personal property. The location of these assets remains unknown. The appellant's retention of the property occurred after he was removed as executor and was done in direct opposition to the Arkansas court order removing him as

executor; however, these acts occurred in Louisiana. This evidence is sufficient to affirmatively show that Arkansas courts did not have jurisdiction over the crimes charged and for this reason, the State was required to prove jurisdiction. *See* Ark. Code Ann. § 5-1-111(a)(2) (1987); *see also Gardner* v. *State*, 263 Ark. 739, 599 S.W.2d 74 (1978), *cert. denied*, 440 U.S. 911 (1979). It is not essential to a prosecution in Arkansas that all elements of the crime charged take place in Arkansas; jurisdiction can lie in this State if at least one element of the charged offense occurred in Arkansas. *See Gardner*, *supra*. In this case, the appellant was charged with two violations of Ark. Code Ann. § 5-36-103(a)(1) (1987), which provides:

> A person commits theft of property if he: Knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in the property of another person, with the purpose of depriving the owner thereof. . . .

The State argued that Arkansas had jurisdiction over the crime maintaining that the appellant exercised unauthorized control over the property in Arkansas. When reviewing the evidence on a jurisdictional question, we need only determine whether there is substantial evidence to support the finding of jurisdiction. *Gardner*, *supra*. Substantial evidence is evidence which induces the mind to go beyond mere suspicion or conjecture, and is of sufficient force and character to compel a conclusion one way or the other with reasonable certainty. *Dillard* v. *State*, 20 Ark. App. 35, 723 S.W.2d 373 (1973).

In support of its contention that the appellant exercised unauthorized control over the property in Arkansas, the State cites Ark. Code Ann. § 28-49-116 (1987), which provides:

> A personal representative may, and when ordered by the court shall, deposit, as a fiduciary, the funds of the estate in a bank or banks of this state, as a general deposit, either in a checking account or a savings account. . . .

This statute neither specifically authorizes nor prohibits an executor from depositing the funds of an estate in an out-of-State bank. The evidence the State offers as proof of unauthorized control shows only that the appellant deposited the liquid assets of

the estate in two Louisiana financial institutions on February 2, 1988, in the name of the estate after the initial transfer from Arkansas. Under these circumstances, however, we recognize that an executor derives his powers from the will, *Bacharach* v. *Spriggs*, 173 Ark. 250, 292 S.W. 150 (1927); *see also Ludlow* v. *Flournoy*, 34 Ark. 451 (1879), and in this case without benefit of the will, we find that, under the statute alone, the proof does not induce the mind to go beyond mere suspicion or conjecture in order to conclude that the appellant made an unauthorized transfer of the estate's funds to Louisiana.

As to the argument that the trial court had jurisdiction over the theft charge with regard to the personal property, we note that the State does not specifically address this issue; however, we find applicable authority in Ark. Code Ann. § 28-49-101(a) (1987), which provides:

> A personal representative shall have the right to, and shall, take possession of all of the personal property of the estate of the decedent, subject to the rights of dower and statutory allowances of the widow or minor children, if any.

In this case, the evidence regarding the appellant's control over the personal property consisted of the testimony of the complaining witness, who is also the appellant's brother and the newly appointed substitute executor. He testified that most of the items of personal property listed on the estate inventory were no longer in Arkansas as of the date of the trial; that he could not recall any conversations concerning the distribution of the items while the appellant was acting as the executor; and that since his appointment as substitute executor the appellant has failed to comply with a court order to turn over the property. Another of the appellant's brothers testified that he, like the appellant, was a Louisiana resident and that the appellant had asked him to help move the personal property to Louisiana but that he was unable to help. As we have previously noted, the record does not contain a copy of the will which might have restricted the appellant's authority and, in light of the statute specifically granting a personal representative the right to take possession of all of the personal property, we find no substantial evidence to support a finding of jurisdiction for the theft of the personal property as we

see no element of the crime having been committed in Arkansas. We therefore reverse and dismiss.

Reversed and dismissed.

MAYFIELD and ROGERS, JJ., agree.

Clarence Alfred LARUE *v.* STATE of Arkansas

CA CR 90-199 806 S.W.2d 35

Court of Appeals of Arkansas
Division II
Opinion delivered April 3, 1991

Matthew Horan, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with first degree sexual abuse, a violation of Ark. Code Ann. § 5-14-108 (1987). After a jury trial, he was convicted of that offense and fined $5,000.00. From that decision, comes this appeal.

For reversal, the appellant contends that the evidence is insufficient to support his conviction; that the trial court erred in permitting a witness called by the State to testify concerning the appellant's post-arrest silence; and that the trial court improperly denied his motion for a new trial. We find reversible error in the evidentiary point raised, and therefore we reverse and remand for a new trial.

Pursuant to *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), we consider the sufficiency of the evidence (including any erroneously admitted evidence) before considering other arguments. When the sufficiency of the evidence to support a criminal conviction is challenged on appeal, we review the evidence in the light most favorable to the appellee and affirm if the verdict is supported by substantial evidence. *Dillard* v. *State*, 20 Ark. App. 35, 723 S.W.2d 373 (1987). Substantial evidence is evidence which induces the mind to go beyond mere suspicion or conjecture, and is of sufficient force and character to compel a conclusion one way or the other with reasonable certainty. *Id.*

We need not recite the facts in detail. There was testimony to show that the appellant fondled the breasts of the twelve-year-old victim while she was working with three other children processing honey on the appellant's bee farm. There was also testimony concerning two later meetings in which the appellant told the victim that he would be dreaming of her, and kissed her. The appellant concludes that there was insufficient evidence to show that the appellant touched the victim for the purpose of sexual gratification, *see* Ark. Code Ann. § 5-14-108(a)(3) (1987), because the witnesses' accounts of the later meetings between the appellant and the victim were contradictory and, he asserts, were therefore so inherently improbable as to fail to rise to the level of substantial evidence. We do not agree. The Arkansas Supreme Court rejected a similar argument in *Parker* v. *State*, 290 Ark. 94, 717 S.W.2d 197 (1986), holding that irregularities and inconsistencies in the testimony of three witnesses did not render the evidence insufficient to support a conviction. As was the case in *Parker*, *supra*, the inconsistencies in the testimony in the case at bar related to the details observed by the witnesses. The discrepancies, conflicts, and inconsistencies were for the jury to assess in weighing the testimony, *id.*, and we hold that the appellant's conviction is supported by substantial evidence.

We next address the appellant's contention that the trial court deprived him of due process of law by allowing the arresting officer to testify that, after the appellant was advised of his *Miranda* rights, the appellant remained silent when accused of the offense. The record shows that the arresting officer testified as follows during the State's case-in-chief:

Q. Did Mr. LaRue agree to talk with you about this girl?

A. I asked Mr. LaRue if he'd like to talk about the accusations, yes, sir.

Q. And his response was?

A. He just started talking.

Q. And what did he say, sir?

A. Mr. LaRue told me that he owned and operated the

> Razorback Honey Bee farm in Dyer, and that at times he employs the local children to help him around his business. He told me that in the process of his business that sometimes he has to use a knife and he has to be careful around the children and that it was possible that he may have been working next to [the victim] and may have moved her over, by touching [the victim] on the shoulder. It was at that time that I told Mr. LaRue that I wasn't talking about him touching [the victim] on the shoulder, that I was talking about him intentionally reaching his hands through the back of her arms, rubbing her around the breast area. I told him that I was talking about him telling [the victim] I'll be thinking about you tonight, asking her do you want me to touch you, again. I told him that I was talking about him grabbing her by the arm and kissing her on the mouth. After I did this, Mr. LaRue appeared to me to become very despondent, he bowed his head, he started to speak a couple of times, at which time he got choked on his words. After waiting several minutes, I told Mr. LaRue that not only did I deal with victims, I also deal with suspects. And from my past experience, that his demeanor was leading me to believe that he was guilty. Again, he still sit [sic] there and didn't say anything. I then told Mr. LaRue that from my experience, when I'm dealing with suspects, I've seen them become defensive, mad, they've pounded on my desk, they at least said I didn't do it or I'm not guilty. I told Mr. LaRue, I said, you have not even told me that you didn't do it. That wasn't until after I said this that Mr. LaRue raised his head, slapped my desk, and said no, I didn't do it.

Shortly thereafter, the appellant's attorney approached the bench and requested a mistrial, which was denied.

The appellant argues that the above-quoted testimony was impermissible under *Doyle* v. *Ohio*, 426 U.S. 296 (1976), where the United States Supreme Court held that it is fundamentally unfair and a denial of due process to allow a

defendant's silence at the time of arrest to be used to impeach an explanation subsequently offered at trial. We agree. *See Stephens* v. *State*, 290 Ark. 440, 720 S.W.2d 301 (1986). The arresting officer's testimony in the case at bar not only mentioned the appellant's post-arrest silence, it focused attention on his silence by offering the officer's opinion that, in his experience with suspects, silence was indicative of guilt. Although it is possible for the State's mention of the defendant's silence to be harmless error if there is no prosecutorial focus by repetitive questioning or arguing on a defendant's silence and where the evidence of guilt is overwhelming, *Vick* v. *State*, 301 Ark. 296, 783 S.W.2d 365 (1990), we cannot say the error in the case at bar was harmless. Here, the appellant denied touching the victim for purposes of sexual gratification, and testified that he had been working in close quarters and had merely moved the victim aside. Given this testimony, and the contradictions in the testimony of the witnesses called by the State, we conclude that the evidence of guilt was not overwhelming, and we reverse and remand. Our resolution of this issue makes it unnecessary for us to address the appellant's assertion of juror misconduct because that issue is not likely to recur on retrial.

Reversed and remanded.

MAYFIELD and ROGERS, JJ., agree.

CITY OF LITTLE ROCK, Arkansas *v.* Steve YOUNG

CA 90-280 806 S.W.2d 38

Court of Appeals of Arkansas
Division I
Opinion delivered April 3, 1991

Mark Stodola, City Att'y by: *Edward G. Adcock*, Asst. City Att'y, for appellant.

Southern, Allen and James, by: *Henry A. "Gus" Allen*, for appellee.

JOHN E. JENNINGS, Judge. At about 1:30 a.m. on January 29, 1989, Johnny Bush was arrested for public intoxication and placed in the "drunk tank" at the Little Rock jail. At approximately 2:15 a.m. Bush tied one of his coat sleeves around his neck and attempted to tie the other to a door bar and said he was going to kill himself. The shift supervisor, Sergeant Barnard, took away Bush's coat and long-sleeved shirt and directed jailers to keep a close eye on Bush. When Sergeant Steve Young, the appellee here, relieved Sergeant Barnard at approximately 7:00 a.m., Young was told of Bush's conduct.

At 10:00 a.m. Bush was released from jail but returned in approximately fifteen minutes and told Young that he wanted to go to the state hospital because he was thinking of suicide. Young arranged transportation and Bush was taken to the state hospital. Less than four hours later Bush had been released from the state hospital, gotten drunk again, and was again arrested for public intoxication. Sergeant Young placed Bush in the "drunk tank"

alone and did not order that he be kept under a "close watch." Sergeant Herbert relieved Young as shift supervisor at 3:00 p.m. and was not told of Bush's earlier suicidal statements. One hour later Bush was found dead in his cell, hanged with his shirt sleeve.

The chief of police suspended Young for ten days for "neglect of duty" in failing to inform the incoming supervisor of Bush's possible suicidal tendencies. The suspension was affirmed by the Little Rock Civil Service Commission. On appeal to circuit court, the circuit judge took additional testimony and found that, while Young's conduct did constitute a neglect of duty, an oral reprimand should be the punishment imposed. Now, on appeal to this court, appellant contends that the trial court abused its discretion in reducing the punishment to a mere oral reprimand. We find no reversible error and affirm.

In support of its argument, the city relies on several cases from other jurisdictions. For instance, in *City of Newark* v. *Massey*, 93 N.J. Super. 317, 225 A.2d 723 (1967), the Superior Court of New Jersey held that the civil service commission ought not to disturb the penalty imposed by the chief of police absent a clear abuse of discretion. In *Ramirez* v. *Civil Service Commission*, 42 Colo. App. 383, 594 P.2d 1067 (1979), the Colorado Court of Appeals held that the district court ought not to disturb the penalty imposed by the civil service commission, absent a gross abuse of discretion. The underlying rationale for such holdings, as appellant contends, was set forth in *City of Richmond* v. *Howell*, 448 S.W.2d 662 (Ky. 1969):

> In the conduct and management of a police department, the city, like any other business, by necessity must have rules and regulations and must have a means of enforcing them. The city officials are in better position to perform this function than are the courts. Certainly the courts would not relish the notion of acting as disciplinarian of the numerous police officers throughout the Commonwealth. Sound public policy requires that the matter of punishment and discipline of the police officer be left to his employer — the legislative body in the present instance.

While reasons of policy may support appellant's argument, the argument is foreclosed by the supreme court's decision in *City of Little Rock* v. *Hall*, 249 Ark. 337, 459 S.W.2d 119

(1970). There, a police officer had been discharged by the chief of police for striking a suspect. The civil service commission upheld the discharge. On appeal to circuit court, the trial judge agreed that the officer had violated regulations, but reduced the punishment to thirty days suspension. The supreme court said, "We have no hesitancy in concluding that the circuit court had jurisdiction to modify the punishment fixed by the civil service commission, notwithstanding the circuit court agreed with the commission that the officer violated the regulations." The court held that the appeal statute (now Ark. Code Ann. § 14-51-308 (1987)) did not specifically restrict the power of the circuit court relative to determining guilt or punishment. The court held that proceedings in circuit court in such cases are de novo and that the supreme court's standard of review is whether the circuit court's verdict or finding of fact is supported by substantial evidence. *Hall*, 249 Ark. 338. Today, however, our standard of review in such cases is whether the circuit court's findings were clearly against the preponderance of the evidence or whether its decision was clearly erroneous. *See Dalton* v. *City of Russellville*, 290 Ark. 603, 720 S.W.2d 918 (1986); Ark. R. Civ. P. 52.

In *Hall* the supreme court noted that the circuit judge found that the officer had an exemplary record of service in his more than eight years with the Little Rock Police Department and that this was an adequate basis upon which the circuit court might reduce the punishment.

In the case at bar the circuit judge made the following specific findings: (1) that the portion of the police department's policy manual relating to the treatment of prisoners with mental or emotional problems was vague and confusing; (2) that the city failed to prove that there were any relevant unwritten policies which were applicable to the situation; (3) that Young was justified to some degree in relying on the findings of the Arkansas State Hospital; and (4) that Young's record throughout his seventeen years with the department was exemplary. We cannot say that any of these findings is clearly against the preponderance of the evidence, nor can we say the circuit court's decision to reduce the ten days suspension to a reprimand was clearly erroneous.

Affirmed.

CRACRAFT, C.J., and DANIELSON, J., agree.

STUDENT LOAN GUARANTEE FOUNDATION OF ARKANSAS, INC. *v.* BARNES, QUINN, FLAKE AND ANDERSON, INC.

CA 90-173 806 S.W.2d 628

Court of Appeals of Arkansas
Division I
Opinion delivered April 3, 1991

Howell, Price, Trice, Basham & Hope, by: *Robert J. Price*, for appellant.

Friday, Eldredge & Clark, by: *Michael G. Thompson* and *Mary L. Wiseman*, for appellee.

MELVIN MAYFIELD, Judge. Appellant, Student Loan Guarantee Foundation of Arkansas, Inc. (SLGFA), appeals an order of the Pulaski County Circuit Court holding it liable to appellee, Barnes, Quinn, Flake & Anderson, Inc. (Barnes, Quinn) for a $26,000.00 real estate commission. For reversal, appellant argues the circuit judge erred in holding (1) that the contract was ambiguous and (2) that the property purchased by the foundation constituted "office space."

On February 18, 1988, Ronald L. Nichoalds, executive director of SLGFA, a nonprofit corporation which guarantees loans for Arkansas students, entered into an agreement with Ramsay Ball, of Barnes, Quinn, which provided:

> The Student Loan Guarantee Foundation of Arkansas (SLGFA) wishes to engage Barnes, Quinn, Flake & Anderson, Inc. as its Exclusive Agent to assist the SLGFA in locating office space in the Little Rock area.
>
> The term of this Exclusive Agency agreement shall be for nine months from the date of your acceptance of the agreement. In consideration of our working exclusively through your firm, you will assist us in determining our criteria, survey the Little Rock market for alternative solutions, assist in evaluating the alternatives, and negoti-

ate on behalf of SLGFA. In the event that you have an agency relationship with the selling party, you will disclose this upon presentation of the particular property.

The fee to Barnes, Quinn, Flake & Anderson, Inc. is to be paid by the building or property owner. Furthermore, it is our understanding that there are no additional fees involved in any work that you may do for us unless mutually agreed to prior to the commencement of such work.

Your acceptance of this agreement should be indicated below.

On September 22, 1988, Barnes, Quinn filed suit in Pulaski County Circuit Court alleging that SLGFA had purchased the "Shack" property located in Little Rock at Third and Victory Streets, across the street from the foundation's current offices, for $260,000.00, without the use of the services of Barnes, Quinn. It was alleged that this violated the exclusive agency agreement (set out above) and that Barnes, Quinn was entitled to a commission of $26,000.00 based on the purchase price.

SLGFA answered, admitting that it had purchased the "Shack" property, but denying that Barnes, Quinn was entitled to a commission. SLGFA affirmatively alleged that the property purchased did not constitute "office space" within the meaning of the contract between the parties; and, in any event, that the contract specified that all fees due were to be paid by the seller of any property purchased.

At trial Dickson Flake, one of the owners of Barnes, Quinn, testified that he had been informed by an employee of the firm, Ramsay Ball, that SLGFA was in need of increased office space and that Ball intended to contact SLGFA to see if Barnes, Quinn could be of assistance. Flake said he subsequently reviewed a proposed letter contract which Ball had prepared, made some alterations to it, and approved the firm's commitment as set out in the letter. (At this point, Barnes, Quinn introduced into evidence the letter agreement which we quoted above.) Flake explained that pursuant to this agreement Barnes, Quinn surveyed existing buildings for purchase, and office sites for development, and presented a report to SLGFA. Also, he said, some potential properties were shown Mr. Nichoalds. Flake testified that his

firm was subsequently asked to locate immediate emergency space suitable for a computer facility, and the firm ultimately negotiated, on behalf of SLGFA, a one-year lease of office space in the First Federal Building for which Barnes, Quinn was paid a fee of approximately $2,000.00 by First Federal.

Flake testified that his firm was asked to find this interim office space in March of 1988. After this, in late April of 1988, he learned from Ramsay Ball that SLGFA was negotiating to purchase the "Shack" property, and he and Ball had a meeting with Nichoalds and Connie Meskimen, general counsel for SLGFA. Flake explained his firm's position that negotiations by SLGFA for the "Shack" property would come under the terms of the contract his firm had with SLGFA. He said he was instructed that Barnes, Quinn was not to contact Claude Carpenter, the owner of the "Shack" property; that Barnes, Quinn was to take no part in the negotiations; and that SLGFA's in-house counsel would be its sole representative in that transaction. Flake said he was presented with a copy of the signed letter agreement of February 18, 1988, and asked to sign the following clause typewritten on the bottom:

> The foregoing agreement is not intended to create an agency agreement between SLGFA and Barnes, et. al. for any real estate purchase by the SLGFA, or for any office space which the SLGFA may undertake to build during or subsequent to the expiration of this agreement.

According to Flake, he refused to execute this addendum to the original contract.

Flake acknowledged that the letter agreement of February 18, 1988, called for Barnes, Quinn to collect its commission from the seller of the property, but he said he explained to SLGFA's representatives that "if we were prevented by the Foundation from being involved and they were explicitly instructing us not to contact Mr. Carpenter, then we were—we would be unable to collect our fee from the seller." Flake said that his firm was entitled to a $26,000.00 commission based upon 10% of the purchase price of $260,000.00. He said this was the normal fee for undeveloped property. Flake also testified that the Little Rock Capitol Zoning District requires one parking space for each 300-400 square feet of office space; that office space without parking is

virtually valueless; and that, in his opinion, a parking lot acquired to complement or be used in connection with an office building constitutes office space.

Mr. Flake also testified that after SLGFA purchased the "Shack" property, it leased a building that was managed by Barnes, Quinn. This building was located a block and a half to two blocks west of the existing SLGFA offices. The "Shack" property was between SLGFA's existing offices and the building it leased through Barnes, Quinn. The lease was for five years and was entered into after SLGFA had purchased the "Shack" property. Barnes, Quinn was not acting for SLGFA in this transaction but was being paid to manage the building that was leased.

When this case was tried on September 28, 1989, Mr. Flake testified that the building leased to SLGFA was being used for office space. Also, at that time, the "Shack" property was being used as a parking lot, according to Flake's testimony. He also admitted that there was not an office building on that property on the day of trial, and he agreed that the property was not office space as it then existed. He did testify, however, that he was told by either Mr. Meskimen or Mr. Nichoalds that the "Shack" property was being acquired "for the purpose of their expansion." He was not told that they were going to build a building on it, but he inferred that they were going to use it for office space. He also admitted that SLGFA could hold the property for a while and then sell it, and that would be land speculation; but he said if the property is used to support an expansion of their existing office facilities "it is office space."

James E. Hathaway, Jr., a Little Rock real estate agent, was called as a witness by Barnes, Quinn. He testified that he was familiar with the "Shack" property and knew that someone had spent some money on the property, and it was now a fairly nice parking lot. He said in his opinion it was "office space" because it was being used in connection with SLGFA's office building.

Ronald L. Nichoalds testified that he was employed by SLGFA as its executive director. He said that they had needed office space badly and, without the approval of the board of directors, he executed the letter agreement of February 18, 1988. He said as a result of the agreement, SLGFA subsequently executed a one-year lease for offices in the First Federal Building.

In regard to the "Shack" property, he said when it was purchased it had an old restaurant building and two "concrete-like block buildings" on it; these were all torn down and they spent about $30,000.00 in turning the property into a parking lot. He said the property was originally purchased because it was an attractive investment property close to the state capitol complex; because it was an attractive building site; and because resale was an option. However, he said it was currently being used as a parking lot; that SLGFA had no long-term plan for the property except for parking; and that there have been no building plans drawn up for the site. Nichoalds said he told Ramsay Ball at the outset that he preferred to move out of the area where SLGFA was then located. Consequently, he said Ball did not show him anything in the area until SLGFA's directors decided to look for space to lease. He admitted that the agreement with Barnes, Quinn covered the acquisition of "office space," but he said the "Shack" property was not purchased for "office space" and was currently being used as a parking lot—not as "office space."

Based upon the above testimony, and other testimony which we need not summarize, the trial court found for Barnes, Quinn. The pivotal finding of fact made by the judge was that "the acquisition of the property across the street from its office site defeated the agreement of the parties on failure of the Student Loan Guarantee Foundation to secure the payment of a commission required by its undertaking with the Plaintiff." In *Manzo* v. *Park*, 220 Ark. 216, 247 S.W.2d 12 (1952), the court said it is a breach of contract for the owner to sell property he has granted another the exclusive right to sell, and this will render the owner liable for such damages as the other person may prove he sustained. *See also Earls* v. *Long*, 224 Ark. 57, 271 S.W.2d 784 (1954) (owner who wrongfully cancels the exclusive listing is liable for damages). The same principle would allow Barnes, Quinn to recover in the instant case if SLGFA's purchase of the "Shack" property breached the exclusive agency agreement between them. While SLGFA has not questioned the amount of the recovery allowed, it does question the right of Barnes, Quinn to recover in any amount.

It is SLGFA's contention that the purchase of the "Shack" property did not breach its contract with Barnes, Quinn because the "Shack" property was not "office space." SLGFA argues that

the letter agreement with appellee, Barnes, Quinn was not ambiguous, and the trial court erred in allowing parol evidence to explain or vary the meaning of the term "office space" used in the agreement. The appellant also argues that even if the term "office space" was ambiguous, the trial court's finding that the "Shack" property constituted "office space" ws clearly erroneous.

Prior to the taking of testimony, counsel for appellant made a motion in limine. During the course of the ensuing discussion the judge said to counsel for appellant:

> Well, let me say this. If you are saying that you don't want him amending the contract by parol evidence, then I would agree that . . . if it is a formal contract, you can't amend that by some sort of parol evidence. However, as I said, I think you can introduce parol evidence to, lack of a better term, ferret out ambiguity.

And the discussion finally concluded with these remarks by the judge:

> Well, for the purpose of the record here, I will deny his motion. As I say, the only thing I'm trying to do here is make sure that the record shows the purpose of the Court in denying his motion, and that is that I — to the extent that it would be introduced for the purpose of amending a formal contract, the Court is not going to receive it, or is not going to treat it in that fashion, but he will treat it with the idea that if it introduces — by its introduction it introduces to the Court an ambiguity into the contract, then the Court will consider it for substantial evidence, all right?

During the testimony of the first witness, counsel for appellant made several objections on the grounds that the questions by counsel for the appellee were attempts to vary or explain the written contract by parol evidence and eventually the court gave appellant's counsel a continuing objection to questions which might violate the parol evidence rule.

We agree with the appellant's contention that its agreement with the appellee was not ambiguous and that the trial court erred in allowing parol evidence to explain or vary the meaning of the term "office space" used in the agreement. As pertinent to this case, *Webster's Ninth New Collegiate Diction-*

ary (1983) defines the word "office" as a "place where a particular kind of business is transacted or a service is supplied," and "space" is defined as "an extent set apart or available." The *American Heritage Dictionary* (2d College ed. 1982) defines "office" as "a place in which business, clerical or professional activities are conducted," and "space" is defined as "an area provided for a particular purpose." *Black's Law Dictionary* (5th ed. 1979) defines "office" as "a place for the regular transaction of business or performance of a particular service." Obviously, a parking lot will not meet these dictionary definitions pertaining to "office space."

In *C & A Construction Company, Inc.* v. *Benning Construction Company*, 256 Ark. 621, 509 S.W.2d 302 (1974), the parties had entered into a written agreement which provided that the appellee would "receive $20,000 for supervision which will be added to the actual cost figure." The court set out the following general rules about the construction of contracts.

> When contracting parties express their intention in a written instrument in clear and unambiguous language, it is our duty to construe the written agreement according to the plain meaning of the language employed. . . . However, where the meaning of a written contract is ambiguous, parol evidence is admissible to explain the writing. . . . Ambiguities are both patent and latent. When, on its face, the reader can tell that something must be added to the written contract to determine the parties' intent, the ambiguity is patent; a latent ambiguity arises from undisclosed facts or uncertainty of the written instrument. . . . However, the initial determination of the existence of an ambiguity rests with the court and if ambiguity exists, then parol evidence is admissible and the meaning of the term becomes a question for the factfinder.

256 Ark.at 622 (citations omitted). The court held that the contract was unambiguous; that it provided a definite amount for supervision; and that the parol evidence rule would not allow oral evidence to change the written contract. The court said: "Had the appellee's president and owner intended, as he now contends was their verbal understanding, that his salary should be in addition to the $20,000 for supervision, the written contract could easily have

so reflected."

A similar situation exists in the present case. Here, we think the term "office space" is clear and unambiguous; therefore, it is our duty to construe the written agreement in this case "according to the plain meaning of the language employed." The written agreement provides that SLGFA wishes to engage Barnes, Quinn as its exclusive agent "to assist SLGFA in locating office space." This is the assignment that Barnes, Quinn accepted, and the truth of the matter is that Barnes, Quinn negotiated a five-year lease by SLGFA of office space in a building that Barnes, Quinn managed, which was located within two blocks of SLGFA's existing offices, and the "Shack" property is simply a parking lot between the buildings.

Because the written agreement in this case was unambiguous, the testimony of Mr. Flake and Mr. Hathaway, which was somewhat corroborated by Mr. Carpenter, that a parking lot used in connection with office space is itself "office space" violated the parol evidence rule. To allow such testimony presents the same problem addressed in *Arkansas Rock & Gravel Company* v. *Chris-T-Emulsion Company*, 259 Ark. 807, 536 S.W.2d 724 (1976), where the court said:

> The trouble is, this argument runs squarely into the parol evidence rule. That is a rule of substantive law, which prevents a party from proving a prior or contemporaneous oral agreement that contradicts the written contract. *Hoffman* v. *Late*, 222 Ark. 395, 260 S.W.2d 446 (1953). It is true that when the language of a contract is ambiguous, proof of oral negotiations is admissible to show that the language was intended to have "any particular meaning that the words will reasonably bear." *Kerr* v. *Walker*, 229 Ark. 1054, 321 S.W.2d 220 (1959). But the rule does not allow a party to prove by oral testimony that clear and unambiguous words were subjectively intended to have a meaning not fairly attributable to them. The remedy in that situation is a suit for reformation of the contract. Restatement, Contracts, § 230 (1932).

259 Ark. at 810. So, we think the opinion testimony that a parking lot used in connection with office space is itself office space should not have been considered by the trial judge under his ruling on

appellant's motion in limine and under his ruling which granted appellant's counsel a continuing objection to questions which might violate the parol evidence rule.

While the trial judge did not make an express finding on the issue, he apparently thought the term "office space" was ambiguous. However, to give effect to the testimony that a parking lot used in connection with office space is itself office space is wrong for another reason in addition to the violation of the parol evidence rule. That reason is demonstrated by the case of *Kerr* v. *Walker*, 229 Ark. 1054, 321 S.W.2d 220 (1959), where the Arkansas Supreme Court explained:

> It is true that prior negotiations between the parties are admissible to show that ambiguous language in the contract was intended to have any particular meaning that the words will reasonably bear, or, if that particular meaning cannot be assigned to the language, to show a mutual mistake that requires a reformation. . . . But such testimony must relate to an understanding that was common to both parties; it is not permissible to show the uncommunicated subjective interpretation that one party or the other placed upon the language of the agreement.

229 Ark. at 1057 (citations omitted). In the present case, we do not believe the evidence shows that SLGFA understood or agreed that a parking lot used in connection with office space was itself office space.

The appellee, however, relies upon the evidence that Mr. Flake was asked to execute an addendum to the original contract which would provide that the original agreement was not intended to create an agency agreement for any real estate purchase by SLGFA, or any office space it might undertake to build, during or subsequent to the expiration of the original agreement. Appellee argues that this shows that SLGFA "acknowledged that the 'Shack' property, whether used as a parking lot for offices or as a building site, fell under the contract." There are two problems with that argument. First, it does not negate the application of the parol evidence rule. In *Hoffman* v. *Late*, 222 Ark. 395, 260 S.W.2d 446 (1953), the court pointed out that "the practical justification for the rule lies in the stability that it gives to written contracts; for otherwise either party might avoid his

obligation by testifying that a contemporaneous oral agreement released him from the duties that he had simultaneously assumed in writing." The *Hoffman* case was relied upon by the court in the *C & A Construction Company* case, *supra*, in pointing out that verbal evidence "cannot" alter the terms of an unambiguous written agreement.

And in the second place, we do not agree that the attempt to get the appellee to execute the addendum to the original contract "acknowledged" that the purchase of the "Shack" property "fell under" the original contract. The addendum was drawn and presented to Barnes, Quinn after Mr. Nichoalds of SLGFA learned that Mr. Ball of Barnes, Quinn said they would expect a commission if SLGFA purchased the "Shack" property directly from Claude Carpenter. Also, there was evidence that SLGFA asked Carpenter to pay the fee to Barnes, Quinn, but again, this was after SLGFA representatives learned that Barnes, Quinn representatives were going to insist that it would be entitled to a commission if SLGFA purchased the "Shack" property directly. We believe that a clear preponderance of the evidence shows that both of these incidents were simply attempts to avoid a problem about a commission in the event SLGFA purchased the "Shack" property.

Moreover, we do not agree with the appellee's view of the effect of statements or inferences, supposedly made by representatives of the appellant, that the "Shack" property was being purchased for expansion or remodeling of SLGFA's existing office facilities. To hold that this evidence shows that the "Shack" property was "office space" would not only violate the parol evidence rule, but would also be clearly erroneous. SLGFA had a written agreement which clearly stated that any fee due Barnes, Quinn would be paid by the owner of any building or property that Barnes, Quinn located and SLGFA purchased for "office space." We do not believe this evidence shows that the "Shack" property purchased by SLGFA in the summer of 1988, which it made into a parking lot by the expenditure of approximately $30,000.00, and which was being used as a parking lot at the time this case was tried in the fall of 1989, was purchased for "office space" as that term was used in the agreement of the parties.

Reversed and dismissed.

DANIELSON, J., agrees.

COOPER, J., concurs.

JAMES R. COOPER, Judge, concurring. I agree with the majority opinion in holding that the term "office space" as used in the written agreement between the parties in this case is not ambiguous. I also agree that the majority opinion has correctly defined and applied that term to the issue presented by this appeal. It is not necessary, however, to speculate on what we would hold if the term were ambiguous. Therefore, I concur with the result reached by the majority opinion.

Although the issue is not presented by the parties, I question whether there was an enforceable contract in this case. An agreement to renew a lease at an annual rental to be agreed upon has been held to be too uncertain and indefinite to be enforced. *Phipps & Brown* v. *Storey*, 269 Ark. 886, 601 S.W.2d 249 (Ark. App.1980). In the present case, the appellee is made the exclusive agent to locate office space for the appellant. However, the appellant is not required to buy the property, and if it does, the appellee's fee is to be paid by the seller who is not a party to the agreement.

John Lee SMITH *v.* STATE of Arkansas

CA CR 90-56 806 S.W.2d 391

Court of Appeals of Arkansas
Division II
Opinion delivered April 10, 1991

William R. Simpson, Jr., Public Defender, *Howard W. Koopman*, Deputy Public Defender, by: *Andrew H. Beavers*, Deputy Public Defender, for appellant.

Ron Fields, Att'y Gen., by: *R.B. Friedlander*, Solicitor Gen., for appellee.

GEORGE K. CRACRAFT, Chief Judge. John Lee Smith appeals from his conviction of theft by receiving a motor vehicle, for which he was sentenced to a term of ten years in the Arkansas Department of Correction. He contends that the guilty verdict is not supported by substantial evidence. We agree.

In criminal cases, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the State, and will affirm if the conviction is supported by substantial evidence. *Dillard* v. *State*, 20 Ark. App.

35, 723 S.W.2d 373 (1987). Substantial evidence has been defined as evidence 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 mere suspicion or conjecture. *Jones* v. *State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984).

Viewed in that light, the evidence in this case discloses that at 3:30 a.m. on May 11, 1989, the Little Rock Police Department received a report that a person had been seen crouching in some bushes near a liquor store. About two blocks from the liquor store, Officer Leslie Houser observed appellant running down the street. Appellant stopped momentarily by a parked 1979 Chevrolet Malibu, which was later identified as having been stolen from the Dumas, Arkansas, residence of Mr. Bill Canada in January 1989. Appellant grabbed the driver's side door handle, but fled around the front of the vehicle after observing the officer.

Several other officers were called to the scene and, after a lengthy pursuit, appellant was apprehended and taken to the police station. Appellant denied any knowledge of, or connection with, the stolen vehicle. He listed his nearest relative as his mother, who resided in Dumas.

At the time that the incident occurred, the vehicle was locked and the windows were up. The officers found no keys to the vehicle on appellant or elsewhere. Inside the car, the officers found tools that might have been related to a burglary, but there was no evidence to connect appellant with any of the vehicle's contents. Twelve identifiable fingerprints were taken from the door frame, rearview mirror, and exterior of the vehicle's trunk. One fingerprint found on a window sill on the driver's side of the car was identified as belonging to appellant. Two of the prints found on the exterior of the trunk lid also were identified as appellant's. It was determined that the remaining fingerprints were made by someone other than appellant.

At the close of the State's case and at the close of all of the evidence, appellant made appropriate motions for a directed verdict, challenging the sufficiency of the evidence. The motions were denied, and the jury found appellant guilty of theft by receiving. The sole issue on appeal is whether the evidence is sufficient to sustain the conviction.

To prove theft by receiving, the State must show that the accused received, retained, or disposed of stolen property, knowing or having good reason to believe that it was stolen. Ark. Code Ann. § 5-36-106(a) (1987). A person "receives" stolen property if he acquires possession or control of, or title to, the property or uses the property as security. Ark. Code Ann. § 5-36-106(b) (1987). Proof of actual possession is not necessary in order to establish theft by receiving; proof of constructive possession will suffice. A person constructively possesses property when he has the power and intent to control it. *Riddle* v. *State*, 303 Ark. 42, 791 S.W.2d 708 (1990).

Here, the only connection between appellant and the stolen car shown by the evidence was that he grabbed the door handle, his fingerprints were on the window sill and the trunk, and he had relatives living in Dumas. The car was found parked on a city street, accessible to the general public. No one saw appellant in control of, or even inside, the vehicle. No keys to the locked vehicle were found in his possession. Appellant argues, and the State does not dispute, that his fingerprints were found only on the exterior of the car. Nor was there any proof connecting appellant to any contents of the car. From our review of the record, we cannot conclude that there is any substantial evidence to support a finding that appellant had actual or constructive possession of the vehicle.

Reversed and dismissed.

JENNINGS and DANIELSON, JJ., agree.

ITT/HIGBIE MANUFACTURING *v.* Idoline GILLIAM

CA 90-308 807 S.W.2d 44

Court of Appeals of Arkansas
Division II
Opinion delivered April 10, 1991

Penix, Penix & Lusby, by: *Bill Penix*, for appellant.

Mills and Patterson, by: *William P. Mills*, for appellee.

JAMES R. COOPER, Judge. The appellant in this worker's compensation case was the appellee's employer, and it accepted an October 10, 1986 injury as compensable and further accepted a twenty-percent (20%) permanent partial disability and paid benefits accordingly. However, the appellant controverted any benefits in excess of twenty-percent (20%) permanent partial disability and argued that the appellee was not permanently and totally disabled as a result of her October 10, 1986, injury. A hearing was held before an administrative law judge (ALJ) who noted that the appellant controverted benefits in excess of 20% permanent partial disability, determined that the appellee is permanently and totally disabled, and ordered the appellant to pay all reasonable hospital and medical expenses arising out of the October 10, 1986, injury. The appellant appealed this decision to the full Commission, which adopted the administrative law judge's opinion. From the Commission's decision, comes this appeal.

On appeal, the employer raises three points for reversal: first, that the Commission failed to make sufficiently detailed findings to allow for a meaningful review by this Court; second, that there was no substantial evidence to support the findings of the administrative law judge which were adopted by the full Commission, and that the ALJ incorrectly shifted the burden of proof to the employer; and third, that the appellee was offered but refused suitable light work and therefore was not entitled to benefits in excess of her twenty-percent (20%) permanent partial impairment. We disagree with the employer's arguments and we affirm.

As to the argument that the Commission's findings were insufficient to permit meaningful review by this Court, we simply do not find this to be the case. In the case at bar the Commission issued a brief opinion which set out the specific findings of the administrative law judge, and affirmed and adopted the administrative law judge's opinion as the decision of the Commission. Under Arkansas Law, the Commission is

permitted to adopt the administrative law judge's decision. *See Odom* v. *Tosco Corp.*, 12 Ark. App. 196, 672 S.W.2d 915 (1984). Moreover, in so doing the Commission makes the findings and conclusions of the administrative law judge also the findings and conclusions of the Commission. *See Lybrand* v. *Arkansas Oak Flooring Co. and Liberty Mutual Insurance Co.*, 266 Ark. 946, 588 S.W.2d 449 (1979). Therefore, for purposes of our review, we consider both the administrative law judge's order and the Commission's order. In this case the administrative law judge went into great detail in his opinion and set out the circumstances of the case and the evidence supporting his findings; therefore we find that the findings of fact made by the administrative law judge and adopted by the Commission are sufficiently detailed to enable this Court to determine whether or not the Commission's findings are supported by substantial evidence.

The appellant asks us to overrule *St. Vincent Infirmary* v. *Carpenter*, 268 Ark. 951, 597 S.W.2d 129 (Ark. App. 1980). It argues that the *St. Vincent* decision should not be allowed to stand because it permits the Commission to "rubber stamp" the administrative law judge's decision. We do not agree. In *St. Vincent*, this Court held that the Commission met its obligation to find the facts by adopting the administrative law judge's decision and that, by adopting the administrative law judge's decision, the Commission made sufficient findings for purposes of our review. We are mindful of the Commission's duty to conduct a *de novo* review on the basis of the record as a whole when deciding any issue. Ark. Code Ann. § 11-9-704 (1987). However, after conducting such a review, the Commission may adopt the administrative law judge's findings which are identical to those arrived at by the Commission. *See* e.g. *Southwest Pipe and Supply and Ins. Co. of North America* v. *Hoover*, 13 Ark. App. 144, 680 S.W.2d 723 (1983), *see also Odom, supra*. We find no merit in the appellant's argument, and we decline to overrule *St. Vincent, supra*.

In its next argument the appellant contends, first, that there is no substantial evidence to support the Commission's decision, and second, that the burden of proof was improperly shifted to the employer. In determining the sufficiency of the evidence to sustain the findings of the Workers' Compensation Commission, we review the evidence in the light most favorable to

the Commission's findings, and we must affirm if there is any substantial evidence to support these findings. *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984). We may reverse the Commission's decision only when we are convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Snow* v. *Alcoa*, 15 Ark. App. 205, 691 S.W.2d 194 (1985).

Viewed in the light most favorable to the Commission's findings, the record reveals that the claimant was fifty-nine years old at the time of the accident; that she had worked for the employer for fourteen years; that she had not been diagnosed as having osteoporosis until her work-related accident; and that, several weeks following her accident at work, there was a subsequent incident in which her back popped and she experienced pain and muscle spasms similar to that which she had experienced after her October 10, 1986, fall.

On October 21, 1986, the claimant sought medical attention and, at the request of Dr. Joseph, the company doctor and the claimant's treating physician, x-rays of the claimant's back were taken by Dr. Elliot, a radiologist. These x-rays did not reveal a fracture but did show osteoporotic change. Dr. Joseph noted, however, that following an incident at home on November 1, 1986, while the claimant was sitting on a commode, she felt a pop in her back and experienced pain and muscle spasms and that she was seen in an emergency room where repeat lumbar x-rays revealed a questionable slight compression fracture. The x-rays were followed up with a CT scan which confirmed the fracture.

The claimant was also seen by Dr. Weber, who noted in this medical report dated June 12, 1987 that he x-rayed the claimant and found compression fractures and severe osteoporosis. He stated that because of the fractures, her age, and her osteoporosis, she was 100% impaired but that if all she had were the fractures incurred in the line of her normal work, her impairment would be ten to twenty percent to the body as a whole, and that a rate of twenty percent to the body as a whole could be attributed to her work injury.

Medical records from Dr. Staggs, who first examined the claimant on September 27, 1988, corroborate the diagnosis of Drs. Joseph and Weber. Specifically, Dr. Staggs states in his

medical report that the claimant's x-rays confirm severe osteoporosis and compression fractures, that the claimant has been at 100% disability since the diagnosis, and that she will never improve. He stated that, because of the pain, he saw no likelihood of her being gainfully employed.

The claimant was also seen by Dr. Jordan on February 8 and April 10, 1989. He concluded that the compression fractures were secondary to the osteoporosis, that she was unable to do any appreciable work at that time because of these problems, and that he did not anticipate that she would be able to return to any productive activity.

The only contrary medical evidence is an entry by Dr. Jordan, dated April 10, 1989. He stated that there was inadequate medical evidence to link the fractures or the claimant's present condition to the October 10, 1986 fall.

The Commission has the duty of weighing medical evidence as it does any other evidence and, if the evidence is conflicting, the resolution of the conflict is a question of fact for the Commission. *Mack* v. *Tyson Foods, Inc.*, 28 Ark. App. 229, 771 S.W.2d 794 (1989). Moreover, the testimony of medical experts is an aid to the Commission in its duty to resolve issues of fact, and it has the duty to use its expertise and experience in translating that testimony into findings of fact. *C.J. Horner Co.* v. *Stringfellow*, 14 Ark. App. 138, 685 S.W.2d 533 (1985). As noted earlier, we may reverse the Commission's decision only when we are convinced that fair-minded persons with the same facts before them could not have reached the same conclusion arrived at by the Commission, *Snow*, *supra*, and in this case we cannot so conclude. We hold that there is substantial evidence to support the Commission's finding that the claimant proved by a preponderance of the evidence that she is permanently and totally disabled as a result of her injury arising from her work-related accident on October 10, 1986.

As to the argument that the administrative law judge incorrectly shifted the burden of proof to the employer, we find that this was not done. The opinion sets forth the employer's contention and then states that "[t]he medical evidence when read in its entirety does not support that conclusion." This statement is followed by the administrative law judge's findings

with regard to the medical evidence after which he concludes that "the claimant has proven by a preponderance of the evidence that she is permanently and totally disabled as a result of her injury in the course and scope of her employment on October 10, 1986." We read these as findings indicating that the administrative law judge found that the preponderance of the evidence showed a causal connection between the claimant's fall at work and the claimant's compression fractures and we perceive no shift in the burden of proof.

The appellant next argues that the claimant was offered suitable work which she refused and that her award should not exceed twenty percent permanent partial impairment. The appellant cites Ark. Code Ann. § 11-9-526 (1987) as support for its contention. This statute provides that "[i]f any injured employee refuses employment suitable to his capacity offered to or procured for him, he shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the commission, the refusal is justifiable." In this case it is undisputed that the job specifications were designed under the supervision of Dr. Joseph, whose work restrictions allowed the claimant to lift and carry twenty pounds frequently and thirty pounds occasionally. However, the appellant admits that the job was formulated without consideration of Dr. Weber's report which stated that the claimant was 100% disabled. We think that this constitutes substantial evidence from which the Commission could determine that the claimant's refusal of the job was justifiable because the job was unsuitable. Furthermore, Ark. Code Ann. § 11-9-526 (1987) provides that a claimant who unjustifiably refuses suitable work would not be entitled to *any compensation.* (Emphasis added.) Here the appellant argues that the claimant is not entitled to benefits in excess of her permanent partial disability of 20 percent to the body as a whole and the controlling authority cited for this argument is Ark. Code Ann. § 11-9-522(b) (1987) which states:

> (b) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably

> expected to affect his future earning capacity. However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

Under these circumstances we do not think that the job offered to the claimant, disregarding the question of whether or not she received the offer, is reasonably obtainable in light of the job specifications as we have previously discussed.

Affirmed.

MAYFIELD and ROGERS, JJ., agree.

Maurice HAYGOOD, Lee Buford, and Robert Clinkscale, Jr. *v.* STATE of Arkansas

CA CR 90-147 807 S.W.2d 470

Court of Appeals of Arkansas
Division I
Opinion delivered April 10, 1991

Ralph M. Cloar, Jr., for appellant Maurice Haygood.

Christopher C. Mercer, Jr., for appellant Lee Buford.

William H. Craig, for appellant Robert Clinkscale.

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

ELIZABETH W. DANIELSON, Judge. Appellants, Maurice Haygood, Grover Lee Buford and Robert Clinkscale, Jr., appeal their convictions of possession of cocaine with intent to deliver, for which each was sentenced to thirty years in the Arkansas Department of Correction. On appeal, they argue that (1) the trial court erred in denying their motion to suppress; (2) the trial court erred in denying their proposed jury instruction on the elements of joint occupancy; (3) the trial court erred in denying their motion for directed verdict; and (4) the evidence was not sufficient to sustain the verdict. We affirm.

At a hearing on a motion to suppress, evidence was introduced that about 9:45 p.m. on August 17, 1989, Sergeant Mike Sylvester, of the Little Rock Police Department, was notified by a confidential informant that between 10:00 and 11:00 p.m. Robert Clinkscale, Jr., and two other black males would be leaving the Brentwood Apartments on Baseline Road in a 1981 Delta 88

Oldsmobile, bearing Arkansas license PJJ-870, with a substantial quantity of cocaine and go to Apartment 199 of the Pines Apartment complex, approximately three-quarters of a mile down Baseline Road. Sergeant Sylvester testified that the informant had previously given information which the officer had verified; that the officer was personally acquainted with Clinkscale; and that the officer through the police department files knew Clinkscale had been "involved in cocaine trafficking." Sylvester, relying on the informant's tip, arranged for both apartment complexes to be placed under surveillance.

Sylvester said he and Detective Joseph Fisher staked out the Brentwood Apartment complex and about 10:20 p.m. the Oldsmobile, which had been described, occupied by Clinkscale and two other black males, arrived and went to the rear of the complex. Approximately fifteen minutes later the vehicle returned and stopped almost directly in front of the officers' surveillance vehicle; the driver Maurice Haygood, Jr., (whom Sylvester said he also knew as a cocaine trafficker) got out; and when the dome light came on, Sylvester saw Clinkscale sitting in the back seat. Haygood walked to the rear of his vehicle and had a brief conversation with a female who had exited another vehicle. She walked to a dumpster, threw something in it, and both she and Haygood got back into their vehicles and both cars left the Brentwood complex. Sylvester testified that Haygood took a circuitous route and went to the Pines Apartments. Sylvester said that, as they followed, he notified the other stakeout officers that the suspect vehicle was on the move and to detain the occupants when it stopped. He said he arrived at the Pines Apartments just moments after the appellants were removed from the car. He understood a gym bag was removed from the car and that it contained other bags which contained a significant quantity of cocaine.

Detective Carlos Corbin testified that he and Detective Tackett were together in a vehicle when they got the call from Sylvester. They were given a vehicle description and when the vehicle pulled up to apartment 199 of the Pines Apartments, the occupants got out and were detained until Sergeant Sylvester could get there. Corbin said he and Tackett identified themselves as police officers; that he had his service revolver drawn; and that Sylvester arrived in a matter of moments. In his report Corbin

wrote that he handcuffed Maurice Haygood, the driver of the car, and Robert Clinkscale, who was in the back seat, and that Detective Watson, who arrived on the scene about the same time as Sylvester, handcuffed Grover Buford, who was in the front passenger seat.

Detective Joe Fisher, Little Rock Police Department Narcotics Detail, testified that when he and Sergeant Sylvester arrived on the scene, Detectives Tackett and Corbin had already detained the occupants of the suspect vehicle. Fisher said he searched the car and found a green nylon gym bag on the passenger's side of the back seat. Under the gym bag, he found a Crown Royal bag which contained a fully loaded nine millimeter semiautomatic pistol with the butt sticking out. Fisher said he first secured the gun, then unzipped the nylon gym bag and found another bag inside which contained "a quantity of a white powder substance and a quantity of a solid white substance," all of which he suspected was cocaine. He said the occupants of the vehicle were then placed under arrest.

Officer Robert Martin, patrolman for the Little Rock Police Department, testified that on August 17 he received a call to meet the narcotics unit at the Pines Apartments. He said he was advised to put appellant Gary Buford in his patrol car and was going to "pat him down" when he noticed Buford was wearing a leather medallion on a cord around his neck. The medallion was of a type which frequently has a pocket in the back where razor blades or small knives are carried. He took the medallion from Buford, and in a pocket in the back of it he found a "small plastic bag containing white powder."

Appellants' first argument is that the trial court erred in refusing to suppress the evidence seized in the search of the automobile. In *Lopez* v. *State*, 29 Ark. App. 145, 778 S.W.2d 641 (1989), we set out the rule regarding automobile searches as follows:

> An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the

> vehicle is on a public way or waters, or other area open to the public. *Cook* v. *State*, 293 Ark. 103, 732 S.W.2d 462 (1987); Ark. R. Crim. P. 14.1. Reasonable cause exists when the facts and circumstances within the officer's knowledge, or of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Munguia* v. *State*, 22 Ark. App. 187, 737 S.W.2d 658 (1987). *See also Tillman* v. *State*, 271 Ark. 552, 609 S.W.2d 340 (1980). . . . In reviewing the trial court's action in granting or denying motions to suppress evidence obtained by warrantless searches, the appellate court makes an independent determination based on the totality of the circumstances, but it will not set aside the trial court's finding unless it is clearly against the preponderance of the evidence. *Munguia* v. *State*, *supra*.

29 Ark. App. at 150-51. Reasonable cause can be based on the collective knowledge of police officers, *Rowland* v. *State*, 262 Ark. 783, 561 S.W.2d 304 (1978), and reasonable cause can be based upon a combination of verified information furnished by anonymous callers and evidence gathered by the police in furtherance of an investigation of the subject matter, *Willett* v. *State*, 298 Ark. 588, 769 S.W.2d 744 (1989), citing *Illinois* v. *Gates*, 462 U.S. 213 (1983).

Appellants contend this vehicle was not on a public street but rather in a private area lawfully entered, and thus exigent circumstances must have been present to validate the search. Because it is an "area open to the public," we cannot agree that the parking lot of an apartment complex qualifies as a private area even though it may be privately owned.

Appellants contend this was not a valid search incident to arrest because there was no reason to believe the automobile contained anything subject to seizure. When major portions of an informant's tip are verified by an officer's own observation, the officer may have reasonable cause to believe the unverified bit of the informant's information. *Draper* v. *United States*, 358 U.S. 307 (1959). The collective information known by the officers in this case—that the informant had provided reliable information in the past; that appellants Clinkscale and Haygood were known

cocaine traffickers; that an automobile fitting the description provided by the informant right down to the license number arrived at the place named within the time frame described by the informant; and that the car traveled to the exact apartment number in the exact apartment complex named by the informant—provided the officers with reasonable cause to believe the vehicle contained things subject to seizure. And if they had reasonable cause to search the vehicle, they could search every part of it and its contents that could conceal the object of the search. *United States* v. *Ross*, 456 U.S. 798 (1982). Thus, we do not believe the trial court's ruling on the motion to suppress was clearly against the preponderance of the evidence.

The appellants' second argument is that the trial court erred in denying their proposed jury instruction on the elements of joint occupancy situations. The trial court, without objection, instructed the jury according to AMCI 3304 as follows:

> There are two kinds of possession, actual and constructive. Actual possession of a thing is direct physical control over it. Constructive possession exists when a person, although not in actual possession of a thing, has the right to control it and intends to do so, either directly or through another person or persons. If two or more persons share actual or constructive possession of a thing, either or all may be found to be in possession.

Based on language in *Plotts* v. *State*, 297 Ark. 66, 759 S.W.2d 793 (1988), appellants sought an addition to the above instruction. The additional language stated:

> Where there is joint occupancy of a place where contraband is found, some additional factor must be present linking the accused with the contraband. In such cases, the State must prove two elements: (1) that the accused exercised care, control, and management over the contraband, and (2) that the accused knew the thing possessed was contraband.

The trial court refused to give the requested instruction. Appellants argue that because of the court's action, the jury was not informed that mere presence in the automobile was insufficient to sustain the conviction, and without this instruction the jury could

have thought it was compelled to find all three defendants guilty without first determining that they all knew the gym bag contained cocaine.

The State's brief points out that even though a requested instruction is a correct statement of the law, this does not mean the trial court erred in not giving it. In *Wallace* v. *State*, 270 Ark. 17, 603 S.W.2d 399 (1980), the court said, "we have consistently held that it is not error to refuse to give a requested instruction where the subject matter is fully covered by instructions already given." In the present case, instruction AMCI 3304 correctly states the law. An instruction not included in AMCI should be given only when the AMCI instruction does not state the law or where AMCI does not contain a needed instruction on the subject. *Henderson* v. *State*, 284 Ark. 493, 684 S.W.2d 231 (1985). In addition to AMCI 3304, the court instructed the jury that each defendant was presumed to be innocent and would have to be proved guilty beyond a reasonable doubt, and that, even though they were being tried jointly, the evidence must be considered separately as to each defendant. The trial judge, in deciding not to give the instruction as requested by the defendants, expressed an opinion that the additional language they wanted to add to AMCI 3304 was redundant and might "elevate to a comment on the evidence." We find no error in the court's failure to give the instruction with the additional language requested by appellants.

Appellants' last two arguments constitute a challenge to the sufficiency of the evidence. In resolving the question of the sufficiency of the evidence in a criminal case, this court affirms the judgment if there is any substantial evidence to support the finding of the trier of fact. *Ryan* v. *State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Williams* v. *State*, 298 Ark. 484, 768 S.W.2d 539 (1989); *Ryan* v. *State*, *supra*.

The evidence introduced at trial did not materially differ from the evidence introduced on the motion to suppress, with the exception of the testimony of two witnesses from the Arkansas State Crime Lab. Gene Bangs, a chemist and instrumentation

engineer at the Crime Lab, testified that he tested the substance which other evidence showed came from the pocket in the back of the leather medallion worn by appellant Buford, and it was cocaine that weighed 1.12 grams. The other witness from the Crime Lab was Gary Dallas, chief chemist in the Drug Section, who testified that the substance, which other evidence showed came from the gym bag found in the back seat of the car, tested positive for cocaine; that the weight of the powder substance was 542.3 grams; and the weight of the solid substance was 74.7 grams.

Appellants' sufficiency argument contends that the evidence does not tie possession of the cocaine to any appellant. Their premise is that the evidence must show some additional factor other than mere joint occupancy of a place where contraband is found. In *Plotts* v. *State*, *supra*, the appellant was a passenger in his own car when a zippered clothes bag containing 5 pounds 12.7 ounces of marijuana was found on the back seat. The court stated:

> Other courts have held that the prosecution can sufficiently link an accused to contraband found in an automobile jointly occupied by more than one person by showing additional facts and circumstances indicating the accused's knowledge and control of the contraband, such as the contraband's being (1) in plain view; (2) on the defendant's person or with his personal effects; or (3) found on the same side of the car seat as the defendant was sitting or in immediate proximity to him. Other facts include the accused (4) being the owner of the automobile in question or exercising dominion and control over it; and (5) acting suspiciously before or during arrest.

297 Ark. at 70 (citations omitted).

In *Nowden* v. *State*, 31 Ark. App. 266, 792 S.W.2d 621 (1990), we applied the *Plotts* rationale to affirm the conviction in a case in which the appellant was driving a truck which neither he nor the passenger owned. The truck was stopped because the decals were peeling off the license tag, and a check revealed that the plate had been issued to another vehicle. After the stop, an officer saw a grocery sack containing green vegetable matter (later tested and found to be marijuana) which was in plain view

on the floorboard on the passenger's side of the truck. We held the evidence that Nowden was exercising dominion and control over the vehicle by driving it, plus the additional factors (1) that the contraband was in an area immediately accessible to him, and (2) that Nowden exhibited nervous behavior after he was stopped were sufficient to link him to the contraband.

Likewise, in the present case, in addition to joint occupancy, there is at least one additional factor which links each of these appellants to the cocaine found in the vehicle they were in. Clinkscale is directly linked to the cocaine because it was in a bag on the back seat right beside where he had been sitting. Buford's conviction was based, not only on his joint occupancy of the automobile, but also on the cocaine found in the medallion around his neck. Moreover, there is evidence that it weighed 1.12 grams and under Ark. Code Ann. § 5-64-401(d) (1987), the possession of more than one gram of cocaine creates a rebuttable presumption that it is possessed with intent to deliver. The links between appellant Haygood and the contraband are that he was exercising dominion and control over the vehicle, and instead of taking the direct route to his destination he drove a longer, more circuitous route, and the contraband was in the passenger area of the automobile he was driving and within his immediate access. When considered in the light most favorable to the appellee, we think the evidence is sufficient to support the convictions of each of the appellants.

Affirmed.

MAYFIELD and ROGERS, JJ., agree.

FOUR SEASONS HOME IMPROVEMENT COMPANY *v.* W. B. McCULLOUGH

CA 90-331 807 S.W.2d 48

Court of Appeals of Arkansas
Division II
Opinion delivered April 17, 1991

Hurst Law Offices, by: *Q. Byrum Hurst, Jr.*, and *Terri Harris*, for appellant.

Henry, Cox & MacPhee, by: *Bruce A. MacPhee*, for appellee.

JAMES R. COOPER, Judge. The appellant in this civil case is a home improvement company incorporated in Arkansas. The appellant retained the services of the appellee, a South Carolina attorney, for the purpose of collecting money from a South Carolina customer. There was a dispute as to the fee agreement between the appellant and the appellee and, on June 20, 1988, a South Carolina court entered a default judgment against the appellant in the amount of $2,278.10 plus interest. The appellee subsequently sought registration of the foreign judgment in Arkansas; the appellant objected, raising an affirmative defense and attacking the judgment for want of jurisdiction. At the registration hearing the appellee moved for summary judgment and the trial court granted the motion. From that decision, comes this appeal.

On appeal the appellant advances two points: first, that there was not proper service of process on the appellant pursuant to the laws of South Carolina; and second, that the trial court erred in granting the appellee's motion for summary judgment. We disagree, and we affirm.

As to the appellant's argument that South Carolina was without jurisdiction, we note that jurisdiction is a permissible ground for attacking a foreign judgment and is therefore properly raised in a registration hearing. *See Dolin* v. *Dolin*, 9 Ark. App. 329, 659 S.W.2d 954 (1983). The appellant contends that South Carolina failed to obtain personal jurisdiction over it because the South Carolina Secretary of State, acting as the appellant's agent for service of process, failed to strictly comply with a South Carolina service of process statute which provided: "proof of service shall be by affidavit of compliance filed, together with copy of process, with the clerk of the court in which the action or proceeding is pending. There shall be filed with the affidavit of compliance, the return receipt signed by such foreign corporation or other proof of delivery. . . ." S.C. Code Ann. § 15-9-240(b)(2) (1981). The appellant cites *Bi-State Energy, Inc.* v. *Tidewater Compression, Inc.*, 19 Ark. App. 148, 718 S.W.2d 117

(1986), in support of its argument that South Carolina must strictly comply with the statute. We think this case is inapplicable because *Tidewater* involved jurisdiction in Texas courts and cited Texas case law which required Texas courts to strictly comply with its statutes dealing with service on foreign corporations. In the case before us, South Carolina law is applicable and the appellant cites no South Carolina authority to support its contention that South Carolina law requires strict compliance with its statutes dealing with service on a foreign corporation or that substantial compliance is insufficient for valid service. Our review of applicable South Carolina statutes, rules of procedure, and case law shows that South Carolina Rule of Civil Procedure 4(g) provides that failure to make proof of service does not affect the validity of the service. This rule also provides that "[i]f service was by mail, the person serving process, shall show in his proof of service the date and place of mailing, and attach a copy of the return receipt . . . showing whether the mailing was accepted, refused or otherwise returned." The South Carolina Court of Appeals cited this statute in *Beckham* v. *Durant*, 387 S.E.2d 701 (S.C. App. 1989), in which the court, addressing an appellant's argument that failure to file proof of service within a ten day period, as provided by Rule 5(d) S.C.R.C.P., nullifies the service or extends the period of time for a defendant to answer. The court noted that "Rule 4(g) S.C.R.C.P., specifically states, 'Failure to make proof of service does not affect the validity of the service.' Thus, failure to make proof of service within a ten day period of service, likewise, would not affect the validity of service." We think that this case provides insight into South Carolina's view of proof of service requirements.

The record before us shows that a letter from the South Carolina Secretary of State dated May 14, 1988, addressed to the appellant, reciting the summons and complaint were enclosed, and sent restricted delivery, was filed with the Williamsburg County, South Carolina Court on September 14, 1988. In addition, a letter from the Secretary of State, dated May 2, 1988, addressed to the appellee and enclosing the signed returned receipt, dated May 17, 1988, was filed in the Williamsburg County Court on June 6, 1988. We think that the Arkansas chancellor could find that these two letters, filed along with the signed return receipt, constituted the information required for

adequate proof of service under South Carolina law. Furthermore, we think that the chancellor could find in light of *Beckham, supra*, that despite the Secretary of State's failure to file an affidavit of compliance, there had been substantial compliance with the statute giving South Carolina jurisdiction over the appellant. The appellant was afforded the opportunity to offer evidence to support his allegation of lack of jurisdiction, and since the chancellor found jurisdiction with the South Carolina Court, and since there is no dispute that the judgment was regular on its face and duly authenticated, we find that the judgment was entitled to registration. *Springwind Farms, Inc.* v. *McLane Co.*, 21 Ark. App. 257, 731 S.W.2d 784 (1987).

The appellant also asserts that the chancellor erred in granting summary judgment because there was an issue of material fact, raised by the assertion of accord and satisfaction as an affirmative defense. In support of this assertion the appellant cites Ark. Code Ann. § 16-66-608 (1987) which provides:

> Any defense, setoff, counterclaim, or cross-complaint, which under the law of this state may be asserted by the defendant in an action on foreign judgment, may be presented by appropriate pleadings and the issues raised thereby shall be tried and determined as in other civil actions.

The appellant maintains that pursuant to this statute the issue of accord and satisfaction must be considered. The record shows a check from the appellant to the appellee in the amount of $150.00 dated October 6, 1987. It is clear from the complaint filed in South Carolina that the South Carolina court and the appellee credited the appellant with this payment. Furthermore, the June 6, 1988, judgment was obviously entered subsequent to this payment. Under these circumstances, the appellant's assertion of accord and satisfaction is merely an attempt to relitigate an issue already determined by the South Carolina court. We have held that Ark. Code Ann. § 16-66-608 (1987) does not permit the relitigation of any issue finally determined by the foreign court because those matters are foreclosed. *Dolin, supra.* Therefore, we find that the issue of accord and satisfaction was foreclosed and the trial judge did not err in granting summary judgment.

Affirmed.

DANIELSON and JENNINGS, JJ., agree.

DONNA'S BAIL BONDS, Inc. *v.* STATE of Arkansas

CA 90-237 807 S.W.2d 934

Court of Appeals of Arkansas
Division I
Opinion delivered April 17, 1991

J. Michael Hankins, for appellant.

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

MELVIN MAYFIELD, Judge. Donna's Bail Bonds, Inc. appeals from a bail bond forfeiture and judgment in the amount of $50,000.00 entered against appellant as surety on the bond. It is argued the bond was taken without authority and is therefore void and unenforceable. We agree.

The record shows that a hearing was held on September 21, 1989, in the Seventh Judicial Circuit Court on the request of Chris Zulpo for release on bond. Zulpo's attorney told the court that Zulpo had been tried and convicted of kidnapping, that his conviction was affirmed by the Arkansas Supreme Court, and he was confined in the Arkansas Department of Correction. Zulpo's attorney also told the court that Zulpo, on the order of another judge, had been released to the sheriff of Saline County for a hearing on a Rule 37 petition, and appellant was requesting that he be released on bond pending the hearing. The court admitted

Zulpo to bail in the amount of $50,000.00, over the objection of the deputy prosecuting attorney who was present at the hearing.

On October 4, 1989, the state filed a motion asking that the trial court "immediately revoke the bond" which had been made by Zulpo because "the Court did not have the authority to place the defendant on bail," citing *Deason* v. *State*, 263 Ark. 56, 62, 562 S.W.2d 79, 82 (1978). Zulpo's attorney filed a response, but on October 9, 1989, the trial court entered an order granting the state's motion for the reason that "the Court did not have the authority to place the defendant on bail." The *Deason* case was cited as authority.

On October 19, 1989, the trial court entered an order stating the bond was forfeited because "on the 17th day of October, 1989 . . . the Defendant, CHRIS ZULPO, being called at the bar of this Court as required by law, came not but made default." On October 27, appellant filed an answer asking for a hearing and alleging that the bond forfeiture should be set aside on the basis that the bond had been adjudicated to be illegal and there could not be a forfeiture of an illegal bond.

At a hearing held on February 13, 1990, appellant argued that a bond executed without authority was void and that there was a question as to whether the petition for Rule 37 was properly before the court as "no one ever got permission from the Supreme Court under Rule 37.2." After hearing arguments of counsel, the trial judge stated:

> Mr. Zulpo was properly before this court and the jurisdiction of the court to act on his petition is one question. The authority of the court to set a bail bond is before the court is another question and that bond was set, the amount of the bond was set, bond was entered into by the bondsman and the court rejects the argument that the bond is unenforceable and that the bail cannot be held liable for it as well as the surety.

On February 15, 1990, the trial court entered an order forfeiting the bond and granting judgment against the appellant as surety in the sum of $50,000.00.

In support of its contention on appeal, appellant cites *Deason* v. *State, supra*, which held that Ark. Stat. Ann. § 43-2714 [now

Ark. Code Ann. § 16-91-109 (1987)] provided for the defendant's right to bail on appeal but not on collateral attack. The opinion in *Deason* also relied upon Ark. R. Crim. P. 36.13. That case, like the present case, involved a question of whether a defendant who has been convicted and committed to prison is permitted bail while his Rule 37 petition is pending. Therefore, the *Deason* case is relied upon by the appellant in this case for the proposition that a defendant is not entitled to bail while making a collateral attack on his conviction. Moreover, the appellant points to Ark. R. Crim. P. 37.1 (which is conceded to have been in effect when Zulpo was convicted and sentenced) and argues that *only* a defendant who has not appealed his conviction to the Arkansas Supreme Court or Court of Appeals may file in the trial court a Rule 37 attack on his conviction of sentence. Otherwise, it is argued, Rule 37.2 requires that a defendant must secure prior permission from the supreme court before such an attack can be filed in the trial court. Thus, for this reason also, the appellant contends the trial court did not have authority to grant bail to Zulpo while he was out of prison for the purpose of his Rule 37 hearing.

The second prong of appellant's argument is that a bail bond taken without authority is void and unenforceable against the surety on the bond. Appellant cites the case of *United States* v. *Hudson*, 65 F. 68 (W.D. Ark. 1894), where Judge Parker held that a bail bond to be effective and binding on the principal and sureties must be valid. The opinion then states that for a bond to be valid it must (1) be taken by competent legal authority, (2) be in correct legal form, and (3) have sureties that are sufficient. Mr. Justice White, Associate Justice of the United States Supreme Court, had issued an order admitting the defendant to bail upon furnishing bond in the amount of $5,000.00 approved by the district judge; however, District Judge Parker held that Justice White was "without authority of law" to make the order for bail. On the point of the liability of sureties on bail bonds, Judge Parker quoted with approval the following language from another case:

> They are liable in any case only upon the ground that they enter into a recognizance ordered by a tribunal having authority to act in the premises.

65 F. at 73. Among the many cases that Judge Parker cited in support of the above statement are *Cooper* v. *State*, 23 Ark. 278 (1861), and *Blevins* v. *State*, 31 Ark. 53 (1876). In *Cooper*, the court said that "where a recognizance or bail bond is taken without authority it is void," and in *Blevins*, the court held that a bond taken by the sheriff of Pope County who arrested a man in Conway County was a nullity because the Pope County sheriff had no authority in Conway County. The *Cooper* case was cited with approval in *Thomm* v. *State*, 35 Ark. 327 (1880), and the *Blevins* case was cited with approval in *Littleton* v. *State*, 46 Ark. 413 (1885).

The *Hudson, Cooper, Blevins* and *Thomm* cases are cited in an Annotation, *Liability of Surety on Bail Bond Taken Without Authority*, 27 A.L.R. 4th 246 (1984). The annotation makes the following summary pertinent to the issues under consideration in the present case.

> A defense to the forfeiture of a bail bond occasionally raised by a surety seeking to avoid liability on that bond is that the person taking or requiring the bond was without authority to do so, and therefore that the bond is void and unenforceable. Generally, the courts have held that under such circumstances, the surety is not liable on the bond as a statutory obligation.

Id. at 248. The cases cited in appellant's brief that are cited in the above A.L.R. annotation are cited in support of the statement from the annotation quoted above. Five federal cases and cases from thirty-one states are also cited in support of the statement. The case preceding the annotation is *People* v. *Wood*, 101 Ill. App. 3d 648, 428 N.E.2d 691 (1981). In that case the trial court entered an order forfeiting a defendant's bail bond and entered a judgment against the defendant's father who had signed as surety on the bond. On appeal, it was held that the trial court had attempted to release the defendant on his own recognizance while at the same time requiring the defendant's father to sign a bail bond as surety. The appellate court held that there was no authority for taking or requiring a surety where the defendant is released on his own recognizance. The court said: "A bail bond taken without authority is a nullity and hence is void, and the surety on such a bond is not bound by the subsequent forfeiture of

the bond." An Arizona case cited in support of the above statement from the A.L.R. annotation states:

> The overwhelming weight of authority throughout the country is to the effect that a bail bond in a criminal case which is void as a statutory obligation, because taken without authority, is void for all purposes.

State v. *Swinburne*, 121 Ariz. 404, 590 P.2d 943 (Ariz. App. 1979). *See also* 8 Am. Jur. 2d *Bail and Recognizance* § 102 (1980).

It seems clear to us that the trial court in the present case was not authorized to admit Chris Zulpo to bail during his release by the Department of Correction to the Saline County Sheriff for a hearing on a Rule 37 petition. Moreover, the record shows that the defendant had appealed his conviction to the Arkansas Supreme Court and does not show that the supreme court had granted permission for the Saline Circuit Court to hear Zulpo's Rule 37 petition; therefore, it appears that the hearing was not authorized under Ark. R. Crim. P. 37.2. If for either reason the Saline Circuit Court was not authorized to admit Zulpo to bail, the weight of authority in the United States, as well as in Arkansas, holds that a bail bond taken without authority is void and the surety on such a bond is not liable.

The state argues that there is no order in the record stating that Zulpo was released for a Rule 37 hearing, and suggests that Zulpo might have filed a petition for writ of error coram nobis or a petition to correct an illegal sentence and could have been released for a hearing on either of them, and such hearing could be held without prior approval by the supreme court. This argument ignores two points. One, the state does not cite authority which holds that the circuit court had authority to admit Zulpo to bail even if a hearing was to be held on either of the collateral attacks suggested by the state. Two, the defense attorney, the prosecuting attorney, and the trial judge all stated orally and in writing that the reason for Zulpo's release from prison was to attend a Rule 37 hearing in Saline County. We think the record is so clear on this point that it is simply not open to question.

The state also makes the argument that the circuit court had

jurisdiction to hear evidence to determine whether it had jurisdiction to grant Zulpo relief of any kind, and therefore it had personal jurisdiction over Zulpo and authority to set bail pending the hearing. This appears to be the position taken by the trial court as indicated by its statement which we quoted above. The problem with this view is that we are cited no authority that allows the trial court to admit Zulpo to bail even if we accept the premise on which the view is based. The hearing is still a collateral attack on Zulpo's conviction, and we are cited no authority that allows a trial court to bring a convicted felon out of prison and admit him to bail while he makes a collateral attack on his conviction.

A third argument, briefly mentioned by the state, is that viewed from a purely contractual vantage point, the appellant got what it bargained for and collected a fee from Zulpo for becoming surety on his bond and should be held to the contract it made. This argument, aside from jurisdictional and public policy considerations, has been rejected by most courts. In the A.L.R. annotation referred to above, it is stated:

> Efforts to hold the surety liable on a bail bond taken without authority as a common-law obligation have also, as a general rule, failed. Courts considering this proposition have generally reasoned that the consideration for the bond in the form of the release of the principal, which might be sufficient to find a similar obligation valid in a civil matter, is not a basis for enforcement of the surety's obligation on an invalid bond. . . . This is not the universal view, however, as in at least two jurisdictions, the courts have found sufficient consideration to support the bond and therefore have held that the bond is valid as a common-law or voluntary obligation on the part of the surety.

27 A.L.R.2d at 248-49. Fourteen states and a federal case are cited as supporting the above statement. Only Georgia and Iowa are listed as jurisdictions which have held that bail bonds approved by courts without authority are nevertheless valid as a contractual or voluntary obligation. We think the majority view is the better one.

Finally, in addition to what we have said, the overriding problem with holding the appellant liable as surety on the bail

bond in this case is the state's motion asking the trial court to revoke the bond because it "did not have the authority to place the defendant on bail," and the trial court's finding that it "did not have the authority to place the defendant on bail" and its order revoking the defendant's bond. Faced with this adjudication, we feel compelled to hold that the surety on Zulpo's unauthorized — or illegal — bond is not liable.

The judgment appealed from is reversed and the proceedings against the appellant are dismissed.

ROGERS and DANIELSON, JJ., agree.

L & S CONCRETE COMPANY, INC. *v.* BIBLER BROTHERS, INC.

CA 90-189 807 S.W.2d 50

Court of Appeals of Arkansas
Division I
Opinion delivered April 17, 1991

Davidson Law Firm, Ltd., by: *Charles Darwin Davidson* and *Dinah M. Dale*, for appellant.

Laws & Murdoch, by: *Hugh Richardson Laws*, for appellee.

MELVIN MAYFIELD, Judge. L & S Concrete appeals from a judgment rendered it as garnishee in the amount of $19,047.13 plus interest and costs.

On June 29, 1989, appellee Bibler Brothers obtained a default judgment against Arkoma Industries, Inc. in the amount of $19,047.13 plus interest for the balance owed on some lumber Arkoma had purchased from the appellee. The judgment was unpaid and on July 28, 1989, appellee filed a writ of garnishment, accompanied by allegations and interrogatories, alleging L & S Concrete was indebted to Arkoma or "has in its hands and

possession, goods, chattels, monies, credits and effects" belonging to Arkoma. Interrogatory No. 2 propounded by the appellee is as follows:

> 2. Had you, in your hands and possession, on or after the date of service of the Writ of Garnishment herein, any goods, chattels, monies, credits and effects belonging to the defendant, Arkoma Industries, Inc.? If so, what was the nature and value thereof?

Appellant denied it was obligated to Arkoma, and in answer to Interrogatory No. 2 stated "No. However, some property of the bank lender of Arkoma is on L & S Concrete Company's property."

On September 1, 1989, appellee filed a reply to the appellant's answers to the allegations and interrogatories served upon the appellant as garnishee. The reply included the following:

> 3. At the time the writ of garnishment was served on the garnishee, it had in its possession certain lumber belonging to Arkoma Industries, Inc. The plaintiff denies that the lumber belonged to the bank lender of Arkoma as stated in the garnishee's answer. The garnishee has not answered the interrogatories truthfully or accurately.
>
> 4. The lumber that was in the possession of the garnishee has been removed since the date on which the writ of garnishment was served upon it.

Appellee asked for judgment against appellant in the amount of $19,047.13 plus interest and costs.

A hearing was held November 1, 1989, and at the close of the appellee's evidence, appellant made a motion for a directed verdict on the basis that there was no showing that the property was in any way within the meaning of the garnishment statute "in the possession or control or custody of the garnishee." The trial court denied appellant's motion and appellant proceeded to present its evidence.

On November 14, 1989, the trial court sent a letter to the parties which stated:

> After a review of the evidence presented and the letter

> briefs of counsel, it is the finding of the Court that the plaintiff should have and recover from L & S Concrete Company, Inc., garnishee, the amount of the original indebtedness owed by Arkoma Industries, Inc., in the amount of $19,047.13 plus interest and costs.
>
> The Court finds that the value of the property held by the garnishee was $22,000.00 to $23,000.00. The Court feels that L & S Concrete Company, Inc., had in its hands or possession the property of Arkoma Industries, Inc. Even though Mr. Charlie Weaver indicated that he was not aware of the property being on the L & S property, the Court feels that the facts would indicate that he did. Mr. Fred Weaver, who is owner of Arkoma Industries, Inc., and brother of Charlie Weaver, indicated that he had open use of the L & S property whenever he needed. It is difficult for the Court to believe that L & S Concrete Company, Inc., was not aware of three large truckloads of timber products on its property.
>
> L & S Concrete Company, Inc., apparently had knowledge of the physical presence of the lumber on its property when it answered the allegations and interrogatories of plaintiff stating that property of the bank lender of Arkoma Industries, Inc., was situated on its property.

On November 20, 1989, the trial court entered an order granting appellee judgment in the amount of $20,060.74 plus post-judgment interest at the rate of ten percent per year until paid.

Appellant argues on appeal that the trial court committed reversible error by denying its motion for a directed verdict because garnishment was improper in this case. Appellant contends it cannot be liable as garnishee because (1) it owed no debt to Arkoma; (2) that the property did not belong to Arkoma because it was specially manufactured pursuant to a purchase order and subject to a perfected security interest held by Arkoma's lender; and (3) that property was not in its hands or possession.

Arkansas Code Annotated § 16-110-102 (1987) states:

> (a)(1) Whenever, in a civil action, the plaintiff shall

> have reason to believe that any other person is indebted to the defendant or has in his hands or possession goods and chattels, moneys, credits, and effects belonging to the defendant, the plaintiff may sue out a writ of garnishment.

Appellant's argument that it cannot be liable as garnishee because it owed no debt to Arkoma ignores the alternative provision "or has in his hands or possession goods and chattels . . . belonging to the defendant" set out in the above statute. Appellee cited *Harris* v. *Harris*, 201 Ark. 684, 146 S.W.2d 539 (1941), which stated "it is the settled rule that the effect of the service of the writ of garnishment is to impound all property in the hands of the garnishee belonging to the judgment debtor," but appellant says the garnishee in that case "actually owed a debt to the judgment debtor." However, in *Patterson* v. *Harland*, 12 Ark. 158 (1851), the garnishee had about 140 bushels of corn in his possession, one-half of which belonged to the judgment debtor, and judgment was rendered against the garnishee for the value of the corn. Clearly, the garnishee was not indebted to the judgment debtor in that case. Moreover, appellant's argument that the lumber did not belong to Arkoma because it was specifically manufactured for a customer in Iowa and that a bank in Arkansas held a lien on it is not supported by the evidence. This issue is really not seriously argued on appeal. Appellant's real contention is that it did not have "possession" of the lumber placed on its property because it exercised no control over the lumber.

In support of this argument, appellant cites *Foos Gas Engine Co.* v. *Fairview Land & Cattle Co.*, 185 S.W. 382 (Tex. App. 1916), and *Milwaukee Stove & Furnace* v. *Apex Heating*, 418 N.W.2d 4 (Wis. App. 1987), but we find those cases are not controlling here. *Milwaukee Stove* was decided on the basis of the Wisconsin garnishment statute which states a creditor may proceed against any person who is indebted to or has "any property in his or her possession or under his or her control." The property involved was the "complete inventory of shop equipment and materials" of a heating and cooling business which was to be sold at auction by one George Woodrich. The court held that the property was not in the possession of Woodrich because the garnishment statute was designed to impose liability on persons who "maintain actual possession or control of property" not on

persons who "perform some act in relation to the property." However, the Arkansas statute is not as restrictive as the Wisconsin statute, and requires only that a person have property of the defendant "in his hands or possession." In *Harris* v. *Harris, supra*, our supreme court stated the general law regarding garnishment.

> It is the settled rule that the effect of the service of the writ of garnishment is to impound all property in the hands of the garnishee belonging to the judgment debtor (in the instant case, Dora Fraser) at the time of service, or that may thereafter come into his hands, up until the filing by him of a true and correct answer. *Magnolia Petroleum Co.* v. *Wasson*, 192 Ark. 554, 92 S.W.2d 860. In the Magnolia Petroleum case we held that "Recovery in garnishment proceedings can be had only up to date of filing answer."
>
> In *Hockaday* v. *Warmack*, 121 Ark. 518, 182 S.W. 263, this court said: "It is a well settled rule that a garnishee, after service of the writ upon him must retain possession of all property and effects of the principal debtor in his hands, and if he fails to do so he is liable for the value of the same to the plaintiff in the principal action. Such was the holding of this court in *Adams* v. *Penzell*, 40 Ark. 531.

201 Ark. at 687.

In *Foos*, the Texas Court of Civil Appeals held that a land company garnisheed in an action against an engineering company which had been digging wells on its land could not be held liable for the value of the machinery the engineering company left on the land as the land company was not in possession of the machinery. There is, however, authority to the contrary. In *Hamilton-Collinson Hardware Co.* v. *Arkansas City Oil & Gas Co.*, 169 P. 190 (Kan. 1917), an oil and gas company left a rig, tools, and appliances on the land of its lessor. In actions brought by laborers who had obtained judgments against the oil and gas company, the court held, for the purpose of garnishment, that the lessor was in possession and control of the property left on his farm by the oil and gas company. The court stated:

> The statute under which the proceeding was had provides, among other things, in effect, that if a plaintiff

> makes oath in writing that he has good reason to believe that any person or corporation has property of the defendant in his possession or under his control, he is subject to be garnished. . . . The property belonged to the defendant. A person had it in his possession. It was liable for the debts of the laborers who obtained the judgments, and no good reason is seen why the property was not reached by the garnishment process.

169 P. at 191 (citations omitted).

The appellant in the instant case argues that to hold it liable as garnishee merely because of "bare presence" is comparable to holding a landowner as garnishee simply because someone placed goods or chattels on his land. At oral argument, appellant likened the issue in the present case to that of one just parking an automobile on another's land. However, in such situations, the proper response to interrogatories submitted with a writ of garnishment would be that the property was left without consent on the garnishee's property; that the garnishee has no power to prevent the removal of the property subject to garnishment; and should the property be removed, there is nothing the garnishee can do about it. Or, one could simply follow the provisions of Ark. Code Ann. § 16-110-409 (1987) and answer that the property is surrendered to the plaintiff, and then obtain from the court, as provided in subsection (b) of § 16-110-409, "an order releasing and discharging the garnishee from all responsibility to the defendant, in relation to the goods and chattels . . . so surrendered." Here, instead of following either of the paths suggested, the appellant stated only that some "property of the bank lender of Arkoma" was on its property, and as we have pointed out, the evidence will not support that answer.

At trial in this case, there was evidence that Fred Weaver, owner of Arkoma, is the brother of Charlie Weaver, sole stockholder and CEO of appellant L & S Concrete, and that Charlie Weaver also owns 100 percent of the stock in Weaver-Bailey Construction Company. There was also evidence that Weaver-Bailey and L & S share a common yard. In his testimony, Fred Weaver admitted that approximately three truck loads of the lumber products (which he said consisted of four by six sign posts, twelve to twenty feet long) were transported and stored on

the property of L & S Concrete and that there is a fence around the yard to keep intruders out. Fred Weaver also testified that he put the material there without his brother's permission. However, when asked whether he would have to ask permission of a brother, Fred Weaver responded: "Well, I didn't." And when asked whether this was any kind of practice that was carried on between the two, if "you needed space, to put things over on each other's property," Fred responded that he had owned part of the company for several years and "I just felt like if I needed something I did it." He said if he needed something, even if he needed to borrow a piece of equipment or something, he would get it without asking his brother.

Appellee James Bibler testified that Arkoma's debt began to get old and that he was in contact with Fred Weaver trying to get payment. When no satisfaction of the debt came across, Bibler tried to find some of Arkoma's lumber products. He testified that he located some material on the back lot of what he thought was Weaver-Bailey Construction Company, and he filed a garnishment. After he found out it wasn't on the Weaver-Bailey lot, he filed garnishment against L & S. Bibler testified the material was still there on August 9, but it was gone on September 10.

After the above evidence was presented, the appellant made a motion for directed verdict which was denied. The appellant then called Charlie Weaver, sole stockholder and CEO of appellant company, who testified that he was not aware Arkoma had placed some lumber products on L & S's property, and the first he learned about this lumber on his property was the day of trial. He testified further that three truck loads of lumber would cover "a pretty good area."

Both parties then rested, and appellant again moved for a directed verdict. In reviewing the denial of a motion for directed verdict, we give the proof its strongest probative force. Such proof, with all reasonable inferences, is examined in the light most favorable to the party against whom the motion is sought and if there is any substantial evidence to support the verdict we affirm the trial court. *Grendell* v. *Kiehl*, 291 Ark. 228, 723 S.W.2d 830 (1987).

Apparently the trial court did not believe appellant's story and in view of all the testimony and circumstances of this case, we

S.W.2d 830 (1987).

Apparently the trial court did not believe appellant's story and in view of all the testimony and circumstances of this case, we think there is substantial evidence to support the court's finding that the appellant had in "its hands or possession" property belonging to Arkoma.

Appellant also argues appellee failed to plead with particularity its post-hearing allegations of fraud. Because the issue of fraud was not raised in the trial court and was not the basis of the trial court's decision, we do not reach this issue.

The judgment of the trial court is affirmed.

ROGERS and DANIELSON, JJ., agree.

Emma Jean NORMAN *v.* Raymond GREEN, Individually, and Mary Green, His Wife, and Raymond Green, Executor of the Will of Mary Etta Green, Deceased

CA 90-329 807 S.W.2d 937

Court of Appeals of Arkansas
Division I
Opinion delivered April 24, 1991

Landers and Shepherd, by: *Bobby E. Shepherd*, for appellant.

Arnold and Thomas, by: *W.H. "Dub" Arnold*, for appellee.

JOHN E. JENNINGS, Judge. This is an appeal from an order of the circuit court of Union County dismissing the complaint of the appellant, Emma Jean Norman, which sought judgment for $23,000.00 plus interest. The relevant facts were briefly and fairly summarized by the trial court in its letter opinion:

> Mary Etta Green died on March 31, 1987, at the age of 86 after a long illness. She was survived by her stepson, Raymond Green, who along with his wife are defendants. The plaintiff, Emma Jean Norman, is a nurse's assistant who works in the South Arkansas Medical System caring primarily for the elderly. She met Mary Etta Green possibly in the 70's, however, when Ms. Green became ill in the summer of 1986, was asked by Ms. Green to move in with her. Emma Jean Norman is married and she and her husband maintain a separate residence in Crossett.
>
> On December 17, 1986, Ms. Green asked Ms. Norman to go to the bank and bring her a green bag. Ms. Norman was given a letter authorizing her to enter Ms. Green's safety deposit box. It was at this point that Ms. Norman discovered that Ms. Green had $23,000.00 in the green bag. Ms. Norman removed $520.00 from the bag and took it to Ms. Green. Thereafter a lease agreement was entered into by Ms. Green and Ms. Norman in effect stating that upon the death of either the property in the box should pass to the survivor. Ms. Norman entered the safety deposit box again on 16 March, 1987, testifying that Ms. Green wanted her to check its contents in that she was concerned with Raymond Green getting into the box. Fourteen days later Ms. Green died. On 22 April, 1987, Raymond Green had the safety deposit box drilled and he removed the $23,000.00. Thereafter, Ms. Norman brought this suit for the money.

The contention on appeal is that upon the death of Ms. Green, Ms. Norman became the sole owner of the money contained in the safe deposit box. We affirm the decision of the

trial court.

The court made the following specific findings of fact:

(1) The money was solely the property of Ms. Green. Ms. Norman made no contribution to the $23,000.00.

(2) Ms. Norman was surprised when she discovered the $23,000.00 in the safety deposit box on December 17, 1986. Up and unto this time she was unaware that the money existed.

(3) Ms. Green was extremely ill and during her last days bedfast.

(4) At least two neighbors, Ms. Ratcliff and Ms. Powell, testified as to the attentiveness of Raymond Green to his stepmother and their close relationship.

(5) Raymond Green was listed and named in a 1982 Will of Mary Etta Green as her sole heir. This Will has been probated.

(6) Other than the testimony of Emma Jean Norman there is no evidence of any gift of the $23,000.00 to Ms. Norman, other than the lease agreement.

The court concluded that it could not rule that a joint estate was ever created in the contents of the safety deposit box and that, at best, the parties had the right to deposit objects in the box and remove them, but that the evidence fell far short of establishing joint ownership of the money with a right of survivorship.

For reversal, appellant relies on *Black* v. *Black*, 199 Ark. 609, 135 S.W.2d 837 (1940), and *Newton County* v. *Davison*, 289 Ark. 109, 709 S.W.2d 810 (1986). While we agree that those cases, together with the supreme court's recent decision in *Kulbeth* v. *Purdom*, 305 Ark. 19, 805 S.W.2d 622 (1991), provide the framework for decision, we cannot agree that those cases require reversal here.

After discussing the facts, the court in *Newton County* v. *Davison*, said:

> Based on the foregoing evidence we are unable to say that Mrs. Morak clearly intended to make a gift to the

Davisons of the contents of the safe deposit box. In *Black* v. *Black*, 199 Ark. 609, 135 S.W.2d 837 (1940), we noted that there is a presumption of ownership in favor of the surviving lessee of a safe deposit box which can be rebutted by testimony to the contrary. In that case, however, the lease agreement signed by the parties renting the box specifically stated that the property placed in the box is joint property and upon the death of either joint tenant the property passes to the survivor. Such an agreement as to the contents is missing here.

. . . .

Other courts have held that the deposit of articles in a jointly leased safe deposit box of itself works no change in title, absent an express agreement that the contents of the box shall be joint property. This is so even if the language in the lease describes a joint tenancy with the right of survivorship, unless it specifically refers to the contents. Similarly, it is generally held that a joint lease of a safe deposit box in and of itself is insufficient to support the contention that a gift has been made of the contents.

In finding the language of the lease and Mr. Davison's testimony insufficient to establish ownership of the contents of the lock box, we announce our intention to require an affirmative showing that the owner of a lock box intended to give the contents of the lockbox to another. Such an intention cannot be demonstrated without a specific written reference to the disposition of the contents of a lock box and is not indicated by an agreement only to rent the box in two or more names with a right of survivorship. [Citations omitted.]

In *Kulbeth*, *supra*, the supreme court found that the requirements established in *Newton County* v. *Davison* had been met where the following provision was separated from the body of the safe deposit box lease and highlighted in bold print:

In addition to agreeing to the foregoing provisions of safe deposit box lease which are hereby made a part of this paragraph, the undersigned agree that each, or either of them is joint owner of the present and future contents of

said box and said Bank is hereby authorized to permit access to said box by either of the undersigned and that in the event of the death of either of the undersigned the survivor shall have the right to withdraw said contents and upon said withdrawal said Bank shall be automatically relieved of any further obligation or responsibility to the heirs, legatees, devisees or legal representatives of the deceased. Receipt is hereby acknowledged of 2 keys to said box.

In the case at bar Ms. Green and Ms. Norman signed, as lessees, a one page pre-printed document entitled "Lease of Safe Deposit Box, Joint Tenant, including Husband and Wife." The document's only reference to joint tenancy is found in paragraph 10:

> 10. Lessor shall not be liable for any delay caused by failure of the vault doors or locks to operate.
>
> J. C. *In case the Lessees are joint tenants*, including husband and wife, it is hereby declared that all property of every kind at any time heretofore or hereafter placed in said box is the joint property of both Lessees and, upon the death of either, passes to the survivor subject to inheritance tax laws. Each of the Lessees shall have full access to and the control of the contents of said box without further authority. The lessor shall not be liable, in the event that property belonging to the joint tenants having access to said box be misappropriated by one or more of those having access. Each or all of the Lessees may appoint a deputy to have access to or surrender the box. [Emphasis added.]

Clearly, the provision in paragraph 10 of the lease is conditional in nature: it states, in effect, that *if* the lessees are joint tenants, then the property contained in the box will pass to the survivor at the death of the other lessee. On the facts of the case at bar, this language is insufficient to meet the requirements of *Newton County* v. *Davison* of "an affirmative showing that the owner of a lockbox intended to give the contents of the lockbox to another."

Appellant correctly contends that the language in *Black* v. *Black*, *supra*, was virtually identical to that in the case at bar.

There, the lease provision began, "[i]n case the lessees are joint tenants, including husband and wife. . . ." The distinction between *Black* and the case at bar is that while the language of the lease in *Black* was conditional, as here, the condition was met in *Black*, i.e., Mr. and Mrs. Black were in fact husband and wife, so that the dispositive provisions of the clause were activated. Even so, the supreme court in *Black* held that the language created only a presumption that the money in the safe deposit box had become a joint estate and that, under the facts of *Black*, the presumption had been entirely rebutted.

Our conclusion is that under the applicable decisions of the Arkansas Supreme Court, the trial judge's decision, that a joint tenancy with right of survivorship was not created as to the money contained within the safe deposit box, was not clearly erroneous.

Affirmed.

CRACRAFT, C.J., and DANIELSON, J., agree.

Wilson MATHIS and Laverne Mathis, His Wife *v.* John BRASHEAR and Gail Brashear, His Wife, The City of Conway, Arkansas and Conway Corporation

CA 90-332 807 S.W.2d 666

Court of Appeals of Arkansas
Division II
Opinion delivered May 1, 1991

Phil Stratton, for appellants.

Brazil, Clawson & Adlong, for appellees John and Gail Brashear.

Tim D. Williams, for appellee City of Conway.

Henry & Henry, for appellee Conway Corp.

MELVIN MAYFIELD, Judge. Appellants Wilson and Laverne Mathis appeal a Faulkner County Chancery Court decision that dismissed their adverse possession complaint.

The record shows that certain property in Faulkner County was platted into blocks and lots as the Hayes Addition to the City of Conway, Arkansas, and filed for record on December 4, 1917. In September 1961 the Hayes Addition was annexed to the City of Conway. The plat provided for a forty-foot easement to be known as Maple Street to run between Blocks 8 and 1, but Maple Street was never opened and a portion of that street is the property at issue in this case. Appellants own Lots 1, 2, 3, 4, 5, 27, 28, 29, 30, 31, and 32 of Block 8. Lots 1 and 32 are adjacent to Maple Street. It was stipulated that appellants have used, maintained, mowed, and planted trees and shrubs on the area between Blocks 1 and 8 known as Maple Street since 1952.

On May 9, 1989, appellants filed suit to claim this strip of land by adverse possession. The chancellor held, on stipulated facts, that Ark. Code Ann. § 14-301-113 (1987), passed in 1907, prohibited the acquisition of any city street by adverse possession and that Ark. Code Ann. § 22-1-201 (1987), passed in 1923, prohibited the acquisition of any public thoroughfare, road, or highway by adverse possession, and dismissed appellants' complaint.

Arkansas Code Annotated § 14-301-113(a) (1987) provides in part:

> No title or right of possession to any alley, street, or public park, or any portion thereof, in any city or incorporated town in this state shall or can be acquired by adverse possession or adverse occupancy thereof.

And Arkansas Code Annotated § 22-1-201 (1987) provides:

> (a) No title or right of possession to any public thoroughfare, road, highway, or public park, or any portion thereof, shall or can be acquired by adverse possession or adverse occupancy; and the right of the public or of the proper authorities of any county to open or have opened any such public thoroughfare, road, highway, park, or parts thereof shall not be defeated in any action or proceeding by reason of adverse possession or adverse occupancy of any such public thoroughfare, road, highway, or park, or any portion thereof where adverse possession or occupancy commenced after the passage of this section.
>
> (b) Any thoroughfare, road, or highway that may be platted by any landowner and dedicated to the public as a public thoroughfare, road, or highway where the plat shows or the bill of assurance states the width of the road or highway or any park dedicated by any landowner to the public as a public park for the use and benefit of the public shall not be acquired by adverse possession or adverse occupancy of any such land so dedicated to the public, or any portion thereof, where the adverse possession or occupancy commenced after the passage of this section.

But appellants argue on appeal that these statutes are not applicable because the street was not accepted by the public until 1961 when the subdivision was annexed into the city, and even then, the dedicated property was never opened as a street, and therefore, their adverse possession of the portion of Maple Street at issue ripened into ownership between 1952 and 1961, prior to public acceptance of the property.

Appellants argue that there are two essential elements of a dedication: the owner's appropriation of the property to the intended use and its acceptance by the public. *City of Jonesboro* v. *Kirksey*, 239 Ark. 205, 388 S.W.2d 78 (1965), *Fitzhugh* v.

Goforth, 228 Ark. 568, 309 S.W.2d 196 (1958); *Hankins* v. *City of Pine Bluff*, 217 Ark. 226, 229 S.W.2d 231 (1950). Appellants rely heavily on *Mebane* v. *City of Wynne*, 127 Ark. 364, 192 S.W. 221 (1917), for the proposition that unless the city accepts the dedication and puts the property to public use, the landowner can recall the dedication or the property can be adversely possessed. Appellants' reliance on *Mebane* is misplaced. The court in *Mebane* held there had been an acceptance of the street portions of the dedication, and stated:

> This court has steadily adhered to the rule that "an owner of land by laying out a town upon it, platting it into lots and blocks intersected by streets and alleys, and selling lots by reference to the plat, is held to have dedicated to the public use the streets and alleys and other public places marked on the plat and such dedication is irrevocable." *City of Hope* v. *Shiver*, 77 Ark. 177; *Davies* v. *Epstein*, 77 Ark. 221; *Dickinson* v. *Arkansas City Improvement Co.*, 77 Ark. 570; *Brewer* v. *Pine Bluff*, 80 Ark. 489; *Stuttgart* v. *John*, 85 Ark. 520; *Paragould* v. *Lawson, supra* [88 Ark. 478]; *Balmat* v. *City of Argenta*, 123 Ark. 175.

127 Ark. at 370.

More recently in *Wenderoth* v. *City of Ft. Smith*, 256 Ark. 735, 510 S.W.2d 296 (1974), the Arkansas Supreme Court stated:

> It is well established that whenever a dedicator-owner of land makes and files a plat and thereafter lots are sold with reference to it, as here, such constitutes an irrevocable dedication of any street or passageway for public use shown or indicated on the plat. Furthermore, whenever a dedication becomes irrevocable, a public authority can accept the dedication for public use whenever the necessity occurs.

256 Ark. 736-37 (citations omitted).

Applying this rule, the plat of Hayes Addition to the City of Conway was recorded and the land dedicated in 1917, and when the first lot was sold in reference to the plat, the streets became irrevocably dedicated. The two statutes prohibiting adverse possession of public property were enacted prior to

appellants' purchase of their property and, therefore, appellants could not adversely possess Maple Street.

Affirmed.

COOPER and ROGERS, JJ., agree.

WASHINGTON COUNTY FARMERS MUTUAL FIRE INSURANCE CO. *v.* Darrel PHILLIPS and Alma Lane Phillips

CA 90-359 807 S.W.2d 940

Court of Appeals of Arkansas
Division II
Opinion delivered May 1, 1991

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

Billy J. Allred, for appellees.

MELVIN MAYFIELD, Judge. Appellant Washington County Farmers Mutual Fire Insurance Company appeals from a jury verdict finding appellees entitled to recover $7,227.00 under an insurance policy.

On August 6, 1987, the appellant issued a policy insuring the appellees' dwelling and their household and personal effects against fire and other named perils. The policy defined "household and personal effects" as follows:

> (2) HOUSEHOLD AND PERSONAL EFFECTS usual and incidental to the occupancy of the premises as a dwelling (but excluding accounts, bills, currency, deeds, abstracts, evidence of debt, money, securities, diamonds, antiques, motor vehicles, aircraft, radio and television antenna and masts, windchargers, citizen band radios, scanners, lawn mowers, animals and pets, outdoor equipment, fences, trees, shrubs, plants and lawns) belonging to the insured, or at the option of the insured, belonging to the members of his household, all while on the premises herein described.

On November 26, 1988, a fire occurred at appellees' residence causing damages to the porch and wall of the residence and a total loss to seventeen stamp vending machines stored on the porch. Farmers Mutual denied coverage for damage to the vending machines, and on March 10, 1989, appellees filed a complaint seeking to recover fire damages to their residence totaling $282.23 and damages to the vending machines totaling $7,227.00, plus an additional 12% penalty and attorneys fees. Subsequent to the filing of the complaint, Farmers Mutual paid

the full amount of loss to the residence, and that portion of the complaint was dismissed with prejudice.

On August 16, 1989, appellant filed a motion for summary judgment on the basis that, as a matter of law, the stamp vending machines which were to be put to business use in the future were not covered under the policy's definition of "household and personal effects usual and incidental to the occupancy of the premises as a dwelling." The trial court denied appellant's motion, on the holding that the question as to whether or not the policy covered the stamp machines was a question of fact to be determined at trial.

On April 9, 1990, immediately prior to trial, appellant asked the court for a ruling on whether or not the applicable contract language was ambiguous. The trial court stated:

> Well, in reading the contract terms, I think that is a matter for the jury to determine. Now if it's clear and there is no doubt then I think the Court can rule one way or the other. But in reading the terms at this time, I am going to decline to instruct them as to whether it is ambiguous or not ambiguous and allow them to make that determination by means of an instruction that I give them.

At the close of the appellees' case, appellant moved for a directed verdict asserting there was no evidence of any ambiguity and appellees had admitted the vending machines were going to be put to a business use. The trial court overruled appellant's motion stating that it had previously ruled that it was a fact question as to whether or not the machines were covered under the insurance policy, and there was no policy language excluding business property. At the close of all the evidence, the motion was renewed and again denied. The case was then submitted to the jury which returned a verdict for the appellees in the amount of $7,227.00.

On appeal, appellant argues that the jury's verdict is not supported by substantial evidence. Appellant also argues the trial court erred (1) in denying appellant's motions for summary judgment and directed verdict, (2) in refusing to rule whether or not the policy language was ambiguous and leaving it to the jury to decide, and (3) in giving jury instructions number 7 and 8.

These instructions stated:

JURY INSTRUCTION NUMBER 7

> Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, and be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense. However, where the terms or words of policy are of doubtful meaning or have more than one meaning, that construction most favorable to the insured will be adopted.

JURY INSTRUCTION NUMBER 8

> You are instructed that if you find that the term "household and personal effects usual and incidental to the occupancy of the premises as a dwelling" is of doubtful meaning or has more than one meaning, then you must construe the phrase in favor of the plaintiffs, Darrel Phillips and Alma Lane Phillips, and against the defendant, Washington County Farmers Mutual Fire Insurance Company.

In the first place, our supreme court has held that the denial of a summary judgment is not reviewable where the denial is followed by a trial on the merits. *The American Physicians Insurance Co.* v. *Hruska*, 244 Ark. 1176, 428 S.W.2d 622 (1968). As to appellant's contention that it was entitled to a directed verdict, this contention is based on its argument that the policy was not ambiguous and therefore there was no question for the jury to decide. Appellant does not argue that the stamp vending machines were not "personal effects . . . belonging to the insured . . . on the premises." The contention is that they were not personal effects "usual and incidental to the occupancy of the premises as a dwelling." These terms, however, are not defined by appellant's policy.

In reviewing the denial of a motion for directed verdict, we give the proof its strongest probative force. Such proof, with all reasonable inferences, is examined in the light most favorable to the party against whom the motion is sought and if there is any substantial evidence to support the verdict we will affirm the trial court. *Grendell* v. *Kiehl*, 291 Ark. 228, 723 S.W.2d 830 (1987).

Here, the appellee Alma Phillips testified that she purchased the vending machines in April 1988 because her husband wasn't able to work, and she wanted some way for him to have extra income. She testified that when the machines arrived they were put on the porch of appellees' house by UPS; that at the time of the fire in November of 1988, the machines were not being used in a business; that they were still in boxes and Mrs. Phillips was waiting for information on how to load, unload and maintain the machines. She testified she hadn't set any of the machines up but had talked to several merchants who indicated they might like to have a machine located at their places of business. Mrs. Phillips testified further that she thought the stamp machines were "an incidental happening" to her living in the residence, that it was not something that happened every day, and in fact at the time of the trial, she had some furniture in her house that she had bought for someone else. She said she did "store" things at her house and had things at her house "besides the things she used everyday."

Although Joyce Cunningham, secretary-manager of the appellant, testified it denied appellees' claim for the vending machines because it did not feel they were usual and incidental to the occupancy of the premises as a dwelling and that this terminology means "what you live with, what it takes to occupy a house, cooking, sleeping, what you wear," the jury did not have to accept appellant's view. A summary judgment was reversed in *Camp* v. *Elmore*, 271 Ark. 407, 609 S.W.2d 86 (Ark. App. 1980), where Judge Newbern, writing for the Arkansas Court of Appeals, said the trial court must have determined, as a matter of law, that "a wide variety of personalty, including such items as fishing equipment, a cement mixer, wrenches and motors" was not property that "was usual or incidental to the premises as a dwelling." Judge Newbern's opinion stated, "we consider the words highly ambiguous." It is also clear that ambiguous provisions are to be construed most strongly against the insurer which drafts the policy. *Home Indemnity Co.* v. *City of Marianna*, 291 Ark. 610, 616, 727 S.W.2d 375 (1987); *Drummond Citizens Insurance Co.* v. *Sergeant*, 266 Ark. 611, 619, 588 S.W.2d 419 (1979).

The appellees argue that the answer to the question of whether the presence of stamp vending machines is "usual and incidental to the occupancy of the premises as a dwelling" is

probably not but *maybe so*. We agree. The storing of personal effects on the dwelling premises is undoubtedly usual to the occupancy of the dwelling; however, stamp vending machines may not be the usual type of personal effects so stored. But under the circumstances in this case, we think the jury could find that it was perfectly normal, natural, and in the ordinary course of events to store these machines on the appellees' dwelling premises until they could be put in use at some place of business. Obviously, the storage of the machines was incidental to the occupancy of the premises as a dwelling. So the answer as to whether the presence of the machines was usual was, as the appellees put it, "probably not but maybe so," and the answer by the jury after hearing the evidence was "yes it was usual." We think that answer is supported by substantial evidence.

Appellant has placed emphasis in its brief on the fact that appellees admittedly acquired the machines for use in business. However, although the policy language contains a long list of exclusions, there is no exclusion for property acquired for use in a prospective business and the issue to be decided was whether the vending machines were "usual and incidental to the occupancy of the premises as a dwelling" at the time of the fire.

As to appellant's argument that the trial court erred in refusing to rule on whether the policy language was ambiguous, we think, although the trial court did not make an explicit ruling on that issue, by virtue of its ruling that there was a question for the jury to decide, the trial court found, at least by implication, that the language of the policy was ambiguous. Counsel for appellant told the trial court that he did not contend the law as stated in instructions 7 and 8 was wrong, he objected just to the giving of the instructions to the jury. It is clear that where a contract is ambiguous, its meaning becomes a question of fact. *Floyd* v. *Otter Creek Homeowners Association*, 23 Ark. App. 31, 742 S.W.2d 120 (1988). The rule applies to insurance policies. *State Farm Insurance Companies* v. *Gilbert*, 3 Ark. App. 52, 621 S.W.2d 880 (1981). *See also Shelter Mutual Ins. Co.* v. *Smith*, 300 Ark. 348, 779 S.W.2d 149 (1989) (insurance coverage depended upon whether the appellees' horse racing activity was a hobby or a business; court held this was a question of fact under the evidence presented).

Appellant also argues the trial court erred in refusing to give its proffered instructions 1 and 2 which it says were taken from the opinion in *Barnett* v. *Maryland Casualty Co.*, 253 Ark. 1103, 490 S.W.2d 784 (1973). These instructions were as follows:

INSTRUCTION NO. 1

> You are instructed that property which is not acquired, used or even contemplated for use in a residence does not constitute household or personal effects usual and incidental to the occupancy of the premises as a dwelling.

INSTRUCTION NO. 2

> You are instructed that property which is acquired in connection with or anticipation of a business does not constitute household or personal effects usual and incidental to the occupancy of the premises as a dwelling.

We do not think *Barnett* is controlling here. In that case, the supreme court simply held that the trial court's interpretation of the language of a provision of a policy of insurance was not unreasonable and was supported by substantial evidence. In the instant case, the appellant's proffered instructions would, in effect, have directed a verdict on the factual issue the jury was to consider, and the trial court was correct in refusing to give the proffered instructions. *See Miller* v. *Ballentine*, 242 Ark. 34, 411 S.W.2d 655 (1967), and *Love* v. *H.F. Construction Company*, 261 Ark. 831, 552 S.W.2d 15 (1977), which hold that the giving of binding instructions is erroneous.

Affirmed.

COOPER and ROGERS, JJ., agree.

C.R. APPOLLOS *v.* INTERNATIONAL PAPER COMPANY and IP Timber Lands Operating Co., Ltd.

CA 90-464 808 S.W.2d 786

Court of Appeals of Arkansas
Division I
Opinion delivered May 8, 1991

Mathis & Dejanes, by: *Travis Mathis*, for appellant.

Roberts, Harrell and Lindsey, P.A., by: *Searcy W. Harrell, Jr.*, for appellees.

GEORGE K. CRACRAFT, Chief Judge. C. R. Appollos appeals from a decree of the Clark County Chancery Court dismissing his complaint and quieting appellees' title to a tract of land. We find no error and affirm.

The facts necessary to our decision are not in dispute. It was stipulated that appellees had record title to the Southeast Quarter of the Southwest Quarter of Section 30, Township 7 South, Range 22 West in Clark County and had paid taxes on it since

1927. Prior to 1950, appellant's predecessor in title had enclosed a one-acre tract of appellees' land and grazed cattle on it under circumstances that vested title in appellant's predecessor by adverse possession. In 1953, however, appellant's predecessor ceased to use the land for any purpose and permitted it to return to its natural state as timber land. By 1973, when appellant acquired the property, the land was no longer enclosed. The record indicates that, since 1953, the only act of dominion over the property performed by appellant was the cutting of several trees. During the same period, appellees bladed fire lanes, painted lines, and did several controlled burns. From the evidence, the chancellor found that appellees had reestablished title to the one-acre tract prior to the commencement of the action and quieted appellees' title against the claims of appellant.

Although we review chancery cases *de novo* on the record, we do not reverse the decision of the chancellor unless his findings are clearly against the preponderance of the evidence, giving due deference to his superior position to judge the credibility of the witnesses and the weight to be given their testimony. *Hicks* v. *Flanagan*, 30 Ark. App. 53, 782 S.W.2d 587 (1990); *Clark* v. *Clark*, 4 Ark. App. 153, 632 S.W.2d 432 (1982); Ark. R. Civ. P. 52 (a).

Appellant contends that the chancellor erred in finding that appellees had reestablished title to the property by adverse possession, arguing that appellees' acts of ownership and actual possession of the tract after 1973 were only fitful and insufficient to overcome appellant's constructive possession as holder of the legal title. We need not reach the merits of appellant's specific argument because, upon our *de novo* review of the record, we find a compelling reason to conclude that appellees had reacquired the property by adverse possession.

Arkansas Code Annotated § 18-11-102 (1987) provides that unimproved and unenclosed land shall be deemed to be in the possession of the person who pays taxes on it for at least seven years in succession, provided that he has color of title. *See Charles* v. *Pierce*, 238 Ark. 22, 378 S.W.2d 213 (1964). The possession contemplated by this section has the same effect as if the person paying the taxes had been in actual, adverse possession of the land for the full seven-year period. *Smith* v. *Boynton Land*

& Lumber Co., 131 Ark. 22, 198 S.W. 107 (1917). Payment of taxes under color of title for more than seven years on unenclosed and unimproved property confers title by limitation. *Buckner* v. *Sewell*, 216 Ark. 221, 225 S.W.2d 525 (1949); *Reynolds* v. *Snyder*, 121 Ark. 33, 180 S.W. 752 (1915). *See Burbridge* v. *Bradley Lumber Co.*, 214 Ark. 135, 215 S.W.2d 710 (1948). The payment of taxes under this section constitutes an eviction of all others who claim to be in constructive possession. *See Union Sawmill Co.* v. *Pagan*, 175 Ark. 559, 299 S.W. 1012 (1927).

The fact that appellees' record title was divested by adverse possession, or that the land had once been enclosed by appellant's predecessors and improved, does not mandate a different result. In *Moore* v. *Morris*, 118 Ark. 516, 177 S.W. 6 (1915), on facts peculiarly similar to those here, the court declared:

> We are of the opinion, also, that even if DeMoss or his heirs acquired title by adverse possession, that title was reacquired by the original owners, the Lester heirs, by payment of taxes under color of title under the Act of March 18, 1899 [Ark. Code Ann. § 18-11-102]. The undisputed evidence is that Lester and his heirs paid taxes on the land continuously up to the time it was sold to appellant. *Their paper title, which constituted absolute title up to the time the ownership was wrested from them, if at all, by the adverse occupancy of DeMoss, continued thereafter at least as color of title, and the payment of taxes while the land was in a wild state and unoccupied restored the title to them by adverse possession according to the terms of the statute.* . . . The statute applies only to "unimproved and unenclosed land;" that is to say, land that is wild and in a state of nature. This does not mean, however, that the lands must never have had any other status, for improved lands may be permitted to return to a state of nature. *The statute relates to the condition of the lands at the time the payment of taxes is made under color of title, regardless of the former state of the lands; and if at that time they are unimproved and uninclosed, that is to say in a wild state as before the improvements were first made, then they fall within the terms of the statute and such payments amount to occupancy which will in course of time ripen into title by limitation. Fenton* v. *Collum*,

104 Ark. 624.

Moore, 118 Ark. at 523-24, 177 S.W. at 8 (emphasis added) (footnote omitted). *See also Beshea* v. *Vlazny*, 228 Ark. 559, 309 S.W.2d 28 (1958), *Wimberly* v. *Norman*, 221 Ark. 319, 253 S.W.2d 222 (1952); *Horn* v. *Blaney*, 268 Ark. 885, 597 S.W.2d 109 (Ark. App. 1980).

Here, the property returned to its natural state by 1953 and ceased to be enclosed by 1973. Appellees, under color of title, made payment of taxes on the land for more than seven years thereafter. Therefore, we conclude that the chancellor correctly held that appellees' legal title had been reacquired by adverse possession.

Affirmed.

MAYFIELD and ROGERS, JJ., agree.

Ida Mae HARDIN *v.* SOUTHERN COMPRESS COMPANY

CA 90-296 810 S.W.2d 501

Court of Appeals of Arkansas
Division I
Opinion delivered May 8, 1991

Steven L. Festinger, for appellant.

Bailey, Trimble, Capps, Lowe, Sellars & Thomas, by: *Chester C. Lowe, Jr.*, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Ida Mae Hardin appeals from an order of the Arkansas Workers' Compensation Commission denying her claim for benefits. We find sufficient merit in one of appellant's points for appeal to warrant reversal and remand.

It is undisputed that, on December 24, 1987, appellant slipped and fell in the course and scope of her employment with Southern Compress Company, appellee. On January 12, 1988, appellant underwent surgery for a fractured right ankle. Appellee paid benefits for those medical expenses incurred by appellant through January 11, 1988, but controverted appellant's claim for temporary total and permanent partial disability benefits, along with medical benefits, incurred as a result of her fractured right ankle. Affirming and adopting the findings of fact and conclusions of law made by the administrative law judge, the Commission denied benefits.

Appellant first contends that the Commission erred in not making proper findings of fact. We agree. On appellate review of workers' compensation cases, the extent of our inquiry is limited to a determination of whether the findings of the Commission are supported by substantial evidence. Even where a preponderance of the evidence might indicate a different result, we will affirm if reasonable minds could reach the Commission's conclusion. *College Club Dairy* v. *Carr*, 25 Ark. App. 215, 756 S.W.2d

128 (1988); *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). It is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *Johnson* v. *Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989).

■ Absent necessary findings of fact, this court cannot make a meaningful review of the Commission's decision. 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*, 18 Ark. App. 18, 709 S.W.2d 107 (1986).

Here, the Commission stated:

> [W]e find that the claimant has failed to sustain her burden of proof. Specifically, we find from a preponderance of the evidence that the Findings of Fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.
>
> Therefore, we affirm and adopt the September 27, 1989, decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal. This claim is respectfully denied and dismissed.

■ Although the Commission may specifically adopt the findings of fact made by the administrative law judge, *see ITT/ Higbie Mfg.* v. *Gilliam*, 34 Ark. App. 154, 807 S.W.2d 44 (1991), the administrative law judge in this case failed to make the findings necessary for us to review whether there is substantial evidence to support the decision of the Commission. The administrative law judge merely summarized the testimony of the witnesses; he did not make findings of fact based on that testimony. As we are unable to determine from the record the factual basis upon which the Commission denied appellant's claim, we cannot ascertain whether the Commission correctly applied the law and denied benefits. *See Green House, Inc.* v. *Arkansas Alcoholic Beverage Control Div.*, 29 Ark. App. 229, 780 S.W.2d 347 (1989). We therefore remand the case for the Commission to make the specific findings of fact upon which it relied in making its decision.

Reversed and remanded.

MAYFIELD and ROGERS, JJ., agree.

ASSOCIATED PRESS *v.* SOUTHERN ARKANSAS RADIO COMPANY, d/b/a Radio Station KKOL, and Wayne Brewies

CA 90-264 809 S.W.2d 695

Court of Appeals of Arkansas
Division I
Opinion delivered May 8, 1991

Rollins & Ives, by: *V. Benton Rollins*, for appellant.

Worth Camp, Jr., for appellees.

JOHN E. JENNINGS, Judge. Appellant, the Associated Press, a nonprofit membership corporation organized under the laws of

the State of New York, sued the appellees for breach of contract to provide news services. The trial judge awarded AP judgment for $848.43, the amount that appellees were in arrears on the contract at the time service was terminated, but denied AP's claim for $18,280.28 for loss of future profits, finding that the contract was unconscionable in this regard. The sole issue on appeal is whether the court erred in holding the contract unconscionable. We find no reversible error and affirm.

Wayne Brewies, an El Dorado resident, began operating radio station KKOL, under the name "Southern Arkansas Radio Company," in December of 1984 in Hampton, Arkansas. The station was physically located in a small house trailer. Brewies had previously worked for other radio stations, primarily as an announcer, but had no previous experience in operating a radio station. Although it appears that Brewies and his wife wanted to incorporate, it is undisputed that Southern Arkansas Radio Company is a partnership.

Hampton has a population of approximately 2,000. According to the testimony, the station was quite limited in power, having 100% coverage out to approximately twenty miles.

When KKOL began operations it had a contract with United Press International to obtain news. Brewies testified that during 1985, UPI ceased operations for Arkansas news and information. When this happened, Brewies called Mr. John Reeder of Little Rock. Reeder was an AP sales representative for Arkansas and had stopped by to talk with Brewies in Hampton while the station was still obtaining news services from UPI.

On or about June 11, 1985, AP agreed to provide news service to KKOL and installed the necessary equipment at the Hampton station.

On October 10, 1985, the parties entered into a written agreement. The two-page printed contract provided that the agreement would be effective as of June 11, 1985. It also included the following provision:

> If the member fails to pay the assessment as required under this agreement or otherwise breaches the provisions hereof, including the By-Laws, AP may suspend the Service or terminate this agreement. Upon such a suspen-

> sion or termination the Member shall be liable to AP for the total amounts which otherwise would become due to AP under this agreement, including general assessment increases, if any, accruing after the Member's breach, during the balance of the term hereof, less the direct expenses which AP would incur in physically supplying the Service to the Member. . . .

The term of the agreement was five years. There was evidence to support the trial court's finding that, at the time the written agreement was entered into in October, 1985, Brewies was already behind in his payments to AP. Brewies explained that this was because the station was operating at a loss. Brewies, who had a high school diploma and two and one-half years of college, testified that he did not read the agreement before signing it, although he also testified that Mr. Reeder briefly reviewed it with him beforehand.

In early December 1985, AP terminated its service to KKOL for non-payment. Thereafter, the parties entered into settlement negotiations — AP through its general counsel, Rogers and Wells of New York, and Brewies on his own behalf. When a settlement could not be reached, this suit was filed.

In support of its claim for loss of future profits AP submitted the affidavit of Roger Sturm, its assistant treasurer. The affidavit and attached calculations showed a gross loss of revenue over the four and a half year period following termination of almost $30,000.00. In computing "net loss of revenue" the appellant deducted the following weekly expenses:

Standard M-SAT charge	$ 19.56
Okidata Teletype Maintenance	7.75
Okidata Teletype Amortization	.55
M-SAT Amortization	7.15
Okidata Supplies	13.95

Over the four and a half year period these expenses totaled approximately $11,500.00, leaving a "net loss" of $18,280.28.

The parties agreed at trial and in this appeal that the case is

governed by the Uniform Commercial Code.[1] Ark. Code Ann. § 4-2-302 (1987) provides:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

A determination of unconscionability, under the code or otherwise, appears to be a mixed question of law and fact. *See Restatement (Second) of Contracts* § 208 comment f. On appeal we will review the totality of the circumstances, *see Arkansas Nat'l Life Ins. Co.* v. *Durbin*, 3 Ark. App. 170, 623 S.W.2d 548 (1981), but will reverse the trial court's decision only if it is clearly erroneous. Ark. R. Civ. P. 52. In *Durbin* we said that in determining whether a provision was unconscionable, "[t]wo important considerations are whether there is a gross inequality of bargaining power between the parties to the contract and whether the aggrieved party was made aware of and comprehended the provision in question." We think that, under all of the facts and circumstances of the case, the trial court could find a quite significant difference in bargaining power as between the parties. There is no evidence that these kinds of news services were available in Hampton, Arkansas, from any entity other than the Associated Press. Although relevant, the fact that both

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[1] Unconscionability originated as an equitable doctrine. *See* 1 S. White & R. Summers *Uniform Commercial Code* § 4-2 (3d ed. 1988). The doctrine has been applicable in law courts in this state at least since the adoption of the Uniform Commercial Code in 1961. Act 185 of 1961, § 2-302. In the case at bar, it is doubtful at best that Ark. Code Ann. § 4-2-302 is strictly applicable, because Article 2 of the Code ordinarily applies only to transactions in goods. Ark. Code Ann. § 4-2-102. Nevertheless, the Code section on unconscionability has frequently been applied by analogy in non-Code settings. *See Restatement (Second) of Contracts* § 208 comment a (1979).

parties here are merchants will not preclude a finding of unconscionability. *See Kohlenberger, Inc.* v. *Tyson Foods, Inc.*, 256 Ark. 584, 510 S.W.2d 555 (1974); Mallor, *Unconscionability in Contracts Between Merchants*, 40 Sw.L.J. 1065 (1986).

■ We agree with the general proposition that "[i]t is not the province of the courts to scrutinize all contracts with a paternalistic attitude and summarily conclude that they are partially or totally unenforceable merely because an aggrieved party believes that the contract has subsequently proved to be unfair or less beneficial than anticipated." *Geldermann and Co., Inc.* v. *Lane Processing, Inc.*, 527 F.2d 571 (8th Cir. 1975). Nevertheless, on the facts of the case at bar, we cannot say that the trial court's determination that the provision in question was unconscionable was clearly erroneous. The agreement is a preprinted form; the provision relating to loss of future revenue is harsh in its operation; the contract was signed at a time when the appellee was already in default under its terms; and there appears to be a substantial disparity in the relative bargaining power of the parties.

Appellant argues that its budgets are prepared several years in advance and are computed by taking into account revenue anticipated from its various contracts. While these statements may be true, no support for them may be found within the record on appeal.

Appellant also relies on *Associated Press* v. *Emmett*, 45 F. Supp. 907 (S.D. Cal. 1942). There, a federal district court upheld, under California law, a provision in an Associated Press contract which allowed AP to recover two years worth of assessments in the event of a breach. The contention in *Emmett*, however, was that the contractual provision amounted to a penalty as opposed to being reasonable liquidated damages. Therefore, *Emmett* is not only distinguishable factually from the case at bar, but the court also proceeded under a different legal theory.

Our conclusion is that the trial court's finding of unconscionability is not clearly erroneous.

Affirmed.

CRACRAFT, C.J., and DANIELSON, J., agree.

TIM WARGO & SONS, INC. *v.* The EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

CA 90-300 809 S.W.2d 375

Court of Appeals of Arkansas
Division I
Opinion delivered May 9, 1991

Arens & Alexander, by: *Terry A. Zelinski* and *Carl W. Behner*, for appellant.

Hickam, Williams & Farnell, P.A., by: *Renee S. Williams*; and *Griffin, Rainwater & Draper, P.A.*, by: *Billy J. Hubbell*, for appellee.

JUDITH ROGERS, Judge. Tim Wargo and Sons, Inc., appellant, appeals from a decision denying its motion to set aside an order confirming a sale in foreclosure. On appeal, appellant advances two issues in which it contends that the confirmation of the sale was void, arguing that the chancery court was divested of jurisdiction upon the filing of its petition in bankruptcy and that the action of the court was in violation of the automatic stay provisions of the bankruptcy code. We affirm.

The history of this case needs to be set out for a full understanding of the questions presented on appeal. On April 11, 1986, appellee, The Equitable Life Assurance Society of the United States, filed a complaint in foreclosure in the Chancery Court of Desha County pursuant to a deed of trust it held on farmland owned by appellant. The following September, the chancellor entered a decree of foreclosure and on November 24, 1986, a sale of the property was held wherein Mankin Farms, Inc. was the purchaser as the highest bidder. Thereafter, on Decem-

ber 22, 1986, appellant filed a petition in bankruptcy under Chapter 12 of the bankruptcy code. No further action was taken in the chancery court. Appellant's bankruptcy petition was dismissed in June of 1987; however, appellant appealed the dismissal and a stay pending appeal was placed in effect. This stay was later dissolved on August 30, 1988, and on that date the appellee filed in the chancery court a report of sale relating to the November 24, 1986, foreclosure sale. On the afternoon of August 31, 1988, the chancellor entered an order confirming the sale and a commissioner's deed to Mankin Farms was issued.

It is undisputed that, unbeknownst to the chancellor, appellee and Mankin Farms, appellant had earlier that morning filed yet another petition in bankruptcy, this time under Chapter 11. It was not until September 9, 1988, that appellant filed notice in the chancery court of the latest bankruptcy proceeding. Appellant's bankruptcy action was dismissed with prejudice by order of the bankruptcy court on October 16, 1989, in which the court expressed the reason for the dismissal as being appellant's "continuing pattern of delay, abuse of the bankruptcy system, inattention and negligence." *In re Tim Wargo & Sons, Inc.*, 107 B.R. 622, 625 (Bkrtcy. E.D. Ark. 1989). On December 1, 1989, appellee filed a motion to distribute the purchase money funds of the foreclosure sale which had been held in escrow since the time of the sale. Two weeks later, appellant responded with a motion objecting to the distribution of the funds and seeking to set aside the order confirming the sale of August 31, 1988. After a hearing, the chancellor refused to grant appellant's motion as reflected by his order on March 9, 1990. It is from this order that appellant brings this appeal.

As it did below, on appeal appellant maintains that the chancellor's act of confirming the foreclosure sale was void because the court was without jurisdiction due to the filing of bankruptcy proceedings, and furthermore that the confirmation of the sale violated the automatic stay. Appellant bases its argument on the principle that a sale in foreclosure is not complete until confirmation, citing *Fleming* v. *Southland Life Insurance Co.*, 263 Ark. 272, 564 S.W.2d 216 (1978). Although it is not expressly stated, based on this principle appellant assumes, or is implying, that it retained an interest in the property

after the sale in foreclosure subject to protection in bankruptcy.[1] As the foundation for appellant's argument on appeal, we regard the question of whether or not appellant had an interest in the property as being a threshold issue. For if appellant retained no interest in the property after the sale, then the bankruptcy action would have had no effect on the chancellor's confirmation of the sale.

The identifiable interests appellant may have had in the property are the statutory and equitable rights of redemption. The statutory right of redemption is found at Ark. Code Ann. § 18-49-106 (1987), which allows for redemption within one year from the date of the sale and is exercised by the payment of the purchase price for which the property was sold together with interest. The statute also provides that this right of redemption may be waived in the mortgage instrument or deed of trust. The equity of redemption is generally extinguished by the decree and sale; however, a court in its decree may, and usually does, allow a reasonable time for the mortgagor to pay the amount adjudged against him and redeem the property. *See Martin* v. *Ward*, 60 Ark. 510, 30 S.W.1041 (1895). Thus, it has been held that the time for exercising the equitable right of redemption is left to the sound discretion of the chancellor, *Bentley* v. *Parker*, 257 Ark. 749, 525 S.W.2d 460 (1975), and the limitation contained in the decree of foreclosure is determinative when assessing the time allowed for redemption. *See Fleming* v. *Southland Insurance Co.*, *supra*. In *Fleming*, the supreme court, recognizing that a sale is not final until confirmation, noted that a chancellor may in his discretion permit redemption beyond the time stated in the decree, such as when confirmation is refused on grounds of fraud or some defect in the sale. The court expressed, however, that there is no absolute right to redeem at any time prior to confirmation.

We have had difficulty in evaluating this aspect of the case because the actual record on appeal includes neither the deed of trust nor the foreclosure decree. Thus, we do not know whether

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[1] With certain exceptions not applicable here, the bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." *In re Wingo*, 89 B.R. 54 (Bkrtcy. 9th Cir. 1988); 11 U.S.C. § 541(a)(1).

appellant waived the statutory right of redemption in the deed of trust, and there is no evidence in the record that a tender was made of the purchase price for the preservation of this right.[2] And, without the decree, we have no way of determining whether appellant retained the equitable right of redemption. While it is the appellant's duty to bring up a record demonstrating error, *Smith* v. *Smith*, 32 Ark. App. 175, 798 S.W.2d 443 (1990), we are unwilling to affirm on this basis alone. This precise issue has neither been raised nor argued, and it appears that the parties have proceeded on the assumption that an interest was retained without specifically addressing the issue; therefore, an affirmance for the lack of a complete record would be unduly harsh under the circumstances.

Even assuming that appellant retained an interest in the property, we find no merit in its argument that the trial court erred in failing to set aside the order confirming the sale. As stated earlier, it is the appellant's contention that the confirmation was void *ab initio* based on the theory that the filing of its petition in the bankruptcy court deprived the chancery court of jurisdiction over property included in the bankrupt estate. In support of its position, appellant places reliance on the Supreme Court's decision in *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940). There it was held that under § 75 of the then existing Frazier-Lemke Bankruptcy Act, 11 U.S.C. 203, the bankruptcy court is vested with exclusive jurisdiction over the debtor and his property upon the filing of a petition, and thus declared that foreclosure proceedings taken in a state court afterwards were "beyond its power, void, and thus subject to collateral attack." *Id.* at 438.

Under current law, however, authorities appear to be split as to whether an action taken in violation of the automatic stay is void or voidable. *In re Bresler*, 119 B.R. 400 (Bkrtcy. E.D. N.Y. 1990). The courts finding violations of the stay to be void rely on the decision in *Kalb*.[3] *In re Lampkin*, 116 B.R. 450

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[2] Interpreting Arkansas law, the bankruptcy court in *Booth* v. *First Federal Savings & Loan Association*, 18 B.R. 816 (Bkrtcy. E.D. Ark. 1982), determined that the debtor had no interest in foreclosed property to be included in the bankruptcy estate under the statutory right of redemption when there had been no offer to pay the purchase price. *See also In re Mueller*, 18 B.R. 851 (Bkrtcy. W.D. Ark. 1982).

[3] While at least one court has specifically noted that the reasoning in *Kalb* retains

(Bkrtcy. D. Md. 1990). On the other hand, many courts that have specifically addressed the void/voidable distinction have determined that post-petition transfers in violation of the automatic stay are not void, but are merely voidable. *In re Schwartz*, 119 B.R. 207 (Bkrtcy. 9th Cir. 1990). This distinction is significant in that voidable acts, albeit invalid, are capable of being cured, while void acts have no force and effect and cannot be cured or ratified. *Id.* at 209.

Courts adhering to the view that acts in violation of the stay are voidable, base this holding primarily upon statutory construction. 11 U.S.C. § 549(a)(1) provides in part that the trustee in bankruptcy "*may* avoid a transfer of property of the estate that occurs after the commencement of the case." (Emphasis supplied). In the Ninth Circuit decision of *In re Brooks*, 79 B.R. 479 (Bkrtcy. 9th Cir. 1987), the court, emphasizing the permissive language used, held that the discretionary nature of the trustee's avoidance powers under this section suggests that post-petition transfers in violation of the stay are not absolutely void, but rather voidable. In reaching this conclusion, the court also observed that the bankruptcy court's powers under 11 U.S.C. § 362(d) to grant relief from the stay by "terminating, annulling, modifying or conditioning such stay," were also inconsistent with the notion that violations of the stay are void, and showed a Congressional intention to the contrary. Stated another way, a bankruptcy court's authority under § 362(d) to retroactively validate transfers in violation of the stay is incompatible with the concept that such acts are void. *See e.g. In re Bresler*, 119 B.R. 400 (Bkrtcy. E.D. N.Y. 1990) (relying on *Sikes* v. *Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989).

In the case of *In re Germer*, 107 B.R. 217 (Bkrtcy. D. Neb. 1989), the court reached the same conclusion based on its interpretation of sections 542(c) and 549(c) of the bankruptcy code. Under 11 U.S.C. § 542(c), a transfer of property of the estate after the commencement of the bankruptcy case by a

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vigor, *In re Lampkin*, 116 B.R. 450 (Bkrtcy. D. Md. 1990), another has pointed out that its precedential effect is eroded by the fact that it was decided at a time when bankruptcy referees did not have the power to annul the automatic stay. *In re Schwartz*, 119 B.R. 207 (Bkrtcy. 9th Cir. 1990).

transferor who does not have knowledge of the pending bankruptcy has the same effect as if the bankruptcy had not been filed. *Id.* Pursuant to 11 U.S.C. § 549(c)[4], a good faith purchaser who purchases real property after the commencement of the bankruptcy case without notice of the bankruptcy filing acquires good title. The court found that, since this statutory scheme permits transfers in violation of the stay to vest valid title in certain transferees, it followed that such acts taken in violation of the stay were voidable rather than void. The court further reasoned that had Congress intended an act in violation of the stay to be void, it could have expressly provided for such a result as it had done in 11 U.S.C. § 524(a), which voids judgments on discharged debts.

Even those courts which ascribe to the rule that acts in violation of the stay are void recognize that the rule is not without exception. It has been said that those courts following the rule that an act in violation of the stay is void expressly state that the rule is a "general rule," and many of these courts treat an act as voidable for numerous reasons. *In re Germer*, *supra*. For example, in the decision of *In re Wingo*, 89 B.R. 54 (Bkrtcy. 9th Cir. 1988), the court determined that § 549(c) was a limitation on the general rule, given that under this section the trustee in bankruptcy cannot avoid transfers of real property to *bona fide* purchasers for value who were without notice of the filing of bankruptcy.

In denying appellant's motion, the chancellor here based his ruling on § 549(c), finding that Mankin Farms was a good faith purchaser for value without knowledge of the bankruptcy proceeding. The application of this section hinges on whether the transferee had knowledge, either constructive or actual, of the filing of a petition. *See In re Wingo*, *supra*. In the instant case, the foreclosure sale took place before the filing of a petition, and it is not disputed that Mankin Farms, as well as the chancellor and appellee, was unaware of the filing of the second bankruptcy petition when the sale was confirmed. Moreover,

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[4] 11 U.S.C. § 549(c) provides in pertinent part that "The trustee may not avoid . . . a transfer of real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of such property may be recorded."

notice of the filing was not lodged in the chancery court until after confirmation. Based on the record before us, we cannot say that this finding by the chancellor is clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a). Assuming that appellant retained an interest in the property, we agree with appellant that the confirmation of the sale was a violation of the automatic stay; however, we reject the contention raised in its first issue and hold that the chancellor's act of confirming the sale was voidable. Therefore, we affirm the decision of the chancellor denying appellant's motion to set aside the order confirming the foreclosure sale.

Since we have concluded that the transfer at issue was voidable, we point out an additional reason for affirmance. Under 11 U.S.C. § 349(b)(1), the dismissal of a case reinstates those transfers avoided during the bankruptcy action. The court in *In re Linton*, 35 B.R. 695 (Bkrtcy. D. Idaho 1983), found that improper transfers not affirmatively avoided during bankruptcy should be treated in the same manner as those actually avoided. According to this view, the dismissal of the appellant's bankruptcy action would have the effect of reinstating this transfer, which we must assume was not avoided during the bankruptcy proceeding.[5]

On cross-appeal, appellee has presented a question with regard to its claim of entitlement to the interest earned on the purchase money funds held in escrow. Since appellee filed no notice of cross-appeal, we do not address this issue. *Broadhead* v. *McEntire*, 19 Ark. App. 259, 720 S.W.2d 313 (1986).

Affirmed.

COOPER and MAYFIELD, JJ., agree.

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[5] We are not unmindful that principles of *res judicata* and collateral estoppel might have been asserted as a bar to the litigation of this issue in the chancery court. *See In re Germer*, *supra*. This point has not been argued.

PHILLIPS CONSTRUCTION COMPANY v. Hugh COOK and Joan Cook

CA 90-320 808 S.W.2d 792

Court of Appeals of Arkansas
Division I
Opinion delivered May 15, 1991

Hurst Law Offices, by: *Terri Harris*, for appellant.

Hugh and *Joan Cook*, Pro Se.

GEORGE K. CRACRAFT, Chief Judge. Phillips Construction Company attempts to bring this appeal from the denial of its

motion for a new trial. It argues that the amount of damages awarded to it was too low and that the trial court should have ordered a new trial pursuant to Ark. R. Civ. P. 59(a)(5). Appellees, Hugh and Joan Cook, attempt to cross-appeal from the denial of their Ark. R. Civ. P. 60(b) motion to set aside the award of attorney's fees to appellant. We are unable to consider either of these issues because neither appellant nor appellees properly perfected their appeals under Ark. R. App. P. 4.

Rule 4 of the Arkansas Rules of Appellate Procedure provides in pertinent part as follows:

> (b) Time for Filing Notice of Appeal Extended by Timely Motion. Upon the filing in the trial court within the time allowed by these rules of a motion for judgment notwithstanding the verdict under Rule 50(b), of a motion to amend the court's findings of fact or to make additional findings under Rule 52(b), or of a motion for a new trial under Rule 59(b), the time for filing of notice of appeal shall be extended as provided in this rule.
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> (c) Disposition of Posttrial Motion. If a timely motion listed in section (b) of this rule is filed in the trial court by any party, the time for appeal for all parties shall run from the entry of the order granting or denying a new trial or granting or denying any other such motion. *Provided, that if the trial court neither grants nor denies the motion within thirty (30) days of its filing, the motion will be deemed denied as of the 30th day. A notice filed before the disposition of any such motion or, if no order is entered, prior to the expiration of the 30-day period shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion or from the expiration of the 30-day period.* . . .
>
> (d) Time for Appeal from Disposition of Motion. Upon disposition of a motion listed in section (b) of this rule, any party desiring to appeal from the judgment, decree or order originally entered shall have thirty (30) days from the entry of the order disposing of the motion or the expiration of the 30-day period provided in section (c) of this rule within which to give notice of appeal.

(Emphasis added.)

The sequence of relevant filings in this case is as follows:

April 2, 1990	Entry of judgment for appellant, including award of attorney's fees.
April 10, 1990	Appellant's motion for new trial.
April 25, 1990	Appellees' motion to set aside award of attorney's fees.
April 30, 1990	Appellant's notice of appeal.
May 15, 1990	Order denying both motions above.
June 13, 1990	Appellant's second notice of appeal.
June 22, 1990	Appellees' notice of cross-appeal.

Appellant's April 10 motion for a new trial was timely filed under Ark. R. Civ. P. 59(b) and, therefore, served to extend the deadline for filing its notice of appeal. Ark. R. App. P. 4(b). According to Rule 4(c), appellant's time for appeal would run either from entry of an order on the motion or from the thirtieth day after filing the motion, whichever came first. *Ferguson* v. *Sunbay Lodge, Ltd.*, 301 Ark. 87, 781 S.W.2d 491 (1989). Here, since the trial court did not act on appellant's motion within thirty days, it was deemed denied as of the thirtieth day, or May 10, 1990. Consequently, both the April 30 and June 13 notices of appeal filed by appellant were ineffectual, as a notice of appeal filed before May 10 or after June 11[1] would be untimely under Rule 4(c). *Jasper* v. *Johnny's Pizza*, 305 Ark. 318, 807 S.W.2d 664 (1991). Nor did appellees' April 25 motion to set aside the award of attorney's fees serve to extend the time for appellant to appeal, as appellees' motion was not timely for that purpose under any of the rules listed in Ark. R. App. P. 4(b).

Appellees' notice of cross-appeal is likewise ineffectual. While a notice of cross-appeal ordinarily is timely if filed within ten days of a notice of appeal, Ark. R. App. P. 4(a), no timely

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[1] The next business day after Saturday, June 9, 1990. *See* Ark. R. Civ. P. 6(a).

notice of appeal was filed in this case. Although we otherwise could treat appellees' "notice of cross-appeal" as a notice of appeal in its own right, we cannot in this case since appellees' notice was not filed until June 22, or thirty-eight days after the May 15 denial of appellees' post-trial motion.

While these issues were not raised by the parties, they are jurisdictional ones that we are required to address even when the parties do not. *Eddings* v. *Lippe*, 304 Ark. 309, 802 S.W.2d 139 (1991). Because this court is without jurisdiction, we dismiss the appeal and cross-appeal.

Dismissed.

MAYFIELD and ROGERS, JJ., agree.

Jerry Lee LAMBERT v. STATE of Arkansas

CA CR 90-166 808 S.W.2d 788

Court of Appeals of Arkansas
En Banc
Opinion delivered May 15, 1991

Gregory E. Bryant, for appellant.

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

JOHN E. JENNINGS, Judge. On July 27, 1989, Arkansas State Trooper Kelly Watkins was told by his captain, George Riggs, that the state police had received an anonymous tip from someone in Little Rock that a man named "Jerry" would be leaving the Hot Springs area at approximately 3:00 p.m. The informant said that "Jerry" would be driving a black truck with "Woodline Motor Freight" in orange letters on it and hauling a shortbed trailer. The informant said that the driver would have approximately ten pounds of marijuana with him.

Trooper Watkins set up surveillance on Highway 70 East between Little Rock and Hot Springs, and at about 3:50 p.m. saw a Woodline freight truck heading toward Little Rock. He immediately stopped the truck. At Watkins' request the driver presented his driver's license and identified himself as Jerry Lambert. Trooper Watkins immediately advised Lambert of his *Miranda* rights. He then asked Lambert if there was any marijuana in the truck. Lambert said there was, went to the truck and got it, and gave it to the trooper.

Lambert filed a motion to suppress which the trial court denied after a hearing. Appellant then entered a plea of guilty pursuant to Ark. Code Ann. § 5-64-401 (1987) and was sentenced to six years imprisonment. On appeal the sole contention is that the trial court erred in denying the motion to suppress. We hold that the disposition in this case is governed by the decision of the United States Supreme Court in *Alabama* v. *White*, ___ U.S. ___, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), and that decision requires reversal here.

"Reasonable suspicion," which is something less than probable cause, is required to constitutionally justify an investigative stop. *See Alabama* v. *White, supra; see also Kaiser*

v. *State*, 296 Ark. 125, 752 S.W.2d 271 (1988); Ark. R. Crim. P. 3.1. An anonymous tip, standing alone, will not ordinarily give rise to the reasonable suspicion necessary to justify an investigatory stop. *See Alabama* v. *White, supra; see also Willett* v. *State*, 298 Ark. 588, 769 S.W.2d 744 (1989); *Nottingham* v. *State*, 29 Ark. App. 95, 778 S.W.2d 629 (1989).

The Court in *Alabama* v. *White* discussed the concept of reasonable suspicion at length:

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. . . . Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors — quantity and quality — are considered in the 'totality of the circumstances — the whole picture,' that must be taken into account when evaluating whether there is reasonable suspicion. Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable. The Gates Court applied its totality of the circumstances approach in this manner, taking into account the facts known to the officers from personal observation, and giving the anonymous tip the weight it deserved in light of its indicia of reliability as established through independent police work. The same approach applies in the reasonable suspicion context, the only difference being the level of suspicion that must be established.

___ U.S. at ___, 110 S.Ct. at 2416, 110 L.Ed.2d at 309 (citations omitted).

In *White* the police officer received a telephone call from an anonymous person, stating that Vanessa White would be leaving 235-C Lynwood Terrace Apartments at a particular time in a brown Plymouth station wagon with the right taillight lens broken, that she would be going to Dobey's Motel, and that she

would be in possession of about an ounce of cocaine inside a brown attache case. The officers went to Lynwood Terrace Apartments and saw a brown Plymouth station wagon with a broken right taillight in the parking lot in front of the 235 building. The officers saw the defendant leave the 235 building and get into the station wagon. They then followed the defendant as she drove "the most direct route to Dobey's Motel." Just before the defendant reached the motel, she was stopped by the officers who, after obtaining her consent to search, found cocaine in the car.

In upholding the conviction the Court said:

> Although it is a close case, we conclude that under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of respondent's car.

If *Alabama* v. *White* was a "close case," we cannot hold that the facts corroborating the tip in the case at bar are sufficient in quality or quantity, under the totality of the circumstances test, to give rise to reasonable suspicion. The only information that the trooper had at the time of the stop which matched with the anonymous telephone call was that he saw a Woodline Motor Freight truck on the highway between Hot Springs and Little Rock at about the time the caller said the truck should be there. In contrast to *White*, there was no confirmation of the departure point and the officers did not follow the truck to see whether it was, indeed, going to Little Rock as the caller predicted. The description of the vehicle here was also less precise.

Indeed, the facts in the case at bar do not compare favorably with those in *Kaiser* v. *State*, 296 Ark. 125, 752 S.W.2d 271 (1988). There, Randolph County officers had received information from Missouri officers that Kaiser would be traveling through Randolph County in a gray or silver Lincoln, bearing the license number KLN 436, and carrying fifty pounds of marijuana. At trial the Randolph County Sheriff testified that the Missouri officers had told him that their information came from a confidential (rather than anonymous) informant whom they believed to be very reliable. *See Kaiser* v. *State*, 24 Ark. App. 19, 746 S.W.2d 559 (Cooper, J., dissenting). We upheld the circuit court's decision based on arguments similar to those made by the

state in the case at bar. We said:

> The question of the reasonableness of a stop based on information received from an informant was reached in *Adams* v. *Williams*, 407 U.S. 143 (1972). In that case, police officers stopped a suspected drug dealer on the basis of an informant's tip and the stop was proper in part because the information given by the informant was verifiable by the officer's observations. In the instant case, the stop of appellant was based on information gained from an informant. Appellant's vehicle appeared in the area within the predicted period of time, matched the description given, and bore the predicted license plates. Those details were sufficient indicia of the informant's reliability to create a reasonable suspicion, permitting an investigatory stop of appellant's vehicle.

In a unanimous decision, the Arkansas Supreme Court reversed. The court held that if the Missouri officers had not developed a reasonable suspicion of Kaiser based on the reliability of the informant, the seizures resulting from the stop could not stand.

Our conclusion is that under either the Arkansas Supreme Court's decision in *Kaiser* or the United States Supreme Court's decision in *White*, the facts in the case at bar are insufficient to constitute the reasonable suspicion necessary to justify an investigatory stop.

Reversed and Remanded.

DANIELSON and MAYFIELD, JJ., dissent.

ELIZABETH W. DANIELSON, Judge, dissenting. I cannot agree with the majority opinion. To reverse this case will hinder the ability of our law enforcement agencies to effectively do the work which the public needs and expects.

In reversing, the majority opinion misapplies *Alabama* v. *White*, ___ U.S. ___, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). This recent U. S. Supreme Court case upholds an investigatory stop based on reasonable suspicion derived from reliable information received from an anonymous caller just as we have in the case before us. It is a grave error to twist the law in *Alabama* v. *White*,

supra, in the limiting direction that the majority has elected to do.

The state trooper in this case did all he could to effectively protect the people of this state as well as the individual rights of Mr. Lambert. For the court to say that the state trooper was wrong is to stretch the fourth amendment in a direction that it was never intended.

This case should be affirmed, Mr. Lambert sent to jail, and the state trooper commended for a job well done. To hold otherwise is wrong.

MAYFIELD, J., joins in the dissent.

MELVIN MAYFIELD, Judge, dissenting. I concur in the dissenting opinion by Judge Danielson but would also point out that in addition to its misapplication of the United States Supreme Court case of *Alabama* v. *White*, ___ U.S. ___, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), the majority opinion in the present case misapplies the Arkansas Supreme Court case of *Kaiser* v. *State*, 296 Ark. 125, 752 S.W.2d 271 (1988).

The majority opinion correctly states the Arkansas Supreme Court reversed the conviction in *Kaiser* because the Arkansas police stopped the defendant's car in that case on the strength of information received from the Missouri State Police who told the Arkansas officers that the information of the Missouri State Police came from a reliable informant. The Arkansas Supreme Court concluded:

> In this case, the informant may well have been a reliable one, and the Missouri State Police may well have had a reasonable suspicion of Kaiser. We cannot know that, however, as the record is devoid of testimony supporting that conclusion.

296 Ark. at 129. This was the very reasoning employed by the judges who dissented when *Kaiser* was affirmed by the Arkansas Court of Appeals. *See* 24 Ark. App. 19, 746 S.W.2d 559 (1988). (The dissenting opinion of Judge Cracraft appears at 753 S.W.2d 870.) The dissenting judges relied upon *United States* v. *Hensley*, 469 U.S. 221 (1985), and the Arkansas Supreme Court employed the same reasoning and the same authority in reversing the decision of the Arkansas Court of Appeals.

However, the instant case does not present the same issue presented in *Kaiser* and *Hensley*. Here, the Arkansas State Police received an anonymous tip on their "Drug Hot Line" that at approximately 3:00 p.m. a black truck with "Woodline Motor Freight" in orange letters on it and carrying a short-bed trailer would be leaving the Hot Springs area headed for Little Rock, and the driver "Jerry" would be transporting about ten pounds of marijuana. A trooper set up surveillance on the highway between Hot Springs and Little Rock, and about 3:50 p.m. a truck meeting the exact description and traveling toward Little Rock was stopped by the trooper.

I believe the trooper had reasonable suspicion to stop the truck. I do not believe the holding in either *Kaiser* or *Hensley* answers the question of reasonable suspicion to stop the vehicle involved in the instant case. As Judge Cracraft's dissent to the court of appeals decision in *Kaiser* so clearly states, the Missouri officers said they had information from a reliable informant that a car transporting marijuana would be passing through Randolph County, Arkansas. The problem, Judge Cracraft wrote, was that the Arkansas officers were not told and did not know that the Missouri officers had a reasonable basis for their (the Missouri officers') suspicion. That view was accepted by the Arkansas Supreme Court and the decision of the court of appeals was reversed.

Here, however, the state relies upon the United States Supreme Court opinion in *Alabama* v. *White*, handed down on June 11, 1990. In that case the police department of Montgomery, Alabama, "received a telephone call from an anonymous person, stating that Vanessa White would be leaving 235-C Lynwood Terrace Apartments at a particular time in a brown Plymouth station wagon with the right taillight lens broken, that she would be going to Dobey's Motel, and that she would be in possession of about an ounce of cocaine inside a brown attache case." Montgomery police officers proceeded to Lynwood Terrace Apartments where they saw a vehicle meeting the description given in the telephone tip, and they observed a woman leave the 235 building, *with nothing* in her hands, enter the described vehicle and drive the most direct route to Dobey's Motel. The police stopped her *before* she reached the motel, informed her she was stopped because they suspected she was carrying cocaine,

and with her permission, searched an attache case found in the car. It contained marijuana, and the police placed the woman under arrest. During processing at the police station, cocaine was found in her purse.

In upholding the woman's conviction, the United States Supreme Court said:

> [W]e conclude that when the officers stopped respondent, the anonymous tip had been sufficiently corroborated to furnish reasonable suspicion that respondent was engaged in criminal activity and that the investigative stop therefore did not violate the Fourth Amendment.
>
> It is true that not every detail mentioned by the tipster was verified, such as the name of the woman leaving the building or the precise apartment from which she left; but the officers did corroborate that a woman left the 235 building and got into the particular vehicle that was described by the caller. . . . Given the fact that the officers proceeded to the indicated address immediately after the call and that respondent emerged not too long thereafter, it appears from the record before us that respondent's departure from the building was within the time frame predicted by the caller. As for the caller's prediction of respondent's destination, it is true that the officers stopped her just short of Dobey's Motel and did not know whether she would have pulled in or continued on past it. But given that the four-mile route driven by the respondent was the most direct route possible to Dobey's Motel . . . we think respondent's destination was significantly corroborated.

The Court held that an anonymous tip by itself may not be the basis of reasonable suspicion since it gives virtually nothing from which one might conclude that the caller is honest or his information is reliable, but when "significant aspects of the caller's predictions" are verified, there is "indicia of reliability" to justify an investigatory stop.

Alabama v. *White* fits the case at bar. *Kaiser* and *Hensley* involved a different issue and do not furnish precedent to reverse the appellant's conviction in the case at bar. Therefore, I dissent.

DANIELSON, J., joins in this dissent.

GARY EUBANKS AND ASSOCIATES *v.* BLACK AND WHITE CAB CO.

CA 90-327 808 S.W.2d 796

Court of Appeals of Arkansas
Division I
Opinion delivered May 22, 1991

Gary Eubanks & Associates, by: *James Gerard Schulze*, for appellant.

John Wesley Hall, Jr., by: *William A. McLean*, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Gary Eubanks and Associates appeals from an order dismissing its complaint brought against appellee Black and White Cab Company under the attorney's lien statutes. We find no error and affirm.

In December 1988, Alan Franks employed appellant to represent him in a tort claim against appellee. In a written contract of employment, Franks agreed to pay appellant a contingent fee of one-third of all sums recovered from appellee by settlement or otherwise. Shortly thereafter, appellee received a letter stating that appellant represented Franks and requesting that appellee ask its insurance company to contact appellant. The letter further requested that, if appellee had no insurance, it sign an enclosed affidavit of noninsurance to "help speed up processing

the case." The letter made no mention of intent to assert a lien on the proceeds of the claim and bore the signature of neither an attorney in the firm nor the client. It did contain a stamped statement that the letter had been dictated by someone in the appellant firm "but typed and mailed in his absence." The letter was sent by ordinary mail.

Subsequently, Franks personally settled his claim with appellee, and the entire proceeds of the settlement were delivered to Franks. Appellant then brought this action, claiming that appellee's action had deprived appellant of its "contractual lien," and seeking judgment against appellee for one-third of the amount paid to Franks in settlement of the claim. Both parties moved for summary judgment, asserting that no genuine issues of material fact remained to be decided. The trial court granted appellee's motion, holding that appellant's actions were insufficient under Ark. Code Ann. § 16-22-302 (1987) to put appellee on notice of appellant's claim to a lien.

Arkansas Code Annotated § 16-22-302(a)(1) provided as follows:

> From and after service upon the adverse party of a written notice signed by the client and by the attorney at law, solicitor, or counselor representing the client, which notice is to be served by registered mail, a return receipt being required to establish actual delivery of the notice, the attorney at law, solicitor, or counselor serving the notice upon the adversary party shall have a lien upon his client's cause of action, claim, or counterclaim, which attaches to any settlement, verdict, report, decision, judgment, or final order in his client's favor, and the proceeds thereof in whosoever's hands they may come.

The intent and purpose of the statutory requirements are to assure that the adverse party knows that the attorney represents his client and to make the adverse party aware of the attorney's intent to claim a lien on the proceeds of the claim for the amount of the attorney's fee. *Metropolitan Life Insurance Co.* v. *Roberts*, 241 Ark. 994, 411 S.W.2d 299 (1967). The requirement that the notice be given by registered mail is intended not only to serve as proof of the adverse party's receipt, but also to give the recipient "unmistakable warning that the attorney is insisting upon his lien

and that any subsequent compromise will involve liability for the attorney's compensation." *Whetstone* v. *Daniel*, 217 Ark. 899, 901, 233 S.W.2d 625, 626 (1950).

We agree with appellant that strict compliance with the statute is not required and that substantial compliance will suffice. *See Metropolitan Life Insurance Co.* v. *Roberts*, *supra*. The extent of appellant's reliance on *Roberts*, however, is misplaced. There, the only failure in compliance was that the written notice did not contain the signature of the client. There was no indication that any of the other requirements of the statute were not met. Under the circumstances of that case, the court held that the attorney had substantially complied with the statute and permitted recovery.

Here, unlike in *Roberts*, the letter does not contain notice of intent to assert an attorney's lien on the proceeds of the claim, was not dispatched by registered mail, and contains the signature of neither attorney nor client. Even a liberal interpretation must be consistent with the basic intent of the statute. *Whetstone* v. *Daniel*, *supra*. To construe the statute as appellant suggests would simply dispense with the necessity for compliance with any of the statutory requirements. Not having given appellee the warning required by the statute, appellant must look to its client for its fee. *Id.*

Affirmed.

MAYFIELD, J., agrees. ROGERS, J., concurs.

JUDITH ROGERS, Judge, concurring. I concur with the majority opinion, which at first glance may seem to lead to a harsh result. I feel that previous cases would indicate that substantial compliance would satisfy the intent of the statute. Our opinion today is a warning to attorneys to employ language specifically asserting their lien in correspondence with the opposing counsel or party.

Tony Lee BENAC *v.* STATE of Arkansas and State of Arkansas Ex Rel Jeanene Cottrill

CA 90-243 808 S.W.2d 797

Court of Appeals of Arkansas
En Banc
Opinion delivered May 22, 1991
[Rehearing denied June 19, 1991.*]

Willard Crane Smith, Jr., for appellant.

G. Keith Griffith, for appellee.

JAMES R. COOPER, Judge. The appellant in this civil case was married to the appellee, Jeanene Cottrill, in September 1977. On June 29, 1979, the appellee gave birth to Nathan Benac. The appellant was divorced from the appellee by a North Carolina divorce judgment dated July 30, 1982. On August 2, 1989, the State of Arkansas, through its child support enforcement unit, filed a complaint in the Chancery Court of Crawford County, Arkansas, seeking an order requiring the appellant to pay child

*Mayfield, J., would grant rehearing.

support on behalf of Nathan Benac. (Ms. Cottrill had assigned her rights to support to the State of Arkansas pursuant to Ark. Code Ann. § 20-76-410 (1987)). In his answer, the appellant denied being the father of the child. Subsequently, he obtained counsel and filed a third-party complaint against Ms. Cottrill and he requested blood testing to determine paternity pursuant to Ark. Code Ann. § 9-10-108 (Repl. 1991). After a hearing, the chancellor found that Nathan's paternity had been determined by the North Carolina court and that the issue was *res judicata*, ordered the appellant to pay child support, and denied his motion for blood testing. From that decision, comes this appeal.

For reversal, the appellant contends that the chancellor erred in denying his motion for paternity blood testing. We do not agree, because we conclude that the chancellor properly determined that the issue of paternity had been decided in the North Carolina divorce action and was barred by the doctrine of *res judicata.*

The North Carolina judgment incorporated a finding that "[t]here was one child born of the marriage, namely, Nathan Aaron Benac, born the 29th day of June, 1979. . . ." It has been generally held that, in the event of subsequent proceedings between a husband and wife, they are concluded by a finding or implication of paternity in a prior divorce or annulment decree. Annotation, *Paternity Findings as Res Judicata*, 78 A.L.R. 3d 846, 851 (1977).

The facts of *Withrow* v. *Webb*, 53 N.C. App. 67, 280 S.E.2d 22 (1981), are similar to those presented in the case at bar. After entry of a divorce judgment incorporating a finding of paternity couched in language practically identical to that employed in the case at bar, the husband filed a motion seeking to require his ex-wife and child to submit to blood-group testing. The motion was denied, and the husband appealed. The North Carolina Court of Appeals affirmed the trial court's ruling, holding that the issue of paternity was barred by *res judicata* by virtue of the finding in the divorce judgment, and that, because the issue of paternity was therefore not before the trial court, the statutorily-imposed obligation to order the parties to submit to blood-grouping tests never arose. *Withrow*, *supra*, 280 S.W.2d at 24.

We think it clear that the North Carolina courts

would give *res judicata* effect to the finding of paternity in the divorce judgment in the case at bar, and we are required to do likewise under the constitutional command of full faith and credit. *Pickle* v. *Zunamon*, 19 Ark. App. 40, 716 S.W.2d 770 (1986). We hold that the issue of paternity was barred by *res judicata*, and that the chancellor did not err in denying the appellant's motion for blood testing.

Affirmed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the majority opinion in this case. Actually, I think the majority fails to fully recognize the issue presented.

First, it is important to note who filed this lawsuit. It was commenced by the State of Arkansas through the Child Support Enforcement Unit of the Department of Human Services. The complaint alleges the State has paid $2,204.00 for the support of the appellant's child, for which the State wants a judgment, and that the appellant should be directed to pay into the registry of the court a reasonable sum for the future support of the child. It is also alleged that the mother of the child has assigned her rights for child support to the State.

Second, it is important to note what rights the mother of the child has assigned to the State. The complaint alleges that the appellant and the mother of the child were divorced by the State of North Carolina but that all three of them now live in Arkansas. The complaint, however, does not allege that the North Carolina decree provided for the appellant to pay the mother child support in any amount. Indeed, during the trial of this matter, the State introduced into evidence a North Carolina judgment which granted the appellant "an absolute divorce" from his wife, and which recites "there was one child born of the marriage" and that the child is presently in the custody of its mother, but the decree makes no provision for the appellant to pay child support in any amount.

Third, it is important to note that the appellant, who was the defendant in the trial court in the present case, filed a pro se answer to the complaint filed by the State. In his answer the appellant alleged that he was not the father of the child and,

although married to the mother, that he was in fact in military service and on a ship in the North Atlantic at the time the child was conceived. Moreover, the answer alleged that the child, its mother, and the appellant have such blood types that it is not possible that the appellant could be the father of the child. Subsequently, the appellant obtained counsel who filed a third party complaint making the mother of the child a party and restating the allegations in his pro se answer. In addition, the third party complaint asked that the trial court order blood tests for the child, its mother, and the appellant.

At trial, the appellant testified in keeping with the allegations in his answer and also said that at the time of the divorce in North Carolina he did not have a lawyer but he was told that the paternity of the child could be raised later. The appellant also testified that no child support was ordered because appellant denied he was the child's father, and appellant pointed out that the divorce decree stated that "one child was born of the marriage," but did not state that appellant was the father of the child, did not award custody of the child to either party, and did not provide for the payment of child support in any amount.

Fourth, it is important to note the rulings made by the Arkansas Chancery Court in this case. At the conclusion of the testimony, the court ruled that custody of the child would remain with the mother; that the appellant would pay $250.00 per month child support thru the registry of the court; and that appellant would provide health insurance for the child. The judge also stated he wanted counsel to brief the law of North Carolina on the matters presented, and the issue of whether blood tests should be ordered was continued and briefs were requested on that issue. Subsequently, the court entered an order holding that the "paternity of the minor child" had been "determined appropriately by the court in the State of North Carolina, and that issue is res judicata." The appellant's request for blood testing was denied, and the orders made at the conclusion of the first hearing were "hereby confirmed and remain in full force and effect."

Fifth, it is important to note the issue raised by the appellant in this appeal. He argues that the issue of paternity has never been litigated or concluded, and "The chancellor erred by not granting the appellant's request for paternity blood testing." Appellant's

brief relies upon Ark. Code Ann. § 9-10-108 (Repl. 1991) to support his request for blood testing. That section provides: "At the request of either party in a paternity action, the trial court shall direct that the defendant, complainant, and child submit to . . . blood tests . . . to determine whether or not the defendant can be excluded as being the father of the child and to establish the probability of paternity if the test does not exclude the defendant." The section is part of Act 725 of 1989, which the Arkansas Supreme Court has held was in effect at least on September 7, 1989. *See White* v. *Winston*, 302 Ark. 345, 347, 789 S.W.2d 459 (1990). Thus, the section was in effect on November 7, 1989, when the present case was heard. Ark. Code Ann. § 9-10-101(a)(2) (Repl. 1991) is also part of Act 725 of 1989, and provides that "the chancery court shall have exclusive jurisdiction of paternity matters which arise during pendency of original proceedings brought under equity jurisdiction."

It should also be noted that this case does not involve an attempt to register the North Carolina decree in Arkansas as a foreign judgment, and without registration the trial court in Arkansas did not have the authority to treat the North Carolina decree as an Arkansas decree. *See Nehring* v. *Taylor*, 266 Ark. 253, 583 S.W.2d 56 (1979), and *McGill* v. *Robbins*, 231 Ark. 411, 329 S.W.2d 540 (1959). Moreover, the appellees are not seeking to enforce a provision in the North Carolina decree for payment of child support as no such provision was made in the North Carolina decree. So at best, the appellees are simply trying to obtain an order for child support based upon their contention that the North Carolina decree decided that appellant is the father of the child involved and that the North Carolina decision is res judicata in Arkansas.

This is an issue discussed in H. Clark, *The Law of Domestic Relations in the United States* § 15.1 (1968). The author discusses the importance of res judicata in child support cases and points out that if the putative father is required to pay child support "a far-reaching and burdensome obligation is imposed" and therefore "more serious consequences follow from a determination of paternity than from the usual judgment in an action for damages." *Id.* at 493. The author then states:

> Today non-paternity may in some cases be medically

> established, so that a rigorous application of res judicata may require a man to support a child demonstrably not his own. It would seem that where he can produce evidence of this probative force the husband should be allowed to relitigate paternity.

Id. However, the author points out that the doctrines of res judicata and collateral estoppel have in most situations allowed little relief from any hardship produced by their application. Of the situation most nearly involved in the present case, it is stated:

> The intermediate case is where the divorce decree contains a finding of paternity made without contest by the husband, but does not contain an order for support. There is authority that such a prior finding forecloses an attempt by the husband to disprove paternity, but it would seem preferable to give the husband his day in court on this issue. One case has held that a finding of non-paternity does not prevent the wife from later asking for a child support order. If this is correct, the husband should have the same opportunity in the converse situation.

Id. at 494 (footnoted citations omitted).

It seems to me that the above observations have a great deal of merit and are especially applicable to the case at bar. Here, the appellant testified that he did not have physical access to his wife during the period in which the child was conceived. Furthermore, appellant testified as to his understanding of the blood groupings involved, and the child's mother agreed that appellant's testimony was correct with regard to the types of blood that she, her child, and the appellant had. While the court did not admit it into evidence, appellant proffered a book which stated that, with the blood types to which appellant testified, it would not be possible for appellant to be the father of the child. The above testimony coupled with appellant's testimony that the issue of paternity was not really adjudicated, the fact that the divorce decree did not plainly state that appellant was the father of the child "born of the marriage," and the fact that the decree did not order appellant to pay child support indicates that it might have been proper for the chancellor to have granted appellant's request for blood tests.

In *White* v. *Winston*, *supra*, the Arkansas Supreme Court

held there was no irrebuttable presumption or public policy which precluded a determination of the paternity of a child conceived but not born during the marriage. The issue in the present case is simply the next step from that holding, and since that holding, the Arkansas General Assembly has passed Act 657 of 1989 which declares that the biological mother of a child and the husband of the biological mother shall each be a competent witness, to testify as to the dates of their marriage, their separation, their period of cohabitation, period of nonaccess and lack of sexual contact, in any court proceeding or administrative hearing where paternity or child support is an issue; the Act also provides that the trial court may order blood tests of the mother, her husband, and her child. *See* Ark. Code Ann. § 16-43-901 (Supp. 1989). This Act was in effect at the time this case was tried, and clearly does away with previous restrictions on this type testimony. The admissibility of this type testimony plus the advances in blood-grouping tests will surely promote fact over fiction in paternity cases.

The majority opinion, however, relies upon the Annotation, *Paternity Findings as Res Judicata*, 78 A.L.R.3d 846 (1977), for the proposition that in subsequent proceedings between husband and wife the finding or implication concerning paternity made in a prior divorce or annulment suit between them will generally be conclusive under the doctrine of res judicata. But that Annotation also makes the following statement:

> However, in cases where it was clear, or where it appeared, that the issue of paternity had not been finally adjudicated in the earlier divorce action, the courts have declared that a finding or implication of paternity resulting from the action is not binding on a husband and wife in a subsequent proceeding between them . . . .

Id. at 851. A case which illustrates the principle set out in the above quote is *Garrett* v. *Garrett*, 54 Ohio App. 2d 25, 374 N.E.2d 654 (1977), where the wife claimed a divorce decree was res judicata as to the paternity issue presented by a motion for modification of the divorce decree. The appellate court did not agree for two reasons. One, while the husband raised the issue in general terms and the judge insisted on a finding that the child was the "issue of the marriage" for the child's protection, the husband's counsel clearly and openly reserved the option to raise

the paternity issue again when the child was six months old. The appellate court said, "In short, while the decree was final on its face, the paternity issue was clearly reserved on the record." And the second reason that res judicata did not apply was because Ohio's Civil Rule 60(B) provided a means where, within strict limitations and under certain conditions, the consequences of res judicata could be avoided in the interest of justice.

Another case which agrees with the view by Clark, *The Law of Domestic Relations*, *supra*, and the principle above quoted from the Annotation at 78 A.L.R.3d 846, *supra*, is *In re Evans*, 267 N.W.2d 48 (Iowa 1978), where in 1976 a trial judge modified a decree to reflect that a child referred to in the petition for divorce granted in 1972 was not the child of the man from whom the child's mother was divorced. In affirming this action of the trial judge, the Supreme Court of Iowa said of the modification proceeding "paternity could properly be litigated there since it was not expressly determined in the original dissolution action." 267 N.W.2d at 50. And the court cited both Clark and the Annotation, along with prior Iowa cases, as authority.

Therefore, there is authority for the issue of appellant's paternity, which was in fact not litigated in the North Carolina divorce suit, to be litigated in the present case. The trial court here simply held that the issue was foreclosed by res judicata and refused to order blood test and litigate the paternity issue. The Restatement (Second) of Judgments § 17(3) (1980) states:

> A judgment in favor of either the plaintiff or the defendant is conclusive, in a subsequent action between them on the same or a different claim, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

As the divorce decree in North Carolina did not make an award of child custody or child support, the determination of appellant's paternity was not essential to that decree, and it should not be res judicata as to the paternity issue in the present case. The North Carolina case of *Withrow* v. *Webb*, 53 N.C.App. 67, 280 S.E.2d 22 (1981), cited in the majority opinion, has no application under the facts and circumstances shown by the record in the case at bar. In *Withrow* the wife filed for divorce alleging there was one child born of the marriage. The husband admitted this allegation

and asked for custody of the child. The court's order gave the wife custody but provided for visitation by the husband and directed the husband to pay $35.00 per week for support of the child. Under these facts and circumstances, it was held that the husband's motion stating the child was not his and asking for blood tests should be denied on the basis of res judicata. Those facts and circumstances are obviously different from those in the case at bar.

Moreover, res judicata should not apply in this case because Restatement (Second) of Conflict of Laws § 115 (1969) provides:

> A judgment will not be recognized or enforced in other states if upon the facts shown to the court equitable relief could be obtained against the judgment in the state of rendition.

Under Rule 60(b) of North Carolina's Rules of Civil Procedure, equitable relief could be obtained against the divorce decree sued upon in the present action. That rule, like Rule 60(b) of the Federal Rules of Civil Procedure, provides for relief from a final judgment for certain reasons. In *Poston* v. *Morgan*, 83 N.C.App. 295, 350 S.E.2d 108 (1986), the court reversed a trial court's denial of a motion to modify a judgment which foreclosed claims made by the appellants in several pending cases. The appellate court said the appellants

> rely on a portion of Rule 60(b)(5) which provides that a party may be relieved of a judgment if "it is no longer equitable that the judgment have prospective application," and on Rule 60(b)(6) which allows relief for "any other reason justifying relief from the operation of the judgment."

350 S.E.2d at 110. The court held that "[b]ecause of procedural blunders made by some of the attorneys representing plaintiffs, plaintiffs have never had a full hearing on the merits of any of their claims." *Id.* at 111. I think this case is clear authority for allowing the appellant in the case at bar to have "a full hearing" on the merits of his claim that he is not the father of the child in this case. I also note that North Carolina's Rule 60(b)(5) and (6) does not subject the motion to modify, or the bringing of an independent action for that purpose, to the requirement that the

motion or action must be made within a certain period of time, not even "within a reasonable time."

For the reasons stated above, I would reverse the trial judge's decision and remand this matter for blood tests to be ordered and a determination of paternity to be made based upon all the evidence presented.

Gordon Dale BRADFORD *v.* Shelby Jean BRADFORD

CA 90-323 808 S.W.2d 794

Court of Appeals of Arkansas
Division II
Opinion delivered May 22, 1991

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

Stephen E. James, P.A., by: *Stephen E. James*, for appellee.

JAMES R. COOPER, Judge. The parties in this domestic relations case were divorced on April 17, 1991. The decree granted the divorce to the appellee on her counterclaim and provided for an unequal division of the marital property. The appellant appeals from the chancellor's unequal division of the marital property.

The basis for the appellant's argument on appeal is that the trial court erred in making an unequal division of property. We agree, at least in part, and we determine that the case must be remanded.

Because the case at bar is an appeal from chancery, the whole case is open for review; therefore, all issues raised in the court below are before us for decision, and trial *de novo* on appeal in chancery involves determination of both fact questions and legal issues. *Ferguson* v. *Green*, 266 Ark. 556, 587 S.W.2d 18 (1979). The *Ferguson* court noted that:

> The appellate court reviews both law and fact and, acting as judges of both law and fact as if no decision had been made in the trial court, sifts the evidence to determine what the finding of the chancellor should have been and renders a decree upon the record made in the trial court. The appellate court may always enter such judgment as the chancery court should have entered upon the undisputed facts in the record.

Id. at 564 (citations omitted).

During the marriage, the appellant's parents gave the parties approximately five acres of land. The conveyance was by warranty deed and the grantees were designated to be:

> Gordon Dale Bradford and Jean Bradford, husband and wife.

At trial, the appellant testified that he considered the house to be one-half his. The divorce decree provided that an unequal division of property in lieu of alimony was necessary for several reasons, and, in disposing of the five acres, provided that the appellee was to have possession of the parties' real property and that the appellant was to execute a quitclaim deed to the appellee. The

decree further provided that, if the appellee chose to sell the land, the appellant had the first right of refusal.

We must reverse this case because the chancellor exceeded his authority in awarding the real property held as a tenancy by the entirety to the appellee and in ordering the appellant to execute a deed to the appellee. *Yancey* v. *Yancey*, 234 Ark. 1046, 356 S.W.2d 649 (1962). Under Ark. Code Ann. § 9-12-317 (Repl. 1991), any property held as an estate by the entirety is automatically dissolved upon the entry of a final decree of divorce unless the court orders otherwise, and this statute requires that, in the division of such property, the parties are treated as tenants in common. Under our cases and those of the Arkansas Supreme Court, the chancellor had two options: he could have placed one of the parties in possession of the property, or he could have ordered the property sold and the proceeds divided equally. *See Yancey*, *supra*; *Leonard* v. *Leonard*, 22 Ark. App. 279, 739 S.W.2d 697 (1987).

On *de novo* review of a fully developed chancery record, where we can plainly see where the equities lie, we may enter the order which the chancellor should have entered. However, we decline to do so in this case as the chancellor's division of the property, both personal and real, was stated to be in lieu of alimony and the marital residence and five acres is such a significant part of the marital assets that we think the interests of justice will be better served by remanding the case for a complete resolution of the property rights of these parties, including the alimony question, in a manner consistent with this opinion. In conducting such further proceedings, the chancellor will not be bound by prior determinations regarding the valuation of assets or the relative share of the marital estate to be awarded to each of the parties, and may permit the introduction of such additional evidence as is necessary for the just resolution of the issues.

Reversed and remanded.

DANIELSON and JENNINGS, JJ., agree.

Dora ROARK *v.* James Orvall ROARK

CA 90-310 809 S.W.2d 822

Court of Appeals of Arkansas
En Banc
Opinion delivered May 22, 1991

Janet P. Gallman, for appellant.

Davis and Associates, P.A., by: *Charles E. Davis*, for appellee.

JAMES R. COOPER, Judge. The appellant in this child support case is the mother and the custodial parent of the parties' three children. She and the appellee were divorced on January 16, 1989, pursuant to a divorce decree which granted the divorce to the appellant, gave her custody of the three minor children, provided visitation privileges for the appellee, and required that the appellee pay child support in the amount of $440.00 per week. On February 2, 1990, the appellee filed a petition for modification of the decree, requesting, among other things, modification of child support. The appellant filed a counterclaim, petitioning for modification of the decree and seeking to collect past due child support. On March 26, 1990, a hearing was held and the chancellor entered an order finding that neither of the parties had complied with the divorce decree and that both parties were estopped from raising the issue of back support. Additionally, he

modified the child support required to be paid by the appellee from $440.00 per week to $62.00 per week. From that decision, comes this appeal.

The appellant advances two arguments on appeal: first, that the trial court erred in finding that she was estopped to raise the issue of the appellee's failure to pay child support and that there was no child support due on the ground of estoppel and; second, that the trial court erred in modifying the amount of child support in the absence of a showing of changed circumstances. We disagree with the appellant's arguments and affirm.

Although we review chancery cases *de novo*, we do not disturb the chancellor's findings unless they are clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a). Because the question of the preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the chancellor's superior opportunity to assess credibility. *Callaway* v. *Callaway*, 8 Ark. App. 129, 648 S.W.2d 520 (1983).

The appellant argues that the trial court erred in finding that she was estopped to raise the issue of the appellee's failure to pay child support. Once a child support payment falls due, it becomes vested and a debt due the payee. *Holley* v. *Holley*, 264 Ark. 35, 568 S.W.2d 487 (1987). Arkansas has enacted statutes in order to comply with federal regulations and to insure that the State will be eligible for federal funding. *Sullivan* v. *Eden*, 304 Ark. 133, 801 S.W.2d 32 (1990); see Ark. Code Ann. §§ 9-12-314 and 9-14-234 (Repl. 1991). These statutes provide that any decree, judgment, or order which contains a provision for payment of child support shall be a final judgment as to any installment or payment of money which has accrued. Ark. Code Ann. § 9-14-234(a) (Repl. 1991); Ark. Code Ann. § 9-12-314(b) (Repl. 1991); *see Sullivan* v. *Eden*, *supra*. Furthermore the court may not set aside, alter, or modify any decree, judgment or order which has accrued unpaid support prior to the filing of the motion. Ark. Code Ann. § 9-14-234(b) (Repl. 1991); Ark. Code Ann. § 9-12-314(c) (Repl. 1991); *See Sullivan*, *supra*. While it appears that there is no exception to the prohibition against the remittance of unpaid child support, the commentary to the federal regulations which mandated our resulting State statutes, makes it clear that there are circumstances under which a court might

decline to permit the enforcement of the child support judgment. The commentary states:

> [e]nforcement of child support judgments should be treated the same as enforcement of other judgments in the State, and a child support judgment would also be subject to the equitable defenses that apply to all other judgments. Thus, if the obligor presents to the court or administrative authority a basis for laches or an equitable estoppel defense, there may be circumstances under which the court or administrative authority will decline to permit enforcement of the child support judgment.

54 Fed. Reg. 15,761 (April 19, 1989).

In the case before us the chancellor declined to permit the enforcement of the child support judgment claimed by the appellant on the ground that the appellant was estopped because she had disregarded the divorce decree and had interfered with the appellee's visitation rights. The chancellor determined that both parties ignored the initial divorce decree and were thereby estopped from raising the other's non-compliance in order to receive any relief. The chancellor based his ruling on the principle that both parties, by their own conduct, had barred themselves from the aid of equity. *See Pence* v. *Pence*, 223 Ark. 782, 268 S.W.2d 609 (1954). We think that the chancellor's action was grounded in the maxim that he who comes into equity must come with clean hands.

This maxim is not applied to favor a defendant, and has nothing to do with the rights or liabilities of the parties, but is invoked in the interest of the public on grounds of public policy and for the protection of the integrity of the court. 30 C.J.S. Equity § 93 (1965); *see gen. Estate of Houston* v. *Houston*, 31 Ark. App. 218, 792 S.W.2d 342 (1990). Whether the parties are within the application of the maxim is primarily a question of fact and there must be some evidence to justify the application of the doctrine by the court. 30 C.J.S. Equity § 93 (1965).

The chancellor, in determining from the evidence that the court should refuse to recognize the past due child support, based his decision on the appellant's testimony referring to the children as "my babies," her silence when asked to concede the

fact that they were also the appellee's children, and her response that she felt that the children are hers and that the appellee is the reason the children see a counselor. The chancellor also considered letters from the appellant to the appellee telling him to leave the children alone, that she did not want him calling the children or coming to see them, that the police would be waiting for him when he returned and would put him in jail, and that she had sold property he left behind and kept the money.

Although there was testimony from the appellant that she did not deny visitation, that she offered to take the children to see him, and that the appellant broke several promises to visit, we cannot say that the chancellor's determination that the appellant was estopped from asserting and collecting past due child support in a court of equity was clearly against the preponderance of the evidence. On these facts, the chancellor could find unclean hands and properly decline to enforce the judgment. *See Marshall* v. *Marshall*, 227 Ark. 582, 300 S.W.2d 933 (1957).

We disagree with the appellant's argument that the trial court erred in modifying the amount of child support in the absence of a showing of changed circumstance because the record is replete with evidence showing changed circumstances. The party seeking a modification of child support has the burden of showing changed circumstances, and chancery courts have broad powers to modify child support when modification is in the best interest of the child. *Guffin* v. *Guffin*, 5 Ark. App. 83, 632 S.W.2d 446 (1982). No hard and fast rule can be established regarding specific changed circumstances or a necessary degree of change. *Id.* Accordingly, whether a modification in child support is justified by changed circumstances is within the sound discretion of the chancellor, *id*, and his finding will not be disturbed on appeal in the absence of a showing of an abuse of discretion. *Mitchell* v. *Mitchell*, 2 Ark. App. 75, 616 S.W.2d 753 (1981). The record before us shows that subsequent to the divorce the appellee began a different job and he informed the chancellor of his anticipated net income from the new job. The chancellor considered this evidence and applied the Family Support Chart and modified the child support payments accordingly. Furthermore, pursuant to the original divorce decree, the appellee was ordered to pay child support for three children, one of whom was approaching majority and was engaged to be married or was

married at the time of the modification hearing. Moreover, the appellant admitted that the appellee was unable to make the $440.00 per week child support installments awarded under the original decree when she stated that "[t]here aren't very many people who can afford $440.00 a week child support, not even him." She had also sent, in September, 1989, a letter to the appellee agreeing to accept $100.00 per week for child support. Under these circumstances, we hold that the chancellor did not abuse his discretion by applying the Family Support Chart to the appellee's present net income in order to modify child support from $440.00 per week to $62.00 per week.

Affirmed.

JENNINGS and ROGERS, JJ., dissent.

JUDITH ROGERS, Judge, dissenting. With all due respect, I cannot agree with the application of estoppel to withhold execution of judgment for an arrearage in child support based on the facts of this case. The majority affirms the chancellor's holding to remit judgment for past due support based on theories of estoppel and unclean hands by citing general principles setting out these doctrines, and then concluding that appellant's "attitude" and "denial" of visitation support their application here. In so doing, the court has essentially ignored what is unquestionably the applicable law on this particular subject. *See Cunningham* v. *Cunningham*, 297 Ark. 377, 761 S.W.2d 941 (1988); *Bethell* v. *Bethell*, 268 Ark. 409, 597 S.W.2d 576 (1980); *Holley* v. *Holley*, 264 Ark. 35, 568 S.W.2d 487 (1978); *Sharum* v. *Dodson*, 264 Ark. 57, 568 S.W.2d 503 (1978); *Johnson* v. *Arledge*, 258 Ark. 608, 527 S.W.2d 917 (1975); *Kirkland* v. *Wright*, 247 Ark. 794, 448 S.W.2d 19 (1969); *Riegler* v. *Riegler*, 246 Ark. 434, 438 S.W.2d 468 (1969); *Nicholas* v. *Nicholas*, 234 Ark. 254, 351 S.W.2d 445 (1961); *Carnahan* v. *Carnahan*, 232 Ark. 201, 335 S.W.2d 295 (1960); *Brun* v. *Rembert*, 227 Ark. 241, 297 S.W.2d 940 (1957); *Pence* v. *Pence*, 223 Ark. 782, 268 S.W.2d 609 (1954); *Antonacci* v. *Antonacci*, 222 Ark. 881, 263 S.W.2d 484 (1954); *Allison* v. *Binkley*, 222 Ark. 383, 259 S.W.2d 511 (1953); and *Sage* v. *Sage*, 219 Ark. 853, 245 S.W.2d 398 (1952). It is curious to me that the majority has neglected an entire body of law that has developed on the precise issue presented in this case.

Ordinarily, the chancery court has no power to remit accumulated court-ordered support payments, as in this state entitlement to payment vests in the person entitled to it as the payments accrue as the equivalent of a debt due. *See Holley* v. *Holley*, *supra*. This principle is now codified at Arkansas Code Annotated §§ 9-12-314 and 9-14-234 (Repl. 1991). The supreme court, however, has recognized that chancery courts have the authority to remit accumulated payments in support, but only under limited circumstances. *Cunningham* v. *Cunningham*, *supra*. In this regard, the supreme court has consistently approved of the withholding of judgment for an arrearage in support when it is positively shown that the custodial parent has defeated the non-custodial parent's rights to visitation, such as by removing the child from the jurisdiction of the court and concealing the whereabouts of the child. *See e.g. Sharum* v. *Dodson*, *supra*; *Pence* v. *Pence*, *supra*. The supreme court, however, has not hesitated to reverse rulings remitting past due installments of child support when the proof indicates something less than the outright denial of visitation and when there are other considerations militating against the withholding of judgment. *See Holley* v. *Holley*, *supra*; *Kirkland* v. *Wright*, *supra*; *Nicholas* v. *Nicholas*, *supra*; *Carnahan* v. *Carnahan*, *supra*; *Allison* v. *Bindley*, *supra*. These cases are based on evidence showing that the failure to pay child support was based on something other than the denial of visitation, or when the non-custodial parent at all times knew where the child or children were located. The court has also seized upon circumstances where the non-custodial parent delayed in taking action to enforce his rights or exhibited no great desire to exercise visitation. As was stated in *Holley* v. *Holley*, *supra*:

> There are circumstances in which the court is justified in withholding judgment for unpaid child support installments, such as when the mother having custody deprives the father of temporary custody or visitation rights by failing to comply with the terms of a valid decree governing those rights. *Massey* v. *James*, 251 Ark. 217, 471 S.W.2d 770; *Pence* v. *Pence*, 223 Ark. 782, 268 S.W.2d 609. In such cases, the chancery court is not required to give judgment for arrearages accruing during the time the mother's actions have defeated the father's visitation

> rights.
>
> . . .
>
> There is no evidence that appellant removed the children so far from their father that he could not visit the children without great expense as was the case in *Antonacci* v. *Antonacci*, 222 Ark. 881, 263 S.W.2d 484. There was no indication that the whereabouts of the children were concealed from him as was the case in *Pence* v. *Pence*, 223 Ark. 782, 268 S.W.2d 609, where the court was fragmented on the question. . . . Obviously, he knew where the children were at all times. In these respects, this case is more nearly like *Carnahan* v. *Carnahan*, 232 Ark. 201, 335 S.W.2d 295, where we reversed the chancery court's denial of judgment for arrearages in child support payments. See also *Nicholas* v. *Nicholas*, 234 Ark. 254, 351 S.W.2d 445.

Id. at 42-3, 568 S.W.2d at 491.

In *Bethell* v. *Bethell*, *supra*, the supreme court discussed the application of estoppel to prevent the collection of past due alimony payments. Noting the analogy between alimony and child support cases, the court reviewed its previous decisions regarding the remission of child support payments. Upon this review, the court concluded:

> From *Sage*, *Pence* and our subsequent decisions, we can say that, as a general rule, an ex-spouse is entitled to judgment for all past due installments of alimony awarded by a decree of divorce, not barred by the statute of limitations, unless equity cannot lend its aid because of the actions or conduct of the ex-spouse seeking judgment.

Id. at 419, 597 S.W.2d at 581. As gleaned from the applicable case law, I conclude that the "conduct" which may justify the withholding of judgment is narrowly confined to that which meaningfully interferes or defeats the non-custodial parent's rights to visitation. Throughout its decisions the supreme court has not taken an expansive view of the application of estoppel to deny judgment, and remission has been based largely on a record showing that the child has been secreted away such as to render nugatory the non-custodial parent's right to visitation. The evidence in this case falls woefully short of this standard.

As per the decree, the visitation allowed appellee was restricted to "reasonable visitation in the defendant (appellee) with [the] understanding the Plaintiff (appellant) will not consent to have children with defendant for overnight visitation unless he is legally married to live-in companion and unless defendant will agree not to expose children to "drug" related parties." Appellee, not appellant, left the state and moved to Florida, leaving appellant and the children behind. Appellee did not trouble himself to appear for the divorce, and he did not appeal from the decree in which appellant was awarded custody, and in which child support and visitation were set. Once appellee left the state, he returned only for the hearing in this matter, which was initiated by his petition for modification filed over one year after the divorce, in which he sought not only specific visitation, but also a reduction in child support and an accounting for personal property sold by appellant. Significantly, appellee did not allege in his pleadings that appellant had denied visitation or request that appellant be held in contempt for such denial, but alleged instead "that no provision was made for the defendant to visit with said minor children" in the decree.

In reference to letters noted by the majority, "telling him to leave the children alone, that she did not want him calling the children or coming to see them, that police would be waiting for him when he returned and would put him in jail," these were written from nine months to a year after the divorce. To put this in context, I quote from one letter dated January 31, 1990.

> I am sending you a copy of Wendy (sic) hospital bill. This is just the Hospital bill. I still got one coming from the Doctors. I know you won't help us. But thought I send it anyway. You never helped us when we needed it.
>
> Jim, I am tired of begging you to help me with these kids. I don't want you calling them or coming to see them. You are still just thinking of yourself. You could care less what happens to them. They have to eat everyday where (sic) you help or not. I bet you eat everyday don't you. Just leave us alone. I don't want to hear from you anymore.

Appellant explained that this letter was written after appellee had declined to come to Arkansas to see their critically ill child in the hospital, although he was urged to do so.

There were other letters introduced into evidence. On August 21, 1989, appellant wrote:

> I don't know what (sic) going on in your head. But you better never tell the kids I won't let you see them. You can see them any time you want to. Just as long as I don't half (sic) to see you. . . .
>
> Jim you are just as bad as Elmer or worst (sic). You give up your kids for somebody else's kids. How do you sleep at night. How could you just leave us with all the bills and not even try to help us.

In a post script to a letter dated September 10, 1991, appellant indicates that she has just been able to have a phone installed, and she includes the phone number.

The record in this case shows that appellee made no attempt to visit with the children, even though he was given the opportunity. Appellee was asked to visit the child in the hospital, which he did not do, and a visit with the children was offered in the home of appellant's mother in Florida, which he did not take advantage of. Appellee was also able to make contact with the children by phone. Appellee at all times knew where his children were. Furthermore, the fact that appellant sold property gives me no concern as this property was not covered by the decree. It, therefore, cannot be said that appellant violated the terms of the decree from which appellee sought no relief. Appellant testified that she used the money to "make house payments and feed his kids."

Based on our *de novo* review, the facts here simply reveal that appellant's conduct does not measure up to that for which she should be estopped from receiving judgment for past due support. To the extent that appellant's actions can be characterized as "misconduct," her conduct does not rise to the level of being "inequitable," so as to warrant the withholding of judgment. Appellee was afforded opportunities to visit his children. Since appellee made no attempt to visit with them in Arkansas, it is entirely speculative as to whether such an effort would have been futile, as appellee claimed. It is abundantly clear that appellant displayed bitterness, but we may always find hard feelings in a domestic relations case. While I cannot condone such an attitude, her bitterness is somewhat understandable in that appellee left

her with the children to support, and with considerable debts in his wake. There is no evidence in the record that appellant had poisoned the minds of the children against him. In my view, however, the record reveals that appellee's failure to pay child support had nothing to do with the conduct of appellant, or visitation. In adoption cases, it is said that a father's duty to support his minor children cannot be excused on the basis of the conduct of others, unless that conduct prevents him from performing his duty. *Pender* v. *McKee*, 266 Ark. 18, 582 S.W.2d 929 (1979).

I suggest that the majority has extended the application of estoppel beyond any factual scenario encountered in prior case law. I do not think this a wise course as recently the approach has been more restrictive to the end of advancing the collection of unpaid child support. *See Sullivan* v. *Eden*, 304 Ark. 133, 801 S.W.2d 32 (1990). In *Sullivan* v. *Eden*, the supreme court recognized the recent federal legislation in the area of child support and this state's efforts in compliance, and held that chancery courts were no longer to recognize private agreements modifying the amount of child support after July 20, 1987. Additionally, by Act 870 of 1991, the legislature amended Ark. Code Ann. § 9-14-236 to read:

> (b) In any action involving the support of any minor child or children, the moving party shall be entitled to recover the full amount of accrued child support arrearages from the date of the initial support order until the filing of the action.

The chancellor has ample tools at his disposal if it is felt that the parties are disobeying court orders. In my opinion, the deprivation of child support should be used as a means of last resort. Child support is obviously designed to benefit children, who should not have to suffer for what is perceived as "misconduct" on the part of one parent. I would reverse and remand this case for a determination of the full amount of the arrearage under *Sullivan*, with directions that judgment be entered.

JENNINGS, J., joins in this opinion.

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

CA 90-338 810 S.W.2d 46

Court of Appeals of Arkansas
Division I
Opinion delivered May 22, 1991

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

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

MELVIN MAYFIELD, Judge. This is an appeal from the order of the trial court made after an appeal to this court, granting appellee's motion for additional attorney fees. Neither party has suggested this matter should be decided by the Arkansas Supreme Court. We decide the case as we think it involves the application of statutes and settled court decisions.

Appellee National Cashflow Systems brought an action in circuit court to collect a debt alleged to be owed by the appellant Thomas Race. Appellee obtained judgment against appellant for the debt and was awarded $667.50 for attorney fees. Appellant filed an appeal and we affirmed the judgment of the trial court. *See Race* v. *National Cashflow Systems, Inc.*, 30 Ark. App. 116, 783 S.W.2d 370 (1990). Our mandate awarded the appellee $75.00 as costs in this court on appeal.

The mandate was filed in the trial court on March 15, 1990, and on March 22, 1990, the trial court entered an order directing

its clerk to deliver to the appellee "all monies" held as a supersedeas bond.

On March 29, 1990, appellee filed a petition in the trial court for "an additional award of attorney's fees for the appeal and the subsequent collection of the supersedeas bond in this case." And on April 13, 1990, the trial court awarded appellee an additional attorney fee in the sum of $727.50.

On appeal, the appellant contends the trial court erred in awarding attorney fees following the appeal because it was without authority to reopen the case and enter a new judgment for additional attorney fees. Appellant argues the costs awarded appellee in the mandate were paid and contends there was no authority for an award of attorney fees after the appeal.

In response, appellee contends that Ark. Code Ann. § 16-22-308 (Supp. 1989) provides the authority "for a trial court to award attorney fees to a litigant for legal expenses incurred before an appellate court." That section provides:

> In any civil action to recover on an open account, statement of account, account 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.

In a reply brief, appellant argues even if that section provides for attorney fees upon appeal, they should be requested in the appellate court.

In *Buchanan* v. *Parham*, 95 Ark. 81, 128 S.W. 563 (1910), the Arkansas Supreme Court reversed the judgment of the circuit court which awarded costs to the appellant. That case arose out of an election contest which was decided in *Williams* v. *Buchanan*, 86 Ark. 259, 110 S.W. 1024 (1908). Buchanan was the contestant and judgment in his favor was entered in circuit court. Our supreme court affirmed that part of the judgment which declared Buchanan to have been elected but reversed the judgment on other matters and rendered judgment in favor of Williams for

costs of appeal. After rendition of the judgment in the supreme court, Buchanan filed a motion in circuit court to tax costs against Williams. The trial court rendered judgment in favor of Buchanan against Williams for the amount of costs. The supreme court stated the courts have no authority to give judgment for costs in contested election cases unless authorized by statute and held the judgment of circuit court awarding costs to Buchanan was void. The court stated:

> This court rendered judgment against Buchanan for the costs of the appeal. The circuit court had no power to tax the costs of the appeal, or to enforce the judgment of this court against Buchanan. Parham's remedy for the collection of his fee for making the transcript, which constituted a part of the costs of the appeal adjudged against Buchanan, is by enforcement of the judgment of this court. The judgment against Buchanan inured to his benefit, to the extent of the unpaid balance due him for making the transcript. He can apply here for taxation of his unpaid costs, or, if the same has already been taxed, he can apply to the clerk for a fee bill, which has the force and effect of an execution against the goods and chattels of the party against whom the costs were adjudged.

95 Ark. at 85.

Turning to the instant case, we have held that Ark. Code Ann. § 16-22-308 provides the authority for an award of attorney fees on appeal and that this court has the authority under the statute to award attorney fees to the prevailing party for services of his attorney on appeal. *ERC Mortgage Group, Inc.* v. *Luper*, 33 Ark. App. 9, 799 S.W.2d 571 (1990).

It has also been held that the appellate court can direct the trial court upon remand to award an additional amount for the services of the appellant's attorney in the appellate court. *Fitzgerald* v. *Investors Preferred Life Ins. Co.*, 258 Ark. 966, 530 S.W.2d 195 (1975).

And, in *Hogue* v. *Hogue*, 250 Ark. 102, 464 S.W.2d 67 (1971), the Arkansas Supreme Court said that where it had used its judicial discretion by deciding that liability for costs should be borne equally by both parties, the determination of the exact

amount might properly be left to the trial court.

In *Hogue*, the judgment and mandate of the supreme court directed the cost of appeal be divided equally between the two parties. The cost statement attached to the mandate recited total costs of $291.50 which included a transcript or record fee of $71.50. There was no charge for the reporter's transcription of the testimony because that item was not shown in the original record. Upon receipt of the mandate, the trial court entered a new decree conforming to the court's opinion. Appellees filed a motion to set aside that decree and to permit them to show their actual costs. After a hearing, the trial court vacated its second decree and entered a third decree dividing equally the actual costs of $1,174.50. The supreme court affirmed the trial court's retaxing of costs noting that it is not unusual for an appellate record to omit one or more items of costs and that the correction of such an omission is usually a ministerial matter involving merely a certification by the clerk of the trial court of the true amount of the costs, and upon that certification the appellate court clerk issues a new statement of costs to replace the one that first accompanied the mandate. The supreme court stated that although a different corrective process had been followed in that case, the right result was reached and the action of the trial court was affirmed.

Thus, in the instant case where the additional award of costs on appeal was not awarded at the direction of the appellate court, was not of a ministerial nature, and was for the services of the prevailing party's attorney on appeal, we hold that the trial court was without authority to award attorney fees following the appeal.

There is also another reason for our holding. The mandate issued in this case simply affirmed the judgment of the circuit court and awarded $75.00 costs on appeal. There was nothing further for the trial court to do.

In the early case of *Fortenberry* v. *Frazier*, 5 Ark. 200 (1843), the court stated:

> Appellate power is exercised by the Supreme Court over the proceedings of inferior courts—not by the latter on those of the former. The Supreme Court, except where

> bills of review, in cases of equity, and writs in the nature of a writ of error *coram nobis*, in suits at law, may be prosecuted, possesses no power to review, revise, or reform its adjudications and opinions after the expiration of the term in which they are pronounced and recorded, unless they are suspended by an order made at that term; and they irrevocably conclude the rights of the parties thereby adjudicated. Whatever was before the Court, and is disposed of, is considered as finally settled. The inferior court is bound by the judgment or decree as the law of the case, and must carry it into execution according to the mandate. The inferior court cannot [vary] it, or judicially examine it for any other purpose than execution. It can give no other or further relief as to any matter decided by the Supreme Court even where there is error apparent; or in any manner intermeddle with it further than to execute the mandate, and settle such matters as have been remanded, not adjudicated by the Supreme Court.

5 Ark. at 202.

Fortenberry was cited in *Watkins* v. *Acker*, 195 Ark. 203, 111 S.W.2d 458 (1937), where the supreme court stated that whatever is before it and disposed of must be considered as settled and the lower court must carry that judgment into execution according to the mandate of the appellate court.

For the reasons stated above, the judgment of the trial court is reversed.

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

SPRINGDALE MEMORIAL HOSPITAL *v.* DIRECTOR OF LABOR

E 89-232 809 S.W.2d 828

Court of Appeal of Arkansas
Division I
Opinion delivered May 29, 1991

Cypert, Crouch, Clark, & Harwell, by: *Brian L. Spaulding*, for appellant.

Allan Pruitt, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Springdale Memorial Hospital appeals from a decision of the Arkansas Board of Review awarding unemployment benefits to Catherine Barranger. Appellant contends that the claimant's appeal to the Board of Review was untimely and that, in any event, there is no substantial evidence to support the Board's finding that the claimant was discharged from her employment with appellant for reasons other than misconduct connected with the work. Because

we find merit in appellant's contention that the claimant's appeal to the Board of Review was untimely, we do not address the second issue.

On February 10, 1989, the decision of the appeal tribunal was mailed to the claimant and her attorney. The opinion denied her claim, finding that she had been discharged from her employment for misconduct connected with the work. Although the Board's review of an appeal tribunal's decision ordinarily must be initiated within twenty days of the mailing date of the decision, Ark. Code Ann. §§ 11-10-524(a), -525(a) (1987), this claimant's notice of appeal to the Board of Review was not mailed until October 2, 1989, almost eight months later. Pursuant to *Paulino* v. *Daniels*, 269 Ark. 676, 599 S.W.2d 760 (1980), the Board of Review then conducted a hearing to determine whether the untimeliness of the appeal was due to "circumstances beyond the [claimant's] control."

The claimant testified that, upon receipt of the decision of the appeal tribunal, she discussed the matter with her attorney and instructed him to proceed with an appeal. She stated that he told her that he would and subsequently informed her that he had done so. She did not know why the appeal was not filed before October 2. Although called to testify, the claimant's attorney merely noted that he did not have with him his file in the case, and his reasons for delay in filing the appeal are not shown in the record. On this evidence, the Board found as follows:

> From the evidence, the Board of Review finds that the claimant's appeal to the Board of Review was filed in an untimely manner due to circumstances beyond the claimant's control and her appeal will therefore be considered timely. She entrusted her appeal to her attorney and the failure to file the appeal was due to circumstances beyond the claimant's control.

The Board then reversed the decision of the appeal tribunal on its merits and awarded benefits to the claimant.

We conclude that the Board's determination that the claimant's reliance upon her attorney excuses her failure to file a timely appeal disregards the basic concept of the relationship between attorney and client. It is a rule of general application that

a client is bound by the acts of his attorney within the scope of the latter's authority, including the attorney's negligent failure to file proper pleadings. *See Allen* v. *Kizer*, 294 Ark. 1, 740 S.W.2d 137 (1987); *DeClerk* v. *Tribble*, 276 Ark. 316, 637 S.W.2d 526 (1982). In *Peterson* v. *Worthen Bank & Trust Co.*, 296 Ark. 201, 753 S.W.2d 278 (1988), the court stated:

> The rules of agency generally apply to the relationship of attorney and client. The editors of 7A C.J.S. *Attorney & Client* § 180, provide this summary:
>
> > [U]sually the general rules of law which apply to agency apply to the relation of attorney and client. [Citing *White & Black Rivers Bridge Co.* v. *Vaughan*, 183 Ark. 450, 36 S.W.2d 672 (1931)]. Accordingly, the omissions, as well as commissions, of an attorney are to be regarded as the acts of the client whom he represents, and his neglect is equivalent to the neglect of the client himself. [Citing *Blackstad Mercantile Co.* v. *Bond*, 104 Ark. 45, 148 S.W. 262 (1912)]. Attorney's acts are attributed to the client. Thus, in the absence of fraud, the client is bound, according to the ordinary rules of agency, by the acts, omissions, or neglect, of the attorney within the scope of the latter's authority, [citing *Riley* v. *Vest*, 235 Ark. 192, 357 S.W.2d 497 (1962), and *Beth* v. *Harris*, 208 Ark. 903, 188 S.W.2d 119 (1945)] whether express or implied, apparent or ostensible. In other words, whatever is done in the progress of the cause by such attorney is considered as done by the party, and is binding on him. . . .

296 Ark. at 204-05, 753 S.W.2d at 280. The fact that proceedings before the Board of Review are less formal than those in courts of law does not, in our opinion, alter the responsibility of a client for the acts of his attorney.

On the record presented, we conclude that the Board's finding that the failure to file a timely appeal was due to circumstances beyond the claimant's control is not supported by substantial evidence.

Reversed.

JENNINGS and MAYFIELD, JJ., agree.

CUMBERLAND FINANCIAL GROUP, LTD. *v.* BROWN CHEMICAL COMPANY

CA 91-8 810 S.W.2d 49

Court of Appeals of Arkansas
Division II
Opinion delivered May 29, 1991.

Lavender, Rochelle, Barnette & Dickerson, by: *John M. Pickett*, for appellant.

Charles E. Tilmon, Jr.; and *Autrey & Autrey*, by: *LeRoy Autrey*, for appellee.

ELIZABETH W. DANIELSON, Judge. Cumberland Financial Group, Ltd., appeals from the circuit judge's decision to admit appellee, Brown Chemical Company's, answers to appellant's interrogatories into evidence and to award attorney's fees against appellant. We find no error and affirm.

In November 1988, appellant sued appellee for $52,500.00 for breach of an alleged contract to purchase goods from appellant. Attached to the complaint was a copy of an invoice dated May 11, 1988, for 4,200 gallons of Propanex-4 sold to appellee in Texarkana, Arkansas. In its answer, appellee denied purchasing anything from appellant or having any business dealings with appellant. Appellee stated that it purchased the product from a third-party defendant, Cumberland International

Corporation. Appellee asserted that, in 1987, it prepaid the corporation $85,613.00 for a quantity of Propanex-4 at a total purchase price of $53,760.00, leaving appellee with a credit balance in the amount of $31,853.00. Appellee asserted that, in 1988, the corporation sold and shipped to appellee 4,200 gallons of Propanex-4, and that the credit balance appellee had with the corporation was to be applied to the debt. Appellee stated that it had not paid the corporation the $9,513.00 balance due because appellant had, without any contract or other lawful reason, insisted that appellee owed it $52,500.00 for the Propanex-4 received by appellee in 1988.

Appellant later sent interrogatories to appellee, and appellee's president, George Brown, provided answers on February 27, 1989. In his responses, Brown denied that appellee ordered Propanex-4 from appellant. He stated:

> No, the Defendant has not ordered Propanex-4 from Plaintiff, Cumberland Financial Group, Ltd., at any time. As shown on the sales order under the heading of Crystal Chemical Company attached to Plaintiff's Interrogatories, the Defendant, acting by and through George Brown, on January 5, 1988, placed an order with William B. Parker (W.B.P.), the salesman for Cumberland International Corporation, for Propanex-4. Defendant never received a copy of this sales order and was not aware that the sales order incorrectly stated that the 4,200 gallons of Propanex-4 was being priced to it at $12.50 per gallon. Defendant had a credit balance for its prepayment in the amount of $31,853.09 for Propanex-4 at $9.60 per gallon, for a total of 3,318 gallons. Only 882 gallons of Propanex-4 should have been billed to Defendant at the new price of $12.50 per gallon, less credit for discount of $1.00 per gallon and freight costs of $630.00.

Throughout his answers to the interrogatories, Brown denied having any agreement with appellant to purchase the product.

Before trial, George Brown died, and appellee moved to admit his responses to appellant's interrogatories into evidence. Appellant objected on the ground that the responses to the interrogatories were hearsay and did not fall within a recognized exception to the hearsay rule. Appellee argued that Ark. R. Evid.

804(b)(5) provided a basis for the admission of this evidence. The circuit judge allowed the interrogatories to be admitted. The jury returned a verdict for appellee and found that there was no contract by appellee to purchase the Propanex-4 from appellant. The circuit judge entered judgment for appellee and awarded appellee $6,985.00 for attorney's fees pursuant to Ark. Code Ann. § 16-22-308 (Supp. 1989).

For its first point, appellant argues that, although answers to interrogatories are admissible against the party answering them, they are not admissible against anyone else. Appellant also asserts that the answers to the interrogatories are hearsay and not within a recognized exception to the hearsay rule, notwithstanding the unavailability of Mr. Brown to appear at trial. Appellee does not dispute that the answers to the interrogatories are hearsay; it simply asserts that, under Ark. R. Evid. 804(b)(5), the answers are admissible. This rule states:

> (5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statements into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

This provision sets forth what is known as the residual hearsay exception; it was not, however, intended "to throw open a wide door for the entry of judicially created exceptions to the hearsay rule. To the contrary, [it] is to be narrowly construed." *Hill* v. *Brown*, 283 Ark. 185, 188, 672 S.W.2d 330, 332 (1984). Any exception to the hearsay rule under this provision must have circumstantial guarantees of trustworthiness equivalent to those

supporting the common-law exceptions to the rule. *Hill* v. *Brown*, 283 Ark. at 190, 672 S.W.2d at 333. *See also Blaylock* v. *Strecker*, 291 Ark. 340, 350, 724 S.W.2d 470, 476 (1987).

In *Callaway* v. *Perdue*, 238 Ark. 652, 658-59, 385 S.W.2d 4, 9 (1964), the supreme court held that it is not proper to admit answers to interrogatories into evidence even though the party who answered them has died before trial. The court stated that this is so because there is no opportunity for cross-examination; such answers are usually referred to as "self-serving."

In the case at bar, however, we need not address this question, because appellee introduced more than sufficient evidence to support the judgment. For example, the testimony of William Parker, Joe Eller, and Ann Brown, along with Defendant's Exhibits 2, 3, and 5 clearly support the judgment for appellee. We do not reverse for harmless error in the admission of evidence. *Freeman* v. *Freeman*, 20 Ark. App. 12, 16, 722 S.W.2d 877, 880 (1987). *See also Peoples Bank and Trust Co. of Van Buren* v. *Wallace*, 290 Ark. 589, 592, 721 S.W.2d 659, 661-62 (1986). In fact, appellant even points out in its argument that this evidence is "more probative" of whether the parties had a contract than the answers to the interrogatories. Accordingly, we deny appellant's first point on appeal.

For its second point, appellant argues that Ark. Code Ann. § 16-22-308 (Supp. 1989) does not authorize an award of attorney's fees to appellee because appellee was not the party seeking to recover on the contract relating to the purchase of the goods. Appellant asserts that, because appellee was simply defending the cause of action on the basis that no contract existed between the parties, it is not a prevailing party within the meaning of the statute. We disagree.

Arkansas Code Annotated Section 16-22-308 (Supp. 1989) provides:

> In any civil action to recover on an open account, statement of account, account 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.

Whether to award attorneys' fees under this statute is a matter within the trial court's discretion. *ERC Mortgage Group, Inc.* v. *Luper*, 32 Ark. App. 19, 24, 795 S.W.2d 362, 365 (1990). *Accord Chrisco* v. *Sun Indus., Inc.*, 304 Ark. 227, 229, 800 S.W.2d 717, 719 (1990); *City of Fayetteville* v. *Bibb*, 30 Ark. App. 31, 39, 781 S.W.2d 493, 496 (1989).

Because the party in whose favor the verdict compels a judgment is considered to be the prevailing party, *ERC Mortgage Group, Inc.* v. *Luper*, 32 Ark. App. at 24, 795 S.W.2d at 364, appellee was clearly a "prevailing party" within the terms of the statute. Accordingly, the circuit judge did not err in awarding appellee its attorney's fees.

Affirmed.

ROGERS and COOPER, JJ., agree.

KOPPERS COMPANY *v.* MISSOURI PACIFIC RAILROAD CO., INC.

CA 90-373 809 S.W.2d 830

Court of Appeals of Arkansas
Division II
Opinion delivered May 29, 1991
[Rehearing denied June 26, 1991.]

Hoover, Jacobs & Storey, by: *Lawrence J. Brady, Janet L. Pulliam*, and *William C. Mann, III*, for appellant.

Herschel Friday, James C. Baker, Jr. and *Frederick S. Ursery*, for appellee.

MELVIN MAYFIELD, Judge. In 1962, appellee, Missouri Pacific Railroad Company, Inc. (MoPac), and appellant, Koppers Company (Koppers), entered into an agreement whereby Koppers contracted to treat crossties, switch ties, bridge lumber, timbers, and other lumber materials used by MoPac in its railway system. MoPac contracted to deliver the materials to Koppers by opentop railroad car, and Koppers agreed to unload and treat the lumber and reload the materials onto a railroad car to be returned to MoPac. The contract also contained a paragraph in which Koppers agreed to indemnify MoPac against any and all claims, judgments, and losses incident to or in any way connected with Koppers' operations under the agreement. In accordance with its provisions, the contract was terminated by MoPac effective March 10, 1984.

On October 14, 1982, a Koppers employee was injured on Koppers' premises when he fell between moving railroad cars owned by MoPac. In August 1984, the employee sued MoPac for injuries sustained, and that suit was settled on April 23, 1987. On June 10, 1985 (subsequent to suit being filed by the employee but prior to the settlement agreement), MoPac made written demand on Koppers to defend, indemnify and hold MoPac harmless.

Koppers refused to do so. On August 22, 1988, MoPac brought suit to enforce the indemnity provision in the parties' contract. The trial court entered judgment for MoPac in the amount of $300,000.00, finding that the indemnity clause survived the March 10, 1984, expiration of the contract and required Koppers to indemnify MoPac. Koppers brings this appeal from that ruling. We affirm.

Under the indemnity clause in the contract, Koppers agreed:

> On behalf of itself, its successors and assigns to fully protect, indemnify and save harmless the Railroad, its successors and assigns against any and all claims, demands, suits, judgments, losses and expenses incident to, or in any way connected with the Contractor's operations under this agreement and howsoever arising, whether by reason of the infringement or alleged infringement of patent rights covering or relating to treating processes, machinery, apparatus, appliances or facilities, or by reason of loss or injury of whatsoever nature, to persons or property or otherwise, excepting loss by fire or by the acts of the employees of the Railroad.

Appellant and appellee stipulated that, at the time of the injury, the contract between the parties was in force. The parties further agreed that the contract terminated prior to suit being filed by the injured Koppers employee against MoPac. They also agreed that the only issue before the trial court was whether appellee's right to indemnification from appellant survived the termination of the agreement between the parties.

In holding that the indemnity clause survived, the trial court stated that, although it had not found a case precisely on point, it was "most persuaded" by *Kentucky Fried Chicken Corp.* v. *Collectramatic, Inc.*, 547 A.2d 245 (N.H. 1988). That case involved an indemnity clause by which Collectramatic agreed to protect Kentucky Fried Chicken Corporation (KFC) "from any claim or action . . . for products liability based upon this [a]greement." The agreement was entered into in August of 1972 and specifically provided that the provisions of the indemnification paragraph would survive the termination of the agreement. In 1974, the parties entered into a second agreement which did not contain an indemnity clause and which provided that "this

agreement contains the entire understanding between [the parties] concerning the subject matter hereof and supersedes all prior and contemporaneous understandings or representations between the parties relating thereto."

Collectramatic sold a pressure cooker to KFC pursuant to the 1972 agreement. In 1980, a KFC employee was injured while using this pressure cooker. The employee sued KFC and Collectramatic, and both defendants settled. Then, KFC attempted to recover from Collectramatic the portion of the settlement KFC had paid, basing its claim for indemnity on the 1972 agreement. The court held that KFC was entitled to indemnification under the 1972 agreement and found the parties intended in the 1974 contract to merge only their prior agreements as to terms governing purchases and sales yet to be made, and the parties intended it to have no effect at all on vested rights and concomitant duties with respect to sales already concluded. In regard to the 1972 agreement, the court said:

> One would typically expect that the agreement in effect at the time equipment was bought and sold would determine the parties' rights and duties with respect to that equipment.

Id. at 247. And in response to Collectramatic's argument that a provision in the 1974 agreement clearly indicated that the parties intended that the 1974 agreement would supersede all previous agreements, including the 1972 agreement, the court said:

> For a party to abandon, in a later contract of this type, a right previously bargained for and acquired would certainly be unusual.

Id. at 248.

Koppers, however, argues that the *Kentucky Fried Chicken* case is only marginally on point and would distinguish that case on the basis that the 1972 agreement provided that the indemnity clause "shall survive the termination of this agreement." The court in that case did not regard this provision to be controlling. It said: "The language of each of these agreements is entirely prospective and makes no reference to vested rights and duties." So, although the 1972 agreement provided that the indemnity clause "shall survive the termination of this agreement" and the

1974 agreement provided that it "contains the entire understanding between [the parties]" and that it "supersedes all prior and contemporaneous understandings or representations" between them, the court looked to the intent of the parties and said:

> We therefore hold that the parties did not intend, by the 1974 agreement, to extinguish KFC's right to indemnification for transactions already completed under the 1972 agreement, . . .

Id. at 249.

The appellant concedes that "a contract of indemnity is to be construed in accordance with the rules for the construction of contracts generally." *Arkansas Kraft Corporation* v. *Boyed Sanders Construction Co.*, 298 Ark. 36, 764 S.W.2d 452 (1989). If there is no ambiguity in the language of the contract, then there is no need to resort to rules of construction. *Id.* And "the first rule of interpretation is to give to the language employed by the parties to a contract the meaning they intended." *Sutton* v. *Sutton*, 28 Ark. App. 165, 771 S.W.2d 791 (1989). The appellant argues, however, that in contracts of indemnity the losses to be indemnified must be clearly stated and the intent to indemnify against them must be expressed in clear and unequivocal terms. *Weaver-Bailey Contractors, Inc.* v. *Fiske-Carter Construction Company*, 9 Ark. App. 192, 657 S.W.2d 209 (1983), is cited in support of this argument. The *Weaver-Bailey* language is taken from *Pickens-Bond Construction Company* v. *North Little Rock Electric Company*, 249 Ark. 389, 459 S.W.2d 549 (1970), and *Hardeman* v. *J.I. Hass Co.*, 246 Ark. 559, 439 S.W.2d 281 (1969). *Pickens-Bond* explains that the reason for the requirement of a clear statement agreeing to indemnify a party against the consequences of his own conduct is the natural aversion of the courts to hold one liable for the acts or omissions of another over whom he has no control. 249 Ark. at 395.

In the present case there is no question that appellant Koppers agreed to indemnify appellee MoPac "against any and all claims, demands, suits, judgments, losses and expenses incident to, or in any way connected with the Contractor's [Koppers'] operations under this agreement and howsoever arising. . . ." The intent to indemnify is clear enough and the parties stipulated that the only issue for the trial court to decide was whether

MoPac's right to indemnification "survived the termination of the 1962 agreement between the parties."

The appellant cites *Jones* v. *Sun Carriers, Inc.*, 856 F.2d 1091 (8th Cir. 1988), in support of its contention that MoPac's right to indemnification did not survive the termination of the 1962 agreement. In that case, Sun Carriers, Inc. purchased from Harvey Jones all the stock of Jones Truck Lines, Inc. The sale was closed on April 29, 1980. The stock purchase agreement provided that Jones agreed to indemnify and hold harmless Sun Carriers and Jones Truck Lines against "any and all *damages, losses, deficiencies, liabilities, claims, costs* and *expenses* . . . arising out of any misrepresentation, breach of warranty or nonfulfillment of any covenant . . . under this Agreement . . . ." 856 F.2d at 1092. The indemnity provision further provided that Sun Carriers had to assert any claims for indemnity within three years after the sale of the stock was closed. Within that time period, Sun learned that the Environmental Protection Agency had informed Jones Truck Lines that its terminal in St. Louis may have been sprayed with waste oils contaminated with dioxin. In fact, in 1970 or 1971, Jones Truck Lines had employed an independent contractor to spray the terminal with waste oil for dust control purposes. Therefore, on April 20, 1983 (nine days before the three-year indemnity cutoff date), Sun notified Jones that it was asserting "potential" liabilities relating to the dioxin contamination. It was not until *after* the indemnity cutoff date that the EPA actually required the terminal to be vacuumed and washed down. Subsequently, workers' compensation claims were filed for two Jones Truck Line employees alleging they had developed cancer from exposure to the dioxin.

Harvey Jones filed suit against Sun seeking a declaratory judgment that he was not required to indemnify Sun for the dioxin contamination. The trial court granted Jones' motion for summary judgment and the Eighth Circuit Court of Appeals affirmed. The appellant in the present case contends that the Eighth Circuit Court's reasoning is applicable here and that it leads to the conclusion that Koppers is not obligated to indemnify MoPac in the present case.

We do not agree with appellant's interpretation of the *Sun Carriers* case. Although the Eighth Circuit Court cited two cases

for the statement that, "[g]enerally, no claim arises under an indemnity agreement until a specific demand is made for something as a legal right or until notice of a lawsuit is given," the court then said: "Here, no potential plaintiffs had made any claims against Sun or JTL by the cutoff date." 856 F.2d at 1096. Thus, it is clear that the reason the court granted Harvey Jones' motion for summary judgment was not because no claims had been made but because the contract provided that Sun Carriers had to assert any claims for indemnity within three years after the sale of the stock was closed.

Obviously, the *Sun Carriers* case involved a different situation from the case at bar. Here, the contract between the parties required Koppers to indemnify MoPac for losses and expenses "incident to, or in any way connected with" Koppers' operations under that contract; however, the contract did not have a specified cutoff date within which claims for indemnity had to be made. Loss or expense was sustained by MoPac because of an injury sustained by an employee of Koppers while the agreement between Koppers and MoPac was in effect. Even though the employee did not file suit against MoPac until after MoPac terminated its agreement under which Koppers treated crossties, bridge timbers, and other wood materials, we think the trial judge was correct in holding that MoPac's obligation to the employee, which it settled, was an "expense incident to" or "connected with" Koppers' operations under the agreement while it was in force.

Affirmed.

COOPER and ROGERS, JJ., agree.

Mary Earline CLIFTON *v.* Willie D. CLIFTON

CA 90-411 810 S.W.2d 51

Court of Appeals of Arkansas
Division II
Opinion delivered May 29, 1991

Elbert S. Johnson, for appellant.

Reid, Burge, Prevallet & Coleman, by: *Donald E. Prevallet*, for appellee.

JUDITH ROGERS, Judge. This is a post-divorce action involving the disposition of the marital residence. In ordering the property sold, the chancellor allowed the appellant the actual costs incurred as a result of certain repairs she made to the residence, but also held the appellant liable to the appellee for rent for a specified "holdover" period. Based upon our *de novo* review of the record presented, we reverse.

The evidence discloses that the parties were divorced pursuant to a decree entered on August 12, 1983. The decree provided, in part, that title to the residence, which had previously been held as a tenancy by the entireties, would thereafter be held as a tenancy in common. The decree also indicated that the appellant would be responsible for making the monthly mortgage payment, and that she would continue to remain in the home until one of three contingencies was met. In the event of one or more of these contingencies, the house was to be sold and the net proceeds divided equally between the parties. One such contingency was accomplished on June 3, 1989, when the parties' youngest child turned eighteen. On this date, the appellant retained possession and continued to occupy the residence.

On April 5, 1990, the appellee filed a cause of action seeking the sale of the marital residence, rental income from June 3, 1989, and attorney's fees. The appellant candidly admitted that the property was subject to sale; however, she argued, based upon the decision in *Flucht* v. *Villareal*, 28 Ark. App. 1, 720 S.W.2d 187 (1989), that she should be compensated for the value of improvements made to the residence and that the appellee was not entitled to rent as she was currently making the mortgage payment which inured to the benefit of both of them.

A hearing was held on April 17, 1990, in which the chancellor concluded that the appellant had failed to prove, with reasonable certainty, any enhanced value with regard to the improvements. It was the chancellor's determination that the work that was done on the residence was in the form of repairs rather than improvements. The chancellor further found the

appellee was not entitled to rent from June 3, 1989, to May, 1990, in that the appellant had been making the monthly mortgage payment which had reduced the loan thus benefiting both parties. On April 30, 1990, the appellant filed a motion for a new trial. In ruling on the motion, the chancellor attempted to balance the equities. He stated from the bench as follows:

> . . .[I] am going to — to balance some equities on and I am going to treat this — make an accounting here, and give Mrs. Clifton credit for the $2,307.69 that she has made for the maintenance and upkeep of this home . . . On the other hand, I'm going to grant Mr. Prevalett's client relief — from June 3, 1989, in awarding his client one half of the rent for twelve months from June 3, through May, of this year . . . I'm going to grant Mrs. Clifton off the top of the sale $2,307.69 . . . For her actual cost in maintaining and the upkeep of this residence. I'm also granting Mr. Clifton one half of what the Court finds to be a reasonable amount of rent on this house of $250.00 a month and half of $250.00 obviously is $125.00 and multiply that by twelve (12) and come up with $1,500.00. So I'm going to allow Mrs. Clifton $807.69 — that will be her net take off that she will get off the top of the sale of this house, and again, I'm trying to do equity.

Although the appellant presents five issues which she contends mandate reversal, we have consolidated those issues into two contentions regarding the sufficiency of the evidence to support the chancellor's findings. The appellant's arguments address the rights of cotenants with regard to the reimbursement for repairs and the entitlement to rental income. Specifically, the appellant contends that the chancellor's decision denying her claim for the value of improvements she made to the marital residence is clearly erroneous and further that the chancellor clearly erred in ordering her to pay $125.00 in rent to the appellee from June 3, 1989 to May 1990. Because we find error in the decision below, we reverse.

One of the characteristics of a tenancy in common is that each tenant has the right to occupy the premises, and neither tenant can lawfully exclude the other. *Graham* v. *Inlow*, 302 Ark. 414, 790 S.W.2d 428 (1990). The occupation of one tenant in

common is deemed possession by all. *Cooper* v. *Cooper*, 251 Ark. 1007, 476 S.W.2d 223 (1972). Possession by a tenant is presumed to be possession by all cotenants, *Morgan* v. *Morgan*, 15 Ark. App. 35, 688 S.W.2d 953 (1985).

The appellant first argues that the chancellor clearly erred in holding her liable to the appellee for rent from June 3, 1989 to May, 1990. We agree. When the parties were divorced in 1983, title was changed from a tenancy by the entireties to a tenancy in common. This was accomplished by operation of law and was specifically provided for in the decree. *See* Ark. Code Ann. § 9-12-317 (1987). We do not consider the meeting of the contingency in 1989, the youngest child reaching the age of eighteen, as an act of dispossession or ouster. Furthermore, neither the record nor the decree contains any indication that the appellant was in exclusive possession of the premises. It has been held that acts of possession, payment of taxes, enjoyment of rents and profits, and making of improvements by one tenant in common are consistent with cotenancy and do not necessarily amount to disseizen. *Johnson* v. *James*, 237 Ark. 900, 377 S.W.2d 44 (1964). Dispossession of a cotenant is a question of fact and a tenant in possession who does not exclude his cotenants is not liable for rent. *Beshear* v. *Ahrens*, 289 Ark. 57, 709 S.W.2d 60 (1986); *Hamby* v. *Wall*, 48 Ark. 135, 25 S.W. 705 (1886). Based upon the above cited law, the chancellor's finding holding the appellant liable for rent is clearly erroneous.

In reviewing the remaining argument on appeal, we find the chancellor erred in awarding the appellant $2,307.69 for the actual costs she incurred in having repairs made to the residence. We do not find the chancellor's decision that the expenses incurred were for repairs as opposed to improvements to be clearly erroneous. The chancellor simply considered the money the appellant spent as attributable to the upkeep of the residence.

As a part of this issue, the appellant argues that the court wrongfully excluded the testimony of C.L. McWaters, a real estate appraiser, with regard to the enhanced value of improvements. We disagree with the appellant's characterization of the trial court's ruling in that the record indicates the trial court did in fact allow the witness to testify on this particular issue. At the conclusion of the hearing, the court determined that the testi-

mony did not sustain the appellant's contention as to the enhanced value of improvements, but the court did find the appellant was entitled to her actual costs expended for the repairs.

In examining the case law concerning improvements to the property, this court has specifically rejected the granting of actual costs to the party that made the improvements. *Graham* v. *Inlow*, 302 Ark. 414, 790 S.W.2d 428 (1990); *Flucht, supra.* The court further stated in *Flucht* that the proper test for valuing improvements is the increase in the value of the estate, not the actual costs.

Although we review chancery cases *de novo* on the record, the test on review of this case is not whether we are convinced that there is clear and convincing evidence to support the trial judge's findings, but whether we can say that the trial judge's findings were clearly erroneous. *Freeman* v. *Freeman*, 20 Ark. App. 12, 722 S.W.2d 877 (1987). While we will not overturn factual determinations unless they are clearly erroneous, we are free in a *de novo* review to reach a different result required by the law. *Standridge* v. *Standridge*, 304 Ark. 364, 803 S.W.2d 496, (1991).

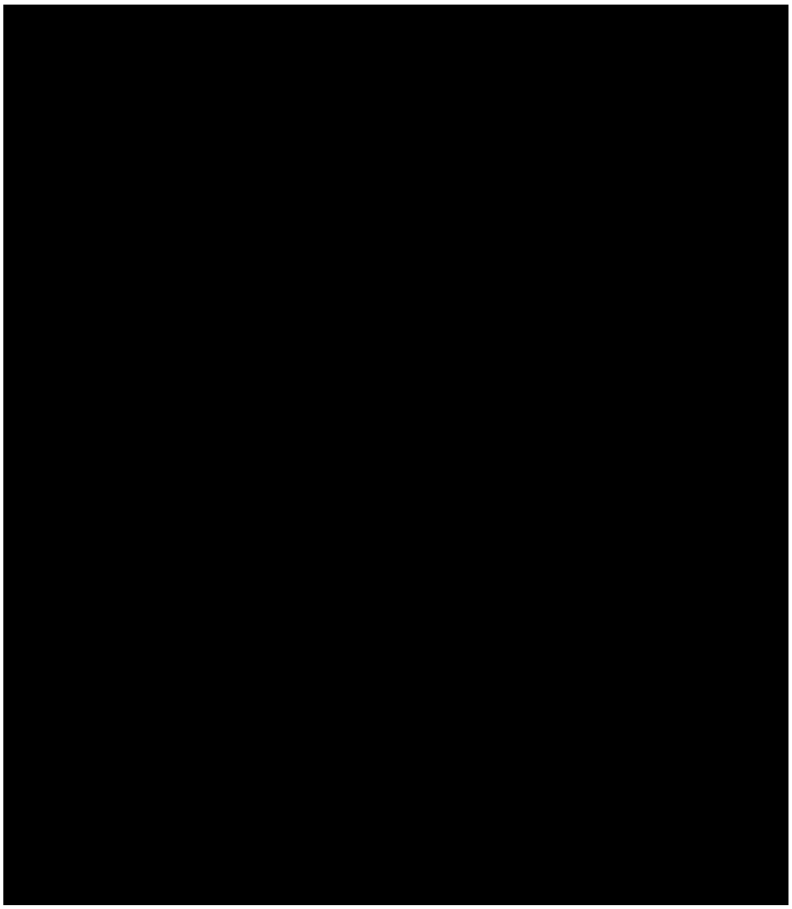
Here, the chancellor did not find the repairs added any significant value to the property or that they were permanent in character such that the property would have an enhanced permanent value. *See Lawrence* v. *Lawrence*, 231 Ark. 324, 329 S.W.2d 416 (1959). Therefore, we reverse the award of $2,307.69 for the actual costs of the repairs and note that when the property is sold, the net proceeds are to be divided evenly between the parties. We note that if the parties had contemplated the recovery of these costs they could have made some provision for this in the decree.

Based upon our *de novo* review of the record, we reverse the chancellor's decision below, and accordingly hold the appellant not liable for rent and not entitled to the $2,307.69 previously awarded for her actual costs of repairs made to the marital residence.

Reversed.

COOPER and DANIELSON, JJ., agree.

[redacted]



[redacted]