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Doyle HOOD as Next Friend and on Behalf of Cory Hood, A Minor *v.* ARKANSAS SCHOOL BOARD INSURANCE COOPERATIVE

CA 90-317 811 S.W.2d 1

Court of Appeals of Arkansas
Division I
Opinion delivered June 5, 1991

Randall W. Dixon, for appellant.

W. Paul Blume, for appellee.

MELVIN MAYFIELD, Judge. This suit was filed on behalf of Cory Hood, a minor, by his father, as next friend, against the Arkansas School Board Insurance Cooperative (ASBIC), the Russellville Public School, and Gallagher Bassett Services, Inc. The complaint alleged that the Russellville Public School is a school district for the State of Arkansas, that its insurance carrier is the ASBIC, and that Gallagher Bassett Services, Inc. is a foreign corporation licensed to do business in the State of Arkansas.

It is then alleged that Cory Hood, while riding on a bus owned and operated by the Russellville Public Schools, was assaulted and sustained severe damage to his right eye, and that his injuries and damages were caused by the negligence of the school bus driver acting as agent for the school district. The complaint also alleged that as a direct and proximate result of the bus driver's negligence the plaintiff suffered damages and expended monies for treatment of injuries, and judgment is prayed against the defendants for these damages and expenses.

None of the defendants filed an answer within the proper time after service of summons but eventually they filed a pleading entitled "Response to Motion for Default Judgment and Motion to Permit Defendants to Answer." In this response, the defendants admitted that they did not timely respond to the complaint filed by the plaintiff "due to an administrative oversight." But it was alleged that "it would be inappropriate for the court to enter default judgment against the defendants in that none of [them] is a proper party under the circumstances of the case and, therefore, the entry of default judgment would produce an unjust result." This pleading also alleged that the Russellville Public School was an entity immune from suit for tort liability, that the ASBIC "is not an insurer and is an unincorporated association," and that Gallagher Bassett Services, Inc. is a "foreign corporation which provides services on claims to the Russellville School District" and does not provide insurance. The prayer of this pleading is for the court to deny the motion for default judgment and that the defendants be permitted to answer or otherwise respond to the complaint.

Approximately ten days after the above described response

and motion was filed on behalf of the defendants, the court entered an order denying the plaintiff's motion for default judgment. Shortly thereafter, a separate answer was filed by ASBIC alleging that it was an unincorporated association through which participating school districts "manage risk and self-insure." The answer also denied most of the allegations of the complaint except it did admit that Cory Hood while riding on a bus operated by the Russellville Public School District was struck by another student. The answer further stated that ASBIC was not amenable to suit under Ark. Code Ann. § 23-79-210 (1987) (which provides for a direct action against the liability insurer of a school district or other organization not subject to suit for tort), and that ASBIC would file a motion for summary judgment on that basis.

Because of our view of the matter before us, we will not describe in detail the motions filed by the other two defendants but suffice it to say that by orders filed on April 27, 1989, the court granted motions to dismiss both the Russellville Public School and Gallagher Bassett Services, Inc. The record reflects no notice of appeal was ever filed from these orders of dismissal.

On August 21, 1989, a motion for summary judgment was filed by ASBIC alleging it is not an insurance company but "a self-funded risk management pool which does not offer insurance for tort liability" and that it is not subject to suit under the Arkansas Direct Action statute, Ark. Code Ann. § 23-79-210 (1987). While a brief in support of the motion for summary judgment was filed, no affidavit was filed in support of the motion, there is no deposition in the record, and the record does not reflect any answers to the interrogatories which were filed by ASBIC. The record does contain, however, an order by the court filed on March 28, 1990, which states that the motion for summary judgment filed by ASBIC has been presented to the court and is "hereby granted and the complaint is dismissed."

On April 17, 1990, a notice of appeal and designation of record was filed by the plaintiff, and it specifically states that the plaintiff is appealing from the order entered on March 28, 1990. Thus, what we have before us is an appeal by the plaintiff from an order granting a summary judgment to ASBIC, and the plaintiff's argument that the trial court erred in failing to grant

plaintiff's motion for default judgment against ASBIC.

We discuss the summary judgment issue first. Under Ark. R. Civ. P. 56(c), summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." There were no depositions or answers to interrogatories or admissions on file; therefore, we can only look at the pleadings. As pointed out above, the complaint filed by the plaintiff alleged that ASBIC was the insurance carrier for the Russellville Public School District; that the plaintiff was injured and sustained damages caused by the negligence of the driver of a school bus for the Russellville Public School District; and that the driver of the school bus was acting as an agent for the school district at the time the plaintiff was injured.

Under these circumstances, we think the trial court clearly erred in granting the motion filed by ASBIC for summary judgment. The motion alleged that ASBIC was "a self-funded risk management pool which does not offer insurance for tort liability" and, therefore, "an action against ASBIC is inappropriate under the Arkansas Direct Action Statute [Ark. Code. Ann.] § 23-79-210." Of course, the problem with that allegation is that it raises an issue of fact. "Summary judgment is only proper when a review of the pleadings, depositions or other filings reveal that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Woods* v. *Hopmann Machinery, Inc.*, 301 Ark. 134, 137, 782 S.W.2d 363 (1990). Here, there is nothing to support ASBIC's motion for summary judgment other than the bare allegations in the motion itself.

On appeal, ASBIC cites *Coffelt* v. *Arkansas Power & Light Co.*, 248 Ark. 313, 451 S.W.2d 881 (1970), for the proposition that ASBIC's "bare allegations" should stand as undisputed in the present case because the plaintiff (appellant) did not file a response to (ASBIC's) appellee's motion for summary judgment. Appellee is mistaken in the holding of that case. In that case Coffelt filed a class action suit for a declaratory judgment seeking a ruling that "our constitutional prohibition against usury is

violated by the utility company's authorized practice of imposing a 'late charge' against customers who do not pay their monthly bills within ten business (fourteen calendar days) after the due date." 248 Ark. 313-14. The power and light company filed a motion for summary judgment. The court's opinion states: "We take the controlling facts from the affidavit and exhibits accompanying the defendant's motion for summary judgment." *Id.* at 314. After discussion, the opinion states that the facts set out in the power and light company's affidavit and exhibits are undisputed, and the opinion then makes this pertinent observation: "We should add that the appellant is mistaken in suggesting in his brief that the facts supporting the motion for summary judgment must be treated as being disputed by the plaintiff's verified complaint." *Id.* at 315-16.

Thus we see the statement in *Coffelt* does not support the argument made by ASBIC in the present case. The matter is made clear in Ark. R. Civ. P. 56(e) which states that when a motion for summary judgment is made and properly supported the adverse party may not rest upon the mere allegations or denials of his pleadings but must respond by affidavits, depositions, answers to interrogatories or otherwise as provided in the rule and show that there is a genuine issue for trial. Moreover, the burden is on the moving party to show that there is no genuine issue of fact for trial. *Wolner* v. *Bogaev*, 290 Ark. 299, 718 S.W.2d 942 (1986).

Because of the allegations made in the complaint filed by the plaintiff in the present case, it was necessary for ASBIC to support its motion for summary judgment in some manner authorized by Ark. R. Civ. P. 56 in order for the summary judgment motion to be granted. The mere statement in the motion alleging that it was not an insurance company and, therefore, was not subject to suit under the direct action statute, Ark. Code Ann. § 23-79-210 (1989), was not sufficient to establish that there was no genuine issue of material fact to be tried under the allegations of the plaintiff's complaint. Thus, the trial court's order granting ASBIC's motion for summary judgment must be reversed.

Appellant also argues that the trail court erred in refusing to grant appellant's motion for default judgment against

appellee ASBIC. Appellant could not, of course, appeal from the trial court's order denying appellant's motion for default judgment because that was not a final, appealable order. *Associates Financial Services Company of Oklahoma* v. *Crawford County Memorial Hospital*, 297 Ark. 14, 759 S.W.2d 210 (1988). However, once a final order was entered, an appeal could be taken. *Heber Springs Lawn & Garden, Inc.* v. *FMC Corporation*, 275 Ark. 260, 628 S.W.2d 563 (1982). Therefore, since the appellant has appealed from the granting of appellee's motion for summary judgment and the dismissal of appellant's complaint, we can consider appellant's argument that his motion for default judgment should have been granted.

Appellee again argues that it was not an "insurer" and therefore not subject to direct suit under the direct action statute; that this is a jurisdictional matter; and even though it did not file an answer, jurisdictional issues may be raised at any time. The cases of *Cigna Insurance Company* v. *Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988), and *Head* v.*Caddo Hills School District*, 277 Ark. 482, 644 S.W.2d 246 (1982), are cited in support of appellee's position. *Cigna's* holding was rendered moot by the supplemental opinion issued in that case, see 294 Ark. 506-A, 746 S.W.2d 558 (1988), holding that the original opinion dismissing the appeal was in error as the appeal was from an order setting aside a default judgment, and the order had been entered more than 90 days after the entry of the default judgment. However, the holding in the original opinion is of no comfort to the appellee in the present case.

The original opinion in *Cigna* held that the denial of a motion to dismiss was not an appealable order because it did not conclude the case. That opinion also pointed out that while a question of jurisdiction can be "raised at any time," that is not to say the issue can be "*appealed*" at any time, only that the *objection* may be raised even though it has not been raised at a previous point in the proceedings. The *Head* v. *Caddo Hills School District* case is cited in *Cigna* as support for the point that the question of jurisdiction can be raised at any time. The *Head* case held that a probationary teacher's remedy for an illegal termination is a suit for breach of contract and not an appeal to circuit court from the school board's termination of the teacher's contract. The appellate court said this was a question of jurisdic-

tion and could be raised for the first time on appeal.

Thus, the jurisdictional question in those two cases involved the power of the court to act. In the supplemental opinion on rehearing in *Cigna*, the court held that the motion to set aside an order of dismissal which had been entered more than 90 days could not be granted except for the reasons set out in Ark. R. Civ. P. 60(c). And in *Head* the probationary teacher could not appeal directly to circuit court from the school board's termination of the teacher's contract because the statutes did not allow such an appeal; therefore, the court had no power to act on such an appeal. In the present case, however, there is no question of the power of the trial court to grant the appellant's motion for default judgment. The power of a court to act was discussed in *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986), where it was claimed that the chancery court, which set aside a property settlement made in contemplation of divorce, did not have jurisdiction to also award damages to the wife for the fraud the husband perpetrated against her in connection with the divorce litigation. The court said, "[W]e have come to the position that unless the chancery court has no tenable nexus whatever to the claim in question we will consider the matter of whether the claim should have been heard there to be one of propriety rather than one of subject matter jurisdiction." 289 Ark. at 175-76, 711 S.W.2d at 456. *See also Hooper* v. *Ragar*, 289Ark. 152, 711 S.W.2d 148 (1986), and *McClain* v. *Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989), where the court said:

> A court or agency is said to have subject matter jurisdiction of an action if the case is one of the type of cases that the court or agency has been empowered to entertain by the sovereign from which the court or agency derives its authority.

29 Ark. App. at 225, 780 S.W.2d at 38.

The question in the present case is not of the power of the court to act but whether, as alleged in appellant's complaint, ASBIC is an insurance company which insured the Russellville School District's tort liability and, therefore, can be sued directly under the provisions of Ark. Code Ann. § 23-79-210 (1987). No timely answer was filed to appellant's complaint by ASBIC, and its "Response to Motion for Default Judgment and Motion to

Permit Defendants to Answer" admitted it did not timely respond to the complaint "due to administrative oversight." The brief filed with the motion stated that this administrative oversight "probably did not come under the heading of 'excusable neglect.' " At the time the trial court denied the plaintiff's motion for default, January 18, 1989, Ark. R. Civ. P. 55 provided that where a defendant does not appear or otherwise defend, a judgment by default *shall* be entered. In *Webb* v. *Lambert*, 295 Ark. 438, 748 S.W.2d 658 (1988), the Arkansas Supreme Court cited *DeClerk* v. *Tribble*, 276 Ark. 316, 637 S.W.2d 526 (1982), in support of the statement: "In the absence of excusable neglect, unavoidable casualty, or other just cause, it is an abuse of discretion for the trial court to refuse to grant a default judgment." And in *Allstate Insurance Co.* v. *Bourland*, 296 Ark. 488, 758 S.W.2d 700 (1988), the Arkansas Supreme Court, in affirming the trial court's refusal to set aside a default judgment, said: "We have been strict in our interpretation of Rule 55 where there has been a failure to make any sort of timely filing or appearance in the trial court."

However, on December 10, 1990, Ark. R. Civ. P. 55 was amended by a per curiam order of the Arkansas Supreme Court. The amendment changed the language in Rule 55(a) to provide that, where a party has failed to appear or defend, a judgment by default *may* (instead of *shall*) be entered by the Court. The "Addition to Reporter's Note, 1990 Amendment" states that under revised Rule 55(a) the entry of a default judgment is discretionary rather than mandatory, and certain factors are mentioned that should be considered in deciding whether to grant the default judgment. The per curiam order states that the changes in Rule 55 will become effective February 1, 1991. The question is therefore presented as to whether the changes in Rule 55 should be given a retrospective effect by applying the provisions of Rule 55 as amended by the per curiam of December 10, 1990.

According to the Reporter's Notes, the changes in Rule 55 are intended to help make it consistent with the applicable Federal Rules of Civil Procedure. In *Klapprott* v. *United States*, 335 U.S. 601 (1949), the United States Supreme Court held that an amended Rule 60 of the Federal Rules of Civil Procedure should be given a retrospective effect to set aside a default

judgment. In Arkansas, our supreme court has also given a retrospective effect to procedural or remedial legislation. *See Forrest City Machine Works* v. *Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981), where the court gave retroactive application to an act that stated, "This enactment is remedial in nature"; and in *Harrison v. Matthews*, 235 Ark. 915, 362 S.W.2d 704 (1962), where the court said:

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

235 Ark. at 917. And in *Spires* v. *Russell*, 300 Ark. 530, 780 S.W.2d 547 (1989), the court considered a legislative act which amended an existing stature by raising from $300.00 to $1,000.00 the amount of damage, resulting from motor vehicle collision, to which penalty and attorney's fee could be assessed. The court held the amendment applicable to damages caused by collision which occurred before the amendment was enacted; however, the amendment provided it applied upon the denial of liability and the filing of suit—both of which occurred after the amendment was adopted by the legislature.

In the present case, we think Rule 55 as amended should be applied by the trial court. This conclusion is reached by either of the routes taken by the above cases: (1) the amendment of Rule 55 is remedial or procedural, or (2) the amendment has no application to the trial court's refusal to grant default judgment on January 18, 1989, but will apply if that issue is again presented to the trial court.

We reverse the summary judgment entered against the appellant and remand for further proceedings in keeping with this opinion.

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

ARKANSAS DEPARTMENT OF HUMAN SERVICES
v. Curtis Lee BROWN

CA 90-371 811 S.W.2d 326

Court of Appeals of Arkansas
Division II
Opinion delivered June 12, 1991

Joe Childers, for appellant.

R. Bynum Gibson, for appellee.

ELIZABETH W. DANIELSON, Judge. Appellee Curtis Lee

Brown was adjudicated the father of Deedra and Deven Toney, minors, in a paternity action on July 8, 1988, and ordered to pay $325 per month in child support. His appeal on the paternity issue was affirmed. On July 13, 1989, he was ordered to pay an additional $32.50 per month for the arrearages of child support which had accrued during the appeal as well as to continue paying $325 per month in child support. The 1989 order set out that "any employer/payor shall withhold no more than $357.50 per month from defendant's income. . . ."

Subsequently, Brown, who is a United States army recruiter in Louisiana, received notice from the Internal Revenue Service that the Arkansas Department of Human Services, the appellant, intended to intercept his federal income tax refund and apply it toward reducing his child support arrearages of $3,314.17. He also learned that DHS had reported to the credit bureau that he was delinquent with his child support. The letter notices that Brown received with this information gave him ten days to contact the Child Support Enforcement Unit of DHS if he had any questions and gave him a telephone number to contact. He called the number in Chicot County which was provided but was told his file was in Monticello. Brown then called Monticello but was told they did not have his file and that he should call Chicot County.

Brown petitioned the Chicot County Chancery Court seeking relief as to the matters set out above. Brown claims that he is in compliance with the court's order by paying $357.50 per month and that with DHS withholding his federal income tax return of $780, he is paying more than he was ordered to pay. He also claims that he is not delinquent with his child support and that it was wrong for the state to affect his credit rating by reporting a delinquency.

The trial court found that Brown was current on his child support payments since the July 13, 1989, order. The trial court stated that when it entered the 1989 order, it did not contemplate that DHS through the IRS would intercept Brown's refund check and apply it to child support that was owing from July 1988 to June 1989. Thus, the court reduced his monthly payment by $70 since it became clear DHS could and would continue to intercept the IRS refund each year.

The state argues that the trial court's decision was clearly erroneous and should be reversed and that Brown's current child support obligation should be restored to $325 per month, retroactive to February 1990. DHS contends that according to *Reynolds* v. *Reynolds*, 299 Ark. 200, 771 S.W.2d 764 (1989), Brown, the party seeking modification of the chancellor's order, had the burden of showing a change in circumstances and that Brown has not shown a change in circumstances justifying modification of the $325 per month child support order. However, there is no hard and fast rule concerning the specific nature of the changed circumstances. *Eubanks* v. *Eubanks*, 5 Ark. App. 50, 632 S.W.2d 242 (1982).

Brown did not allege that he has suffered a change in financial conditions since the court's 1989 order nor did he assert any of the factors the trial court uses as a guide to justify modifying a previous order. What Brown did argue is that the state went outside the bounds of the chancellor's order when it intercepted his IRS tax refund.

The state argues that the fact that Brown had his federal tax refund intercepted to reduce child support arrearages is not a legitimate justification for reduction of his current child support obligation, and reducing his current support obligation defeats the purpose of the federal tax intercept program. Ark. Code Ann. § 9-14-206(a) (1987) permits state agencies to secure payment of past due child support from federal income tax refunds. DHS contends it would be against public policy to deny enforcement of this statute against parents who get behind or fail to pay their child support payments.

The importance of providing financial support for Brown's children is paramount. But, it should not be structured in a way that unnecessarily burdens Brown financially. DHS should be working with Brown and encouraging him to continue to support his children by complying with the court's orders. Therefore, this court will modify the chancellor's order and set child support for Brown's children at $325 per month with no monies paid toward arrearages since the state will continue to withhold Brown's income tax refund and apply it towards the arrearages.

Based on the testimony, we believe the Department of

Human Services was oppressive and out of line in the manner in which it dealt with Brown as well as by reporting him to the credit agencies. Therefore, we will further modify the chancellor's order as follows: DHS is forbidden to report Brown to the credit bureaus unless he becomes $1,000 in arrears of his child support payments from the 1989 order; DHS is to write a letter to the appropriate credit bureaus, informing them that Brown is current in his child support payments and not delinquent, with a copy of that letter sent to Brown, a copy placed in his DHS file, and a copy sent to this court; and finally, DHS is directed to notify Brown as to where he can call for information regarding the state of his child support obligation.

The record reflects that DHS has acted in an unreasonable and detrimental manner in their treatment of Brown and his children. Such behavior by DHS defeats any benefits that it might otherwise accomplish and renders no service to the public it is set up to serve.

Chancery cases are reviewed *de novo* on appeal, but the findings of the chancellor will not be reversed unless clearly erroneous. *Bolan* v. *Bolan*, 32 Ark. App. 65, 796 S.W.2d 358 (1990). When the case is as fully developed as it is here and we can see where the equities lie, we may, on *de novo* review, enter the judgment that should have been entered by the trial court. *Estate of Houston* v. *Houston*, 31 Ark. App. 218, 792 S.W.2d 342 (1990).

Affirmed as modified.

COOPER, J., agrees.

ROGERS, J., concurs.

JUDITH ROGERS, Judge, concurring. I concur in the modification of the appellee's child support obligation, which has the result of reinstating the chart amount without consideration of the tax refund intercept and without additional sums to be applied toward the arrearage. I agree for several reasons.

First, I point out that any reduction based on the refund intercept results in a windfall to the payor spouse. Child support is set based on the payor's *net income*, which *includes* a deduction for withholding. Since the payor spouse is given credit initially for

such amounts withheld, the result of any further reduction based on the intercept of a refund is that the spouse is twice benefitted in a way that was not intended. The injustice of allowing this reduction is apparent in that this remedy would inure to the benefit of only those spouses who are behind in their payments, which would not be available to those who are current in their support.

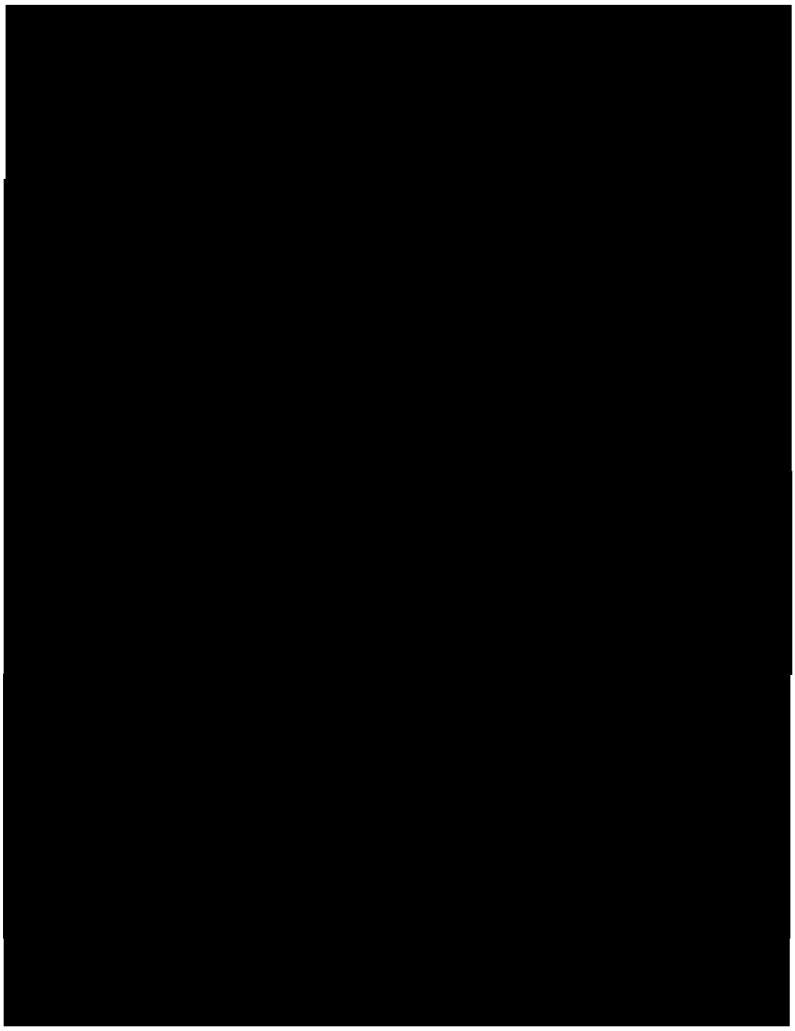
I am also perplexed and dismayed that appellee was reported to the credit bureau, and from the record it appears that appellee's attempts to rectify these matters were thwarted by the bureaucracy. While I hasten to acknowledge that appellee placed himself in this position by failing to pay support or reserve funds to cover these payments during the pendency of the first appeal, appellee has since the July 1989 order remained current in his support and has faithfully been paying additional amounts to be applied toward the arrearage. Under Ark. Code Ann. § 9-14-206(a) (Repl. 1991), the Child Support Enforcement Unit is charged with the responsibility of administering the state plan for child support enforcement required under Title IV-D of the Social Security Act. According to federal regulations, the state must establish by law procedures for making information regarding the amount of overdue support owed available to consumer reporting agencies. 45 C.F.R. § 302.70 (a)(7)·(1990). However, the regulations afford a degree of flexibility in implementing this requirement as it is provided that the state need not apply this procedure in an individual case if its application would not be appropriate, taking into account "the payment record of the parent, the availability of other remedies and other relevant considerations." 45 C.F.R. § 302.70 (b) (1990). Thus, without betraying its responsibility of administering the enforcement program, DHS need not have made the report to the credit bureau. The Department ought to recognize the efforts of payor spouses who remain current in paying support and are diligently making payments toward arrearages. There is room for equity in the performance of it duties.

In any event, the child has a right to receive and benefit from support payments and the department has the duty to see that support obligations are enforced; I, therefore, agree with the restoration of the chart amount in this instance. I realize that the chancellor earnestly tried to balance the equities here, but appellee should not be given the benefit of over-withholding.

Gerald COOK *v.* ALUMINUM COMPANY OF AMERICA

CA 90-304 811 S.W.2d 329

Court of Appeals of Arkansas
Division I
Opinion delivered June 12, 1991



Gibson, Ellis & Tedder, by: *George D. Ellis*, for appellant.

Rose Law Firm, A Professional Association, by: *Phillip Carroll*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Arkansas Workers' Compensation Commission holding that appellant's claim for wage loss benefits was barred by that portion of Act 10 of the Second Extraordinary Session of 1986, which is codified as Ark. Code Ann. § 11-9-522(b) (1987), and which provides that an injured employee who has returned to work at wages equal to what he was making at the time of injury shall not be entitled to benefits in excess of his permanent physical impairment.

At a hearing before the administrative law judge held on August 10, 1989, it was stipulated that appellant suffered a compensable injury on May 24, 1988; that his average weekly wage was $539.00; that all medical bills and appropriate temporary total disability had been paid; and that he was being paid compensation at the rate of $154.00 per week based on a 17%

permanent partial disability. Appellant contended that he was permanently and totally disabled, or, in the alternative, that he had sustained a degree of permanent partial disability in excess of the doctors' anatomical rating of 17%.

The appellant was 57 years old at the time of the hearing. He is a high school graduate who had worked for appellee for 35 years. On May 24, 1988, while working the night shift, he fell approximately fifteen feet from a ladder and landed on his back. He was hospitalized for approximately two weeks with a compression fracture at T-12, recuperated at home and returned to work on December 5, 1988. Two doctors, both orthopedic specialists, one of whom was appellant's treating physician, authorized appellant's return to work, and both doctors agreed that he had a permanent physical impairment rating of 17% to the body as a whole. On September 27, 1988, a report from the treating doctor stated appellant could return to work in two months, but he "will have some permanent limitation of the heavy lifting, sudden vigorous twisting, and will have some level of permanent discomfort in his back as a result of this compression fracture."

Appellant testified that his back hurts at times when he is working and that at times other employees help him with heavy lifting activities. He testified that he makes the same hourly rate that he made before his injury. However, he said that based on "seven or so" weeks prior to his injury and the "ten or so weeks" immediately preceding the hearing, he was now making "around" $60.00 per week less than before his injury. He acknowledged that this calculation included overtime pay and that overtime was in greater supply before his injury. His classification has not changed, and he has never been refused overtime since his return to work. His injury does not prevent him from working overtime; he has accepted overtime work four of the five times it has been offered since his return to work; he is one of four employees in his classification eligible for overtime work; generally this work is offered to the one who has the least accumulated overtime.

A certified rehabilitation counselor testified by deposition, and a report made by him to appellant's counsel was introduced into evidence. The conclusion of that report reads as follows:

> It is my opinion, therefore, that because of Mr. Cook's age, physical impairment, and vocational background that he would not be employable by any other firm or business, whose job description and work requirements were the same as the position he now holds.

On appeal, it is appellant's first argument that except for Ark. Code Ann. § 11-9-522(b) (1987), this is a "classic case" for the application of *Glass* v. *Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). The holding of that case was succinctly explained by Justice David Newbern, while a judge on the Arkansas Court of Appeals, as follows:

> The Arkansas Supreme Court long ago departed from the restrictive view that only anatomical or functional disability could be considered in determining disability to the body as a whole. The departure came in *Glass* v. *Edens* . . . and since that case was decided we have been among the great majority of jurisdictions which allow consideration of several factors in determining not just functional bodily limitations, but loss of earning capacity as a predicate for workers' compensation.

M.M. Cohn v. *Haile*, 267 Ark. 734, 736, 589 S.W.2d 600 (Ark. App. 1979). However, appellant admits that Ark. Code Ann. § 11-9-522(b) (1987), *if applicable to this case*, would prevent the Commission from giving consideration to the appellant's age, education, experience and other matters affecting wage loss, *see Glass* v. *Edens*, 233 Ark. at 788, *in addition* to the medical evidence that appellant sustained a 17% *physical* impairment to the body as a whole. Ark. Code Ann. § 11-9-522(b) reads as follows:

> 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.

But it is appellant's contention that this section of the workers' compensation law does not apply in this case because the appellee has "totally failed in its proof to meet its burden" to show that appellant has returned to work "at wages equal to or greater than his average weekly wage at the time of the accident."

Appellant argues that the word "wages" is not defined and "it makes absolutely no difference why or under what circumstances wages are less after an accident than they were before," but if the claimant is not making preinjury wages "then the respondent has failed in its affirmative proof and the statute is inapplicable." The appellee counters with the argument that "we cannot tell" whether the Commission decided this case on the equality of wages theory since appellant failed to prove by a preponderance of the evidence that his future earning capacity was affected sufficiently to entitle him to a disability rating in excess of 17%.

We think it is clear that the Commission's decision was based upon Ark. Code Ann. § 11-9-522(b). The Commission plainly stated:

> Payments were voluntarily made for a 17% permanent anatomical impairment rating, but the claim for wage loss benefits is barred by that portion of Act 10 of 1986 which is codified as Ark. Code Ann. § 11-9-522(b) (1978).

Thus, the Commission held that appellant's claim for "wage loss benefits" in excess of the physical or anatomical impairment was "barred" by section 11-9-522(b). Moreover, it is our duty to review the decision of the Commission to determine whether it is supported by the facts found by the Commission. *Mosley* v. *McGehee School District*, 30 Ark. App. 131, 783 S.W.2d 871 (1990); *Wright* v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986). In appeals from the Commission, we cannot indulge the presumption used in appeals from trial courts, *see Morgan* v. *Downs*, 245 Ark. 328, 432 S.W.2d 454 (1968), and

Hyde v. *Quinn*, 298 Ark. 569, 769 S.W.2d 24 (1989), that even if the court states the wrong reason, we will affirm if the judgment is correct.

We think it is also clear as to which party has the burden of proof on the issue of whether the injured party has returned to work at wages equal to or greater than his average weekly wage at the time of the accident. To obtain benefits, it is the claimant's burden to show that injury or death of the employee was the result of an accidental injury that arose in the course of the employment, and that it grew out of, or resulted from, the employment. *Farmer* v. *L.H. Knight Company*, 220 Ark. 333, 336, 248 S.W.2d 111, 113 (1952). However, Ark. Code Ann. § 11-9-522(c)(1) (1987) specifically provides:

> The employer or his workers' compensation insurance carrier shall have the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his average weekly wage at the time of the accident.

So, Ark. Code Ann. § 11-9-522, which contains the provision about the wages after injury being equal to or greater than the wages at the time of the injury, also contains a provision stating which party shall have the burden of proving that the wages were the same after the injury as they were at the time of injury. Both provisions were part of Section 5 of Act 10 of the Second Extraordinary Session of 1986, which amended Ark. Stat. Ann. § 81-1313(d). *See* Volume 1, Book 2, *General Acts of Arkansas 1987* at 2914.

It may not be clear, however, as to what the word "wages" or the term "average weekly wages" as used in Ark. Code Ann. § 11-9-522(b), means in all cases. It is true that the general "Workers' Compensation Law" contains a section on definitions and that "wages" is defined therein. *See* Ark. Code Ann. § 11-9-102(8) (1987). As an aside, it might also be noted that under this section, the word "wages" can mean more than *money* paid for services rendered. It is also true that Ark. Code Ann. § 11-9-518 provides that "average weekly wage" shall not be computed on less than a full-time workweek; that the section gives directions on how to determine "average weekly wages" for employees working on a "piece basis," and for overtime earnings;

and there is a general provision that allows the Commission to determine "average weekly wage" by a method that is "just and fair" where required by exceptional circumstances. But there may be cases where there is room for argument on the issue of whether an employee's "wages" after injury are equal to or greater than his "average weekly wage" at the time of the accident in which he was injured. There seems, however, to be no problem in this regard that would affect the validity or constitutionality of Ark. Code Ann. § 11-9-522(b).

Appellant did present constitutional questions to the Commission and they are argued here. But to conclude our discussion of his first argument—that section 11-9-522(b) does not apply in the instant case because the appellee failed to meet its burden of showing that appellant returned to work at wages equal to or greater than his average weekly wage at the time of accident—we think there is substantial evidence to support the Commission's decision on that issue. Although the weeks selected by appellant for comparison show that he earned less after his injury than he was earning at the time of the accident, the difference results from the fact that he did not work as much overtime after his injury as he did before his injury. Appellant admits his hourly rate was the same before and after his injury.

The brief filed for the appellant expresses concern over the possibility that the employer has, or may, simply put appellant back to work for a few hours a week, at the same hourly rate, in order to claim the application of section 11-9-522(b) and prevent a determination of disability based upon *Glass* v. *Edens* considerations. But Ark. Code Ann. § 11-9-522(d) (1987), provides as follows:

> In accordance with this section, the commission may reconsider the question of functional disability and change a previously awarded disability rating based on facts occurring since the original disability determination, if any party makes application for reconsideration within one (1) year after the occurrence of the facts.

This provision appears to be sufficient to prevent an employer from just keeping or putting an injured employee on the payroll in order to invoke the application of section 11-9-522(b). Other provisions of the compensation law might also be applicable in

this regard. But there is substantial evidence in this case that at the time of the hearing before the law judge the appellant was employed and making wages equal to his average weekly wage at the time of his accident. Future events may change this situation, and no definitive answer can be given with respect to all questions that may arise concerning the application of this statute, but the Commission is not stripped of its authority or ability to deal with those issues when they are presented.

With regard to appellant's constitutional arguments, we first note that there is a presumption of constitutionality attendant to every legislative enactment. *Hamilton* v. *Jeffrey Stone Co.*, 25 Ark. App. 66, 752 S.W.2d 288 (1988). One contention made by appellant is that section 11-9-522(b) allows an employer—by continuing to pay the same wages to an injured employee—to determine whether the employee receives compensation for the wage-loss disability he has sustained. *Crowly* v. *Thornbrough*, 226 Ark. 768, 294 S.W.2d 62 (1956), is cited in support of this contention. That case held that legislation which allowed the Secretary of Labor of the United States to fix the minimum wage scale to be paid in certain areas of the state was an unlawful delegation of legislative authority in violation of the Arkansas Constitution. But if the legislature can fix the amounts to be paid for disability sustained by injured workers, it can surely limit compensable disability to the percentage of physical impairment for as long as the employee's wages are the same after the injury. Whether this situation exists, the amounts involved, and other questions that may arise may constitutionally be left to the Commission to adjudicate. That, we find, is the effect of Ark. Code Ann. § 11-9-522 (1987).

Appellant also argues that section 11-9-522(b) violates the 14th amendment to the United States Constitution because there is "absolutely no 'nexus' between the statute and any governmental objective." He cites *Streight* v. *Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983), and *Love* v. *Hill*, 297 Ark. 96, 759 S.W.2d 550 (1988), in support of this argument. Those cases hold that the test of constitutionality is whether the legislation is rationally related to achieving a legitimate governmental objective. While we have not been cited to any similar legislation in other states, it seems obvious that our legislature was attempting to prevent the employer from being liable for benefits for the loss

206, 655 S.W.2d 459 (1983), and *Love* v. *Hill*, 297 Ark. 96, 759 S.W.2d 550 (1988), in support of this argument. Those cases hold that the test of constitutionality is whether the legislation is rationally related to achieving a legitimate governmental objective. While we have not been cited to any similar legislation in other states, it seems obvious that our legislature was attempting to prevent the employer from being liable for benefits for the loss of the ability to earn wages while the injured employee is actually earning wages equal to the wages he was earning at the time of his injury. This seems to be a legitimate governmental objective and not a product of utterly arbitrary and capricious government. *See Corbitt* v. *Mohawk Rubber Co.*, 256 Ark. 932, 511 S.W.2d 184 (1974) (statute which encourages employers to retain injured employees has a rational basis).

Affirmed.

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

J. W. DOBBINS *v.* Don LACEFIELD and L & L Oil Company

CA 90-401 811 S.W.2d 334

Court of Appeals of Arkansas
Division I
Opinion delivered June 19, 1991

Jeff Dobbins, for appellant.

Poynter & Gearhart, P.A., by: *Terry M. Poynter*, for appellee.

GEORGE K. CRACRAFT, Chief Judge. J.W. Dobbins appeals from a judgment entered against him in favor of appellees Don Lacefield and L & L Oil Company for conversion of personal property. We find sufficient merit in one of appellant's points advanced on appeal to warrant reversal.

The record indicates that appellant was the owner of a sixty-acre tract of unimproved and undeveloped land. In 1987, appellant leased five acres of the tract to Floyd Pittman, who desired to erect a building on the land and operate a convenience store and gas station. The lease provided for an initial term of two years at an annual rental of $1800.00, with the option to renew for an additional five years at a substantially higher annual rental. The lease further provided that "Any improvements placed on the

premises by Lessee shall become the property of Lessor upon termination of this lease."

Pittman constructed a building on the property and appellees, as petroleum distributors, supplied him with certain equipment to be used in connection with his business, including three 6,000-gallon underground gasoline storage tanks and a 24-foot by 32-foot canopy, which are in issue here. The gasoline tanks were installed by digging a 20-foot by 30-foot hole, 10 feet deep, with a backhoe. The tanks were placed in the hole by use of heavy equipment, packed with washed sand, and attached to underground electrical cables and pipes that connected the tanks to the above-ground dispensers. In order to remove the tanks, a backhoe and other heavy equipment would be required. The canopy was erected on two poles set in concrete with underground cables running to the canopy from the gasoline dispensers. In order to remove the canopy, a cutting torch must be used to cut the two steel poles, leaving the concrete island. It would take three people two days to disassemble the top portion of the canopy.

Pittman closed the business prior to the expiration of the initial lease term and did not exercise his option to renew. Several months later, appellees advised appellant that they claimed all of the equipment that they had furnished to Pittman under an alleged oral agreement between appellees and Pittman in which appellees retained ownership of the equipment. Appellant refused to return the equipment to appellees, claiming that it constituted fixtures that had become part of the realty owned by appellant pursuant to the written lease agreement he had with Pittman. Appellees then secretly entered appellant's property and removed all of the disputed items except the above-described canopy and gasoline tanks.

Appellant brought this action against appellees for damages in the amount of the value of the equipment that appellees had removed and for a preliminary injunction prohibiting appellees from entering his property and removing the tanks and canopy. Appellees counterclaimed for the value of the tanks and the canopy, relying on their alleged agreement with Pittman. At trial, appellant's motion for directed verdict was denied and the jury found against appellant on his complaint and in favor of appellees on their counterclaim. After remittitur, judgment was entered

against appellant for $16,000.00. This appeal is taken only as to the judgment on appellees' counterclaim.

On appeal, appellant contends that the trial court erred in denying his motion for judgment notwithstanding the verdict, arguing that the finding that the tanks and canopy had not become part of the realty by annexation was not supported by substantial evidence and that they were fixtures as a matter of law. We agree. A trial court may enter a judgment notwithstanding the verdict only if there is no substantial evidence to support the verdict and one party is entitled to judgment in his favor as a matter of law. On appeal, we review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the party against whom the judgment notwithstanding the verdict is sought. *Johnson Timber Corp.* v. *Sturdivant*, 295 Ark. 622, 752 S.W.2d 241 (1988); *McCuistion* v. *City of Siloam Springs*, 268 Ark. 148, 594 S.W.2d 233 (1980).

The test for determining whether items are fixtures is: (1) whether the items are annexed to the realty; (2) whether the items are appropriate and adapted to the use or purpose of that part of the realty to which the items are connected; and (3) whether the party making the annexation intended to make it permanent. *McIlroy Bank and Trust* v. *Federal Land Bank*, 266 Ark. 481, 585 S.W.2d 947 (1979). The issue of whether chattels that have been firmly affixed to the real estate have retained their character as movables is ordinarily one for the jury to resolve. *Thomas Cox & Sons Machinery Co.* v. *Blue Trap Rock Co.*, 159 Ark. 209, 251 S.W. 699 (1923).

The rule applicable to the facts of this case is best stated in *Thomas Cox & Sons Machinery Co.* v. *Blue Trap Rock Co.*, *supra*. There, a lessee purchased machinery from a supplier who retained title. The lessee firmly affixed the machinery to the realty with the full knowledge of the supplier. Whether or not the landowner had knowledge of, or acquiesced in, the agreement for retained title between the lessee and supplier was questioned in the evidence. The trial court found the machinery to be fixtures and directed a verdict against the supplier and in favor of the lessor. On appeal, the supreme court ruled that whether the articles were fixtures was an issue of fact for the jury to determine. The court stated that, if the lessor permitted the machinery to be

firmly affixed to his realty with knowledge of the fact that the supplier had retained title, the lessor would be estopped to assert that the articles in controversy were fixtures and that he had acquired title to them by virtue of his ownership of the land to which they were affixed. The court further stated that, on the other hand, if the supplier furnished the machinery to the lessee knowing that it would be affixed to the realty in such a manner that it could not be removed without damage to the realty, and if the *lessor was ignorant of the fact of the retained title*, the supplier could not recover the machinery. *See Peck-Hammond Co.* v. *Walnut Ridge District*, 93 Ark. 77, 123 S.W. 771 (1909); *Brannon* v. *Vaughan*, 66 Ark. 87, 48 S.W. 909 (1898).

At trial, appellee Lacefield testified that he had placed the disputed items on the premises for Pittman's use with Pittman's understanding that appellee could remove the property at any time. Appellee did not know appellant and had no dealings with him prior to the termination of the Pittman lease. Appellee stated that appellant was never a party to any agreement he had with Pittman and that, at the time that the items were furnished to Pittman, he (appellee) thought that Pittman owned the land but had not checked to find out. Appellee further offered testimony of custom and usage among petroleum products distributors for the limited purpose of proving his intention and understanding with Pittman.

Appellant testified that Pittman told him that he (Pittman) was buying the disputed items but that appellant had no knowledge from whom Pittman was purchasing them. He testified that he did not know appellee and had no dealings with him at anytime prior to the termination of Pittman's lease. Appellant's first knowledge of appellee came when claim was made for the removal of the equipment after Pittman abandoned the property. Appellant had no knowledge of any agreement between appellee and Pittman. Appellant testified that because Pittman had agreed in the lease to give him the improvements at the termination of the lease, appellant had agreed to take less rent than the property was worth.

The written lease agreement between appellant and Pittman provided that any improvements placed on the premises by Pittman shall become the property of appellant upon termina-

tion of the lease. There is no evidence to the contrary that appellees' equipment had been attached to appellant's real estate in such a manner that it could not be removed without serious injury to the realty and was appropriate and adapted to the use or purpose of that part of the realty. There is no evidence that appellant had any knowledge of, or that he acquiesced in, any agreement between appellee and Pittman. Therefore, on the facts of this case, we conclude that the finding that this property so firmly affixed to the land had retained its character as chattels is not supported by substantial evidence.

Reversed and dismissed.

JENNINGS and MAYFIELD, JJ., agree.

Julius C. LYONS *v.* STATE of Arkansas

CA CR 90-237 813 S.W.2d 262

Court of Appeals of Arkansas
Division I
Opinion delivered June 19, 1991

John Joplin, for appellant.

Ron Fields, Att'y Gen., by: *Clint Miller*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. On June 16, 1989, appellant Julius C. Lyons entered a plea of guilty to battery in the second degree and was sentenced to five years in the Arkansas Department of Correction with four and one-half years suspended. On February 12, 1990, the state filed a petition to revoke alleging that appellant had committed the offenses of theft of property and possession of drug paraphernalia. After a hearing held on March 9, 1990, the trial court revoked appellant's suspended sentence and sentenced him to serve four and one-half years in the Arkansas Department of Correction, three and one-half years suspended. Appellant does not appeal the revocation of his suspended sentence; he argues only that the sentence the trial court imposed after revoking his suspended sentence was illegal. The state agrees and recommends that we affirm the revocation and modify the sentence.

In *Gautreaux v. State*, 22 Ark. App. 130, 736 S.W.2d 23 (1987), we said:

> Under our criminal code, a sentence is imposed when the court pronounces a fixed term of imprisonment as opposed to simply specifying a definite period of probation. *McGee* v. *State*, 271 Ark. 611, 609 S.W.2d 73 (1980). According to Ark. Stat. Ann. § 43-2332 (Supp. 1985), if sentence is imposed, then the probationer can only be required to serve the remainder of the time imposed. *Easley* v. *State*, 274 Ark. 215, 623 S.W.2d 189 (1981).

22 Ark. App. at 131. The statute referred to in the above quotation, Ark. Stat. Ann. § 43-2332 (Supp. 1985), is now Ark. Code Ann. § 16-93-402 (1987). It reads, in pertinent part, as

follows:

> (e)(1) At any time within the probation period or within the maximum probation period permitted by § 16-93-401 [five years], the court for the county in which the probationer is being supervised or, if no longer supervised, the court for the county in which he was last under supervision may issue a warrant for his arrest for violation of probation occurring during the probation period.
>
> . . . .
>
> (5) Thereupon, the court may revoke the probation and require him to serve the sentence imposed or any lesser sentence which might have been originally imposed.

Because the trial court, in the instant case, sentenced the appellant to five years imprisonment (with four and one-half years suspended), the court's sentence was *imposed* under the statutes and cases cited above; therefore, he could not be required, after revocation, to serve more than the remainder of his original sentence. Although appellant did not make a specific objection that the sentence imposed at the revocation hearing was illegal, a defendant may challenge on appeal the validity of a sentence of imprisonment even in the absence of an objection at trial to the legality of the sentence. *Howard* v. *State*, 289 Ark. 587, 715 S.W.2d 440 (1986); *Palmer* v. *State*, 31 Ark. App. 97, 788 S.W.2d 248 (1990); and *Jones* v. *State*, 27 Ark. App. 24, 765 S.W.2d 15 (1989).

We, therefore, agree with appellant and the state that appellant's sentence upon revocation was illegal and must be modified. However, the record does not reveal when the appellant was released from the Arkansas Department of Correction. Ark. Code Ann. § 5-4-307 (1987), formerly Ark. Stat. Ann. § 41-1206(3)(Repl. 1977), provides as follows:

> (c) If the court sentences the defendant to a term of imprisonment and suspends imposition of sentence as to an additional term of imprisonment, the period of the suspension commences to run on the day the defendant is lawfully set at liberty from the imprisonment.

In *Vann* v. *State*, 16 Ark. App. 199, 698 S.W.2d 814 (1985), the

the court applied Ark. Stat. Ann. § 41-1206(3) to hold that the suspended portion of a sentence to imprisonment commences to run upon the release of the prisoner from confinement. *See also Matthews* v. *State*, 265 Ark. 298, 578 S.W.2d 30 (1979).

Thus, the suspended four and one-half year portion of appellant's sentence began to run on the day that he was released from the Arkansas Department of Correction. Since we cannot determine from the record exactly when appellant was released from prison, we must remand this case for the trial court to enter a proper sentence in keeping with this opinion.

Affirmed as to revocation and remanded for resentencing.

COOPER and JENNINGS, JJ., agree.

ARKANSAS DEPARTMENT OF CORRECTION, et al.
v. Tammy E. GLOVER

CA 90-356 812 S.W.2d 692

Court of Appeals of Arkansas
En Banc
Opinion delivered June 26, 1991

Frank Gobell, for appellants.

Hunt & Kelly, by: *Eugene Hunt* and *Lisa A. Kelly*, for appellee.

ELIZABETH W. DANIELSON, Judge. Appellants appeal from the full commission's award of benefits to appellee Tammy Glover following the death of her husband, Lois Glover. Because we agree with appellants' contention that there is not substantial evidence to support the commission's finding that Glover's death

arose out of and in the course of employment, we reverse.

A claimant seeking benefits before the Workers' Compensation Commission must prove by a preponderance of the evidence that the injury or death arose out of and in the course of the employment. *J & G Cabinets* v. *Hennington*, 269 Ark. 789, 600 S.W.2d 916 (1980); *Morrow* v. *Mulberry Lumber Co.*, 5 Ark. App. 260, 635 S.W.2d 283 (1982). "Arising out of the employment" refers to the origin or cause of the accident. In order for an injury to arise out of the employment, it must be a natural and probable consequence or incident of the employment and a natural result of one of its risks. *J & G Cabinets*, 269 Ark. 789, 600 S.W.2d 916. "In the course of the employment" refers to the time, place, and circumstances under which the injury occurred. *Gerber Products* v. *McDonald*, 15 Ark. App. 226, 691 S.W.2d 882 (1985). The court in *Howard* v. *Arkansas Power & Light Co.*, 20 Ark. App. 98, 724 S.W.2d 193 (1987), notes that Larson's formulation for the test for course of employment requires that the injury occur within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose or advancing the employer's interests directly or indirectly.

At the time of his death on January 4, 1988, Lois Glover was an employee of appellant Arkansas Department of Correction. Glover reported to work that morning for a shift that began at 6:15 a.m. and was scheduled to end at 6:30 p.m. At approximately 3:45 p.m., Glover was released from work by his supervisor, Lieutenant Mixon, at the request of Lieutenant Spradlin, a Department of Correction officer who was superior in rank to Glover, but who was not Glover's supervisor. Spradlin had requested that Glover be released in order to help him with a personal errand; there was differing testimony as to the purpose of the errand, but no contention that they were engaged in any work-related business. After Spradlin picked up Glover in his vehicle, the two men began riding around and drinking beer. Spradlin was intoxicated at the time he picked up Glover, and Glover was subsequently killed in an accident in which Spradlin was driving.

For an accident to be compensable, there must be a causal connection between the accident and a risk that is reasonably incident to the employment, and that connection

cannot be supplied by speculation. *Gerber Products*, 15 Ark. App. 226, 691 S.W.2d 882. Employment is not limited to that which the person was actually hired to do; whatever the normal course of employment may be, the employer and its supervisory staff have it within their power to enlarge the course of the employment by assigning tasks outside the usual scope of the employment. *See Crouch Funeral Home* v. *Crouch*, 262 Ark. 417, 557 S.W.2d 392 (1977); *Edwards* v. *Johnson*, 227 Ark. 345, 298 S.W.2d 336 (1957). However, the court in *Crouch* dismissed the proposition that an order directing an employee to do something outside the usual scope of the employment need not take the form of an outright command if the employee has the impression the task was expected of him or that it would be in his best interest to perform it; the court stated that this seemed to be too frail and flimsy a basis for extension of a course of employment.

Although the commission should construe the provisions of the workers' compensation act liberally, *see* Act 10 of the Second Extraordinary Session of 1986, there is no presumption that an injury arose out of and in the course of employment, and the claimant has the burden of establishing his claim by a preponderance of the evidence. *Howard* v. *Arkansas Power & Light Co.*, 20 Ark. App. 98, 724 S.W.2d 193 (1987); *Central Maloney, Inc.* v. *York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984).

The administrative law judge and the full commission found that it was the practice of higher ranking correction officers to use lower ranking officers to assist them with personal errands; that lower ranking officers perceived performing these personal errands as a means of rapid career advancement; that the venture engaged in on January 4, 1988, while personal in nature to Spradlin, was not personal to Glover, who was a passenger in a vehicle driven by a supervisor over whom he had no control; and that the accident therefore arose out of and in the course of his employment. We hold there was not substantial evidence to support these findings.

The evidence reflects that before Lt. Spradlin called Lt. Mixon requesting that Glover be released, he had called Glover to see if he wanted to leave work early and accompany Spradlin. Spradlin and Glover had been friends in high school, and though

they had not socialized since that time, they had begun to renew their friendship since Glover had started work with the Department of Correction, and spoke with each other on a daily basis.

On the day of the accident, Spradlin was off duty. Mixon testified that Spradlin told him he needed Glover to go with him because he needed some money and Glover was the only one who could get it. When Mixon told Glover he was being logged off duty, Glover responded that he already knew about it. Spradlin testified that he wanted Glover to help him load his four-wheeler. He testified that when he picked up Glover, he asked him if he wanted to load the four-wheeler first or drink beer first and Glover replied he wanted to drink beer first. Spradlin testified that he did not have any authority over Glover that day, and that he didn't necessarily expect Glover to agree to help him because he was a superior officer, but because they were friends.

In *Crouch*, 262 Ark. 417, 557 S.W.2d 392, the supreme court reversed a finding that an injury arose out of and in the course of employment where the claimant had suffered injuries in an accident on a return trip from the airport, where he had voluntarily gone to pick up his mother, the president of the company for which he worked. Among other factors considered by the court were the facts that there was no evidence the claimant had ever previously performed this service; there was no direction or order for the employee to go on this mission; and the claimant's mother had been on a personal visit and was not acting in the scope of her employment.

■ The findings of the commission must be upheld unless there is no substantial evidence to support them. *Scarbrough* v. *Cherokee Enterprises*, 33 Ark. App. 139, 803 S.W.2d 561 (1991). Substantial evidence exists only if reasonable minds could have reached the same conclusion without resort to speculation or conjecture. *Id.*; *Pickens-Bond Constr. Co.* v. *Case*, 266 Ark. 323, 584 S.W.2d 21 (1979).

■ The evidence in this case does not support a finding that Glover's accident arose out of and in the course of his employment. Instead, it shows that two friends, one of whom happened to be a superior-ranking officer, decided to spend the afternoon drinking beer and perhaps taking care of some personal business. There is no substantial evidence to support a finding that Glover

felt obligated to assist a superior ranking officer. Such a finding would be based on conjecture and speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. *Dena Constr. Co.* v. *Herndon*, 264 Ark. 791, 575 S.W.2d 155 (1979).

An employer should not be expected to bear the burden of compensating injuries to the employee when the whole errand is unrelated to and disconnected from the employment. *Crouch*, 262 Ark. 417, 557 S.W.2d 392. Accordingly, we reverse the finding of the commission and dismiss the claim.

Reversed and dismissed.

LAWSON CLONINGER, Special Judge, agrees.

JENNINGS and MAYFIELD, JJ., dissent.

ROGERS, J., not participating.

JOHN E. JENNINGS, Judge, dissenting. In my view the majority loses sight of our standard of review in making its determination that the Commission's decision is not supported by substantial evidence. In workers' compensation cases, the Commission, and not this court, functions as the trier of fact. *See Blevins* v. *Safeway Stores*, 25 Ark. App. 297, 757 S.W.2d 569 (1988). In determining whether the Commission's findings are supported by substantial evidence, we are obliged to view the evidence in the light most favorable to those findings and give the testimony its strongest probative force in favor of the Commission's action. *Blevins* v. *Safeway Stores*, 25 Ark. App. 297, 757 S.W.2d 569 (1988). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *College Club Dairy* v. *Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988). We do not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. *Silvicraft, Inc.* v. *Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding. *Bearden Lumber Co.* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). The Commission's decision is entitled to the weight we give a jury verdict. *Marrable* v. *Southern LP Gas, Inc.*, 25 Ark. App. 1, 751

S.W.2d 15 (1988).

The credibility of witnesses and any conflict and inconsistency in the evidence is for the Commission, as the trier of fact, to resolve. While it is true that conjecture and speculation cannot take the place of credible evidence, it is equally true that the Commission has the right to consider all of the facts and circumstances of the case and to draw all reasonable inferences deducible from them. *Franklin Collier Farms* v. *Bullard*, 33 Ark. App. 33, 800 S.W.2d 438 (1990). Circumstantial evidence is sufficient to support an award and it may be based upon the reasonable inferences that arise from the reasonable probabilities flowing from the evidence; neither absolute certainty nor demonstration is required. *Herron Lumber Co.* v. *Neal*, 205 Ark. 1093, 172 S.W.2d 252 (1943).

The majority finds no substantial evidence to support the Commission's finding that it was the practice of higher ranking correction officers to use lower ranking officers to assist them with personal errands. Kenneth Luckett, the correction officer sent by Captain Mixon to relieve Lois Glover, testified that he had been relieved on a number of occasions at the order of a superior officer, that he would do whatever the officer told him to do, and that this was just "part of the way you go up in the system." Calvin Spradlin, who had worked for the department for six years prior to his resignation in 1988, testified that it was the "standing practice" at the department for an officer to be relieved from duty to run errands for superior officers.

The majority also holds that the Commission's finding that lower ranking officers perceived performing these personal errands as a means of rapid career advancement is not supported by substantial evidence. Again, Luckett testified that being relieved from duty to do something for a superior officer was part of the way one advanced in the system. Spradlin testified that he knew that doing things that were not within "the line of duty" was in his career interest and that it was his perception that that was how one moved up in the system.

The court also finds no substantial evidence to support the Commission's finding that the venture engaged in on January 4, 1988, was not personal to Lois Glover, who was a passenger in a vehicle driven by a supervisor, Spradlin, over whom Glover had

no control. The majority states that the evidence shows only "that two friends, one of whom happened to be a superior ranking officer, *decided* to spend the afternoon drinking beer and perhaps taking care of some personal business." (Emphasis added.) Captain Mixon testified that he made the decision to relieve Lois Glover at the request of Lieutenant Spradlin. There was no evidence that Glover asked Mixon to be relieved. It was Mixon's recollection that Spradlin told him he needed Glover to go with him to get some money. Spradlin's recollection was that he told Mixon he needed Glover to help him load a four-wheeler. In any event, Luckett testified that Mixon gave him a direct order to go relieve Glover at "Ten Barracks." When Luckett arrived there he told Glover that Mixon wanted to see him in the East Hall, a command post. Although Mixon originally testified that he knew Glover had some time off coming, he subsequently admitted on further examination by appellee's attorney that, in fact, he did not know whether Glover had any time coming or not.

Although the majority concedes that Spradlin and Glover had not seen each other socially since high school, it states that "they had begun to renew their friendship" since Glover started work at the Department of Correction. When the testimony of Spradlin in this regard is read in context, it is clear that the "renewal of the friendship" consisted merely of the two men speaking to each other when they were on the same shift at work.

The majority states that on the day of the accident Spradlin was off duty. Spradlin, however, testified that as an officer living on the department grounds, he was on duty twenty-four hours a day. The majority states that Spradlin "testified that when he picked up Glover, he asked him if he wanted to load the four-wheeler first or drink beer first and Glover replied he wanted to drink beer first." In the first place, Spradlin's testimony was that he asked Glover if he wanted to go *get* the beer before they unloaded the four-wheeler and that Glover said "let's go get the beer." Second, the Commission was not obligated to believe this testimony. Spradlin, by his own admission, was intoxicated at the time he picked Glover up. Furthermore, the Commission may believe part of a witness's testimony and reject other parts. This is a traditional function of the trier of fact. *See Williams* v. *State*, 298 Ark. 484, 768 S.W.2d 539 (1989). Finally, it might be observed that according to Spradlin, although the beer they

bought was his (Spradlin's) brand, Glover had to pay for it because Spradlin had no money.

Although I would concede that the decision in *Crouch Funeral Home, Inc.* v. *Crouch*, 262 Ark. 417, 557 S.W.2d 392 (1977), may be open to differing interpretations, I do not agree that that decision suggests that the Commission was wrong in awarding compensation here.

With due respect to the majority, it seems to sift the evidence, picking out that testimony which supports the result it believes the Commission should have reached, and forgetting that it is the Commission and not this court which makes decisions on credibility.

Lois Glover was not available to testify at the hearing and the appellee had to try to make her case, for the most part, through reluctant witnesses employed by the Department of Correction, the opposing party. The Commission found that she made her case, and in my view that conclusion is supported by substantial evidence.

I respectfully dissent.

MAYFIELD, J., joins.

Barbara J. (Pack) DAVENPORT *v.* Odus J. PACK

CA 90-436 812 S.W.2d 487

Court of Appeals of Arkansas
Division I
Opinion delivered June 26, 1991

G. Randolph Satterfield, for appellant.

Randell Templeton, for appellee.

MELVIN MAYFIELD, Judge. The appellant Barbara J. (Pack) Davenport appeals from the decree of the chancellor who dismissed a motion to enforce a provision of a property settlement agreement contained in the parties' decree of divorce. We reverse and remand.

The parties were divorced on September 8, 1983, by a decree which contained a property settlement agreement dated August 30, 1983. Paragraph V of the agreement provided that "HUSBAND agrees to provide carpet and wallpaper (to be selected by WIFE) for the house to be purchased by WIFE as her future residence." (Parentheses in the original.) The decree approved the property settlement agreement and also contained a provision stating that the court retained jurisdiction to enter such orders "as may be appropriate in enforcing the terms of this agreement."

On October 25, 1989, appellant filed a "Motion to Enforce Decree" which alleged that on June 1, 1989, appellant purchased her "future residence"; that on August 8, 1989, appellant notified the appellee in writing of her desire for appellee to perform the agreement; and that appellee had failed to do so. Appellant asked that appellee be compelled to perform his contract, or in the alternative, that appellant be awarded judgment in an amount to compensate her for the carpet and wallpaper.

Appellee denied appellant's allegations and pleaded the defenses of laches and the statute of limitations, and accord and satisfaction. By way of counterclaim, appellee alleged appellant was indebted to him in the amount of $100.00 per month for

insurance payments.

A hearing was held on April 2, 1990, and on April 9, 1990, the chancellor entered an order dismissing appellant's motion. The order stated:

> From the motion filed herein, the divorce decree entered on September 8, 1983, including the contractual property settlement contained therein, the answer and counterclaim filed by the defendant and the plaintiff's response thereto and the arguments of counsel, the Court finds that the five (5) year statute of limitation and the doctrine of laches applies to this claim and bars the claim asserted by the plaintiff. The defendant withdraws his counterclaim.

Appellant argues the trial court erred in finding her claim barred by the statute of limitations. She argues that under the terms of the property settlement agreement, appellee's obligation would not arise until some future time, and that appellant's right to enforce the contract for wallpaper and carpet accrued upon the purchase of her "future residence."

Appellant also argues the trial court erred in finding her claim barred by the doctrine of laches because that doctrine is premised upon some detrimental change in position which makes it inequitable to enforce the claim. Appellant argues that the trial court took no testimony, therefore, there was no evidence of inequitable circumstances resulting from delay or detrimental change in appellee's position.

The appellee argues that the burden is on the appellant to bring up a record sufficient to demonstrate error and that where no attempt is made to make a record according to the established procedure contained in Rule 6(d) of the Rules of Appellate Procedure, it is presumed the matters presented in an unrecorded hearing support the findings of the trial court.

We first consider the appellee's argument that we should affirm the order of dismissal because the record on appeal contains no record of a hearing before the trial judge. This argument raises preliminary matters for consideration.

To begin with, we see nothing to indicate that the court's order of dismissal was based upon something that occurred in a

hearing. The trial court's order states that the court's findings were based upon "the motion filed herein, the divorce decree entered on September 8, 1983, including the contractual property settlement contained therein, the answer and counterclaim filed by the defendant and the plaintiff's response thereto and the arguments of counsel." All the matters mentioned as a part of the basis for the court's order are in the record as exhibits to pleadings or in response to a request for production of documents—except the arguments of counsel.

Now, the appellant did file a motion in this (appellate) court stating that the court reporter had advised counsel for appellant that the transcript of record of argument of counsel had been accidently erased by the recording device used by the reporter, and appellant prayed for an "Order Ordering the Trial Court to Assist Counsel in Reconstructing the Record." We denied the motion with the notation "See Rule 6(d) of the Rules of Appellate Procedure." Apparently the appellant did not proceed under Rule 6(d) as nothing further was filed in this court. But we know of nothing in argument by counsel—short of agreement or stipulation—that could have authorized the order of dismissal. The trial court's order does not state that it is entered by "agreement or "stipulation" and the appellee does not even contend that this occurred. As the court said in *Dent* v. *Adkisson*, 184 Ark. 869, 43 S.W.2d 739 (1931), "all that the record justifies us in concluding is that the chancellor heard no testimony." 184 Ark. at 874-75.

Another matter for consideration concerns the procedure followed by the trial court. Appellee's response to the motion filed by appellant pleaded the defenses of laches and limitations and alleged an accord and satisfaction. Rule 12 of the Arkansas Rules of Civil Procedure allows certain defenses to be asserted in a responsive pleading and authorizes a party to move for judgment on the pleadings as to those defenses. However, laches and limitations are affirmative defenses, *see* Ark. R. Civ. P. 8(c), and are not listed as defenses that may be the subject of a motion to dismiss under Rule 12. Even so, it has been held that where this is only a procedural point, the motion to dismiss may be treated as if it were properly raised. *Amos* v. *Amos*, 282 Ark. 532, 669 S.W.2d 200 (1984). Thus, if the defenses of laches and limitations were considered under a Rule 12 motion to dismiss,

there would be no evidence to be reported. But if matters outside the pleadings were presented to and not excluded by the court, Rule 12(c) requires that the motion to dismiss be treated as one for summary judgment and disposed of as provided in Ark. R. Civ. P. 56. Again, under that procedure, no evidence would have been taken. The accord and satisfaction pleaded by appellee is also an affirmative defense under Rule 8(c), *supra*, but, in addition, it is based upon evidence that is in the record by response to a motion to produce. Rule 12(c), *supra*, provides that if, on a motion for judgment on the pleadings, matters outside the pleadings are presented, the motion shall be treated as one for summary judgment; and again, there would be no evidence to be taken by the court reporter. *See also Guthrie* v. *Tyson Foods*, 285 Ark. 95, 685 S.W.2d 164 (1985).

The net effect of the above discussion is that we do not agree with the appellee's argument that because the record does not contain the record of a hearing before the trial judge, the court's order of dismissal should be affirmed. It is true, as appellee says, that it is presumed that matters presented in a hearing that are not in the record will support the trial court's findings. In *Phillips* v. *Arkansas Real Estate Commission*, 244 Ark. 577, 426 S.W.2d 412 (1968), the court said that where there has been a failure to bring "into" the record "the testimony" presented to the trial court, it will be presumed that the testimony was sufficient to support the trial court's findings. 244 Ark. at 584. But we do not find that there was any testimony presented to the trial court at the hearing on the motion to dismiss in the case at bar. And in *SD Leasing, Inc.* v. *RNF Corporation*, 278 Ark. 530, 647 S.W.2d 447 (1983), the court held that the burden is upon the appellant to bring up a record sufficient to demonstrate that the trial court is in error. We find, however, that the record in this case does demonstrate error.

The property settlement, approved by the divorce decree, plainly provided that "HUSBAND agrees to provide carpet and wallpaper (to be selected by the WIFE) for the house to be purchased by WIFE as her future residence." The statute of limitations for a contract runs from the point at which the cause of action accrues rather than from the date of the agreement. *Rice* v. *McKinley*, 267 Ark. 659, 590 S.W.2d 305 (1979). The true test in determining when a cause of action arises or accrues is to

establish the time when the plaintiff could have first maintained the action to a successful conclusion. *Dupree* v. *Twin City Bank*, 300 Ark. 188, 777 S.W.2d 856 (1989). One who relies upon a statute of limitations as a defense to a claim has the burden of proving the full statutory period had run on the claim before an action was commenced. *Broadhead* v. *McEntire*, 19 Ark. App. 259, 720 S.W.2d 313 (1986). In order to prevail on a motion to dismiss the complaint on the basis of limitations, it must be barred on its face. *Dunlap* v. *McCarty*, 284 Ark. 5, 678 S.W.2d 361 (1984). Here, the pleadings and attached exhibits do not show that limitations on the appellant's cause of action could have started to run until the wife purchased her future residence on June 1, 1989. Her motion to enforce the written agreement was filed on October 25, 1989. Clearly, the record shows that the five-year statute of limitations had not run when her motion was filed.

The doctrine of laches does not apply in cases involving unreasonable delay unless the opposing party has suffered some prejudice as a result of the delay, and does not apply unless some change in position or circumstance makes it inequitable to enforce the claim. *Gordon* v. *Wellman*, 265 Ark. 914, 582 S.W.2d 22 (1979). *See also Briarwood Apartments* v. *Lieblong*, 12 Ark. App. 94, 671 S.W.2d 207 (1984), where we held that laches is a species of estoppel and said:

> These equitable principles are premised on some detrimental change in position made in reliance upon the action or inaction of the other party. The length of time after which inaction constitutes laches is a question to be answered in the light of the facts presented in each individual case.

12 Ark. App. at 100.

Although the trial court did not base its decision on the defense of accord and satisfaction, we could affirm on the basis that a correct result was reached even if the wrong reason was given, if the court could have decided the accord and satisfaction issue on the pleadings. However, that defense, as the defense of laches, presents an issue of fact and should not have been decided on the pleadings. *See Holland* v. *Farmers & Merchants Bank*, 18 Ark. App. 119, 711 S.W.2d 481 (1986).

Since the chancellor's decision was not based on any evi-

dence, we reverse and remand to the trial court for further proceedings in accordance with this opinion.

Reversed and remanded.

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

ARKANSAS ELECTRIC ENERGY CONSUMERS *v.* ARKANSAS PUBLIC SERVICE COMMISSION and Arkansas Power and Light Company

CA 90-276 813 S.W.2d 263

Court of Appeals of Arkansas
En Banc
Opinion delivered June 26, 1991

[redacted]

[redacted]

Kirkland & Ellis, by: *Stephen A. Herman*; and *Rose Law Firm, A Professional Association*, by: *Herbert C. Rule III* and *Stephen N. Joiner*, for appellant.

Gilbert Glover, Lee McCulloch, and *Paul R. Hightower*, for appellee Arkansas Public Service Commission.

JUDITH ROGERS, Judge. This is an appeal from Orders 17 and 18 of the state Public Service Commission in its Docket No. 89-128U. The appellant is Arkansas Electric Energy Consumers (AEEC), a voluntary association of large industrial customers of Arkansas Power and Light Company.[1] The appellees are the Arkansas Public Service Commission (APSC), Arkansas Power and Light Company (AP&L), which are here to defend the Commission action, and the Attorney General, who participated below but has not filed briefs here.

This case was commenced before the APSC by AP&L on June 21, 1989. AP&L asked the APSC to approve a Stipulation and Settlement Agreement ("Agreement") entered into by AP&L, the Attorney General, and the APSC staff. The Agreement's major provisions address what amounts to a considerable restructuring in the manner and means by which AP&L proposes to conduct its business. The portions of the agreement at issue in this appeal involve the transfer of AP&L's interests in two generating plants to a sibling corporation named Entergy Power, Inc. (EPI)[2], a bulk power marketing company owned by AP&L's parent company, Entergy Corporation.[3] The plants are the

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[1] The AEEC members participating in this case are: Acme Brick Company, Alumax Aluminum Corporation, Aluminum Company of America, Archer Daniel Midland, Arkansas Aluminum Alloys, Arkansas Chemicals, Inc., Arkansas Lime Company, Berry Petroleum Company, ConAgra Frozen Foods (Batesville), ConAgra Frozen Foods (Russellville), Cross Oil & Refining Company, Ethyl Corporation, Great Lakes Chemical Corporation, Halstead Metal Products, International Paper Company, Lion Oil Company, Producers Rice Mill, Quincy Soybean Company, Razorback Steel, Reynolds Metals Company, Riceland Foods, SMI Steele, Superwood Corporation, Temple Inland Forest Products, Tyson Foods, Inc., U.S. Vanadium Corporation, Viskase Corporation, and Weyerhaeuser Company.

[2] At hearings, EPI had not been formed and AP&L sometimes referred to the proposed company by the name "NEWCO."

[3] Entergy corporation is organized and operating under the Public Utility Holding Company Act of 1935 and owns all the common stock of four retailing subsidiaries: AP&L, Mississippi Power and Light Co. (MP&L), Louisiana Power and Light Co.

Ritchie Steam Electric Station Unit No. 2 (Ritchie 2), an oil/gas burner rated at 544 megawatts (MW) of power located near Helena, and the Independence Steam Electric Station Unit No. 2 (ISES 2), a coal burner rated at 842 MW located near Newark. AP&L owns 31.5% of ISES 2, which amounts to 265 MW of generating capacity. The total capacity involved, therefore, is 809 MW.

The ISES 2 capacity has never served Arkansas customers; rather, it was leased by MP&L from the time ISES came on line in December 1984 through December 1989. As of the date of the APSC hearings, it had a remaining useful life of about forty-four years. Ritchie 2 became operational in 1968 and has a remaining useful life of about twenty-seven years.

By the Agreement, AP&L proposed to sell the 809 megawatts of generating capacity to EPI at book value (approximately $171 million) and to have a right to purchase electricity from those plants (to the extent such is not obligated to other EPI customers outside the Entergy system) at cost as needed. Thus, the fixed costs associated with ownership in those generators will be avoided by AP&L.

The Agreement also provides (1) for the transfer of management and operation (but not ownership) of the two generating units of Arkansas Nuclear One (ANO) plant at Russellville to Entergy Operations, Inc. (EOI), a sibling company owned by Entergy Corporation, (2) for recovery of certain deferrals from ratepayers, and (3) for amortization and retention of certain investment tax credits (ITC's).

The points for reversal, as articulated in its brief by the appellant, are:

> I. The PSC Staff's Pre-Filing Commitment to Support the Settlement Violated Due Process.
>
> II. The Commission Failed to Consider Fair Market Value [of the plants].
>
> III. The Settlement was not Supported by Substantial Evidence.

(LP&L), and New Orleans Public Service, Inc. (NOPSI), along with all the stock in several related subsidiaries, including EPI.

On June 22, 1989, AEEC was granted intervenor status, conditioned upon its identifying its membership. A dispute ensued over the issue of identification, but AEEC identified its membership on August 30, 1989, and was granted full status as an intervenor the following day.

A procedural schedule was established by the Commission, bifurcating AP&L's application into two phases, Phase II to deal with the transfer of the ISES 2 and Ritchie 2 plants and Phase I to deal with all other issues. Phase I issues were heard on January 3 and 4, 1990, and Phase II issues were heard on February 9, 12, and 13, 1990. On April 2, 1990, the Commission issued Order No. 17, which granted the application with several modifications. On May 1, 1990, AEEC requested a rehearing and stay of Order No. 17. The request was denied on May 31, 1990. On June 28, 1990, AEEC filed a Notice of Appeal with this Court, seeking review of Order No. 17 and requesting that this Court stay the APSC's order. On July 3, 1990, this Court issued a *per curiam* opinion which denied the appellant's request for a stay. *Ark. Electric Energy Consumers v. Ark. Public Service Comm'n*, 31 Ark. App. 217-A, 791 S.W.2d 719 (1990). The Supreme Court denied AEEC's request for review of this Court's stay on September 10, 1990. AEEC filed its abstract and brief on September 12, 1990. AP&L and the APSC filed supplemental abstracts and briefs on October 19, 1990, and AEEC filed its reply brief on November 13, 1990. Oral arguments were heard April 24, 1991.

The voluminous record in this case consists of nearly 4,000 pages, most of which contain the testimony and exhibits of the dozen or so witnesses who testified on the various issues below. Because so much of the parties' disagreement goes to the substance of the evidence, a brief overview of some of the more salient testimony at the hearings below is appropriate.[4]

R. Drake Keith, President and Chief Operating Officer for AP&L, testified that AP&L was seeking permission to sell the generating plants because the Commission found in a previous rate case that AP&L had 969 MW of "excess generating

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[4] Although the case was heard in two separate Phases below, some witnesses testified at both Phases, and for purposes of simplicity here, any such testimony is merged for summary.

capacity." Excess generating capacity is that capacity over and above what is required to meet peak system demand, plus a reasonable reserve. Keith testified the Agreement's ultimate purpose was to hold down rates and obviate the need for a rate increase in the near future, except in certain limited circumstances.

According to Keith, the ISES 2 sale would eliminate the need for $23 million in additional revenues, a figure representing the annual lease payments to AP&L from MP&L for the plant. He testified that, according to his company's analysis, AP&L and the rest of the Entergy electric system will not need any additional generating capacity until 2000 or beyond and that, if additional capacity becomes necessary in the interim, combined cycle capacity or cogeneration projects would be less expensive in present net value terms than retaining Ritchie 2 and ISES 2.

Keith testified the proposed cost of the transfer would be $171 million, a figure which represents original cost adjusted to compensate for income taxes netted against the depreciated original cost, with the proceeds to be used to retire high cost securities, thereby reducing AP&L's cost of capital, which would reduce the need for future rate increase. He also pointed out that, by transferring the coal-fired ISES 2, AP&L could avoid the costs of dealing with charges which could be mandated by acid-rain legislation.

With regard to the nuclear management issue, he testified that, by transferring management responsibility for ANO to a nuclear management subsidiary, significant savings could be realized. He emphasized that AP&L will retain control over the nuclear-fired plants. Keith also set forth the reasons why the company wanted authorization to recover deferrals (about $4.4 million) due to the excess capacity adjustment and how, in his opinion, amortization of investment tax credits could positively affect AP&L's net earnings by about $10.9 million without impacting retail rates.

As to Phase II issues, Keith affirmed AP&L's position that sale of Ritchie 2 and ISES 2 would be beneficial to ratepayers over the coming 10 to 20 years. He explained a "rate cap" proposal whereby AP&L rates would be limited in any event to what rates would be if the plants were not sold. Under the rate

cap, if ISES 2 and Ritchie 2 were to be transferred, AP&L would keep records, subject to annual PSC audits, reflecting the costs of retaining the units versus savings from selling the units.

As to the cost of transferring the generators, Keith said that it was his understanding that SEC regulations require that transfers between affiliates of public utility holding companies be at cost and that the proposed transfer from AP&L to EPI would be at book value, which is cost less depreciation. Keith also said it was AP&L's position that the company would in all likelihood not need to build additional generating capacity for at least 15 years.

Lee W. Randall, Senior Vice-President of Finance and Administration and Chief Financial Officer for AP&L, addressed, from a management perspective, how the status quo would change if the Agreement is approved and said, in his opinion, that AP&L's customers would benefit.

T. Gene Campbell, Vice-President and Senior Nuclear Executive for AP&L, said there would be potential savings at ANO of about $7.6 million if the Commission decided to allow management transfer to a nuclear management company. On cross-examination, however, he acknowledged that, even without the management transfer, savings of about $2.8 million could also be achieved with modifications in current management practices.

Sandra Hayley, Management Audits Supervisor of the PSC Staff, testified about the proposal to transfer management of ANO to a nuclear management company. She addressed particular safeguards to be accomplished through an ongoing evaluation that could assure that the consolidation of management is in the public interest. Hayley also proposed some changes in the company's Operating Agreement to satisfy regulatory concerns. Essentially, she testified favorably to the Settlement Agreement, provided adequate oversight and documentation of savings could be maintained.

Russell D. Widmer, Senior Technical Policy Analyst of the PSC Staff, testified about two aspects of the settlement, one involving recovery of excess capacity deferrals and the other dealing with the amortization of ITC's. He proposed some modifications in the bookkeeping methods AP&L proposed to use in regard to ITC's, noting that more than one method is available

by which ITC's could be amortized.

John Strode, Manager, Electric Section, PSC Staff, headed the PSC staff investigation of AP&L's current rates and the settlement's revenue requirement effects. He concurred with AP&L's position that its rates would not need to be adjusted if ISES 2 and Ritchie 2 are sold. He also agreed with the proposal as to amortization of ITC's. Strode oversaw some considerable accounting and economic analyses of AP&L's financial condition and the potential impact of the settlement agreement. One of Strode's conclusions was that, with the termination of the ISES 2 lease, AP&L's current retail revenue situation would result in a revenue deficiency of slightly over $21 million. Strode testified that, even if the proposed sale is completed, AP&L would have a revenue deficiency of $5.5 million. He said that the sale would not wipe out the total $21 million deficiency because of other factors such as reduced reserve equalization revenues, fuel adjustment clause savings, and elimination of excess capacity deferrals because AP&L would no longer have excess capacity. His testimony supported the position taken by AP&L that, if the settlement is approved, no rate adjustments would be needed but that, without the sale of ISES 2 and Ritchie 2, AP&L might be entitled to seek rate relief of about $21 million.

Strode also testified to rebut an assertion by AEEC witness Falkenberg that the off-system sales potential (wholesale to other companies outside allocated service territory) of ISES 2 and Ritchie 2 is identical whether or not the plants are sold. Basically, Strode said that, if sold, the sale potential of the units would be greater because the price of energy would be lower due to lower revenue requirement for the two plants.

Donna Gray, Director of Management and Financial Analysis, PSC Staff, testified at the hearing. Gray's stated purpose in testifying was to address the issue of whether the settlement was in the public interest and to evaluate AP&L's required rate of return. She said the proposed sale of ISES 2 and Ritchie 2 would be of significant benefit to ratepayers in present value terms. She stated that, according to projections by Staff member Lou Ann Westerfield, AP&L's total revenue requirement would decrease by about $26.8 million if the plants were sold, compared with a present value cost of holding the plaints at about $96.3 million.

The net present value of selling versus holding, according to Gray, was $410.3 million to ratepayers. Gray said that selling the plants at book value would be beneficial to ratepayers.

Gray also agreed with Hayley's conclusion that transfer of ANO management to a nuclear management company was in the public interest and would benefit ratepayers. She also summarized Widmer and Strode's analysis of ITC amortization and recovery of deferrals of excess capacity returns. The ITC amortization, Gray said, would reduce AP&L's revenue requirement by $14.7 million, with the deferrals totalling $1.8 million.

Gray also testified in support of a rate moratorium, modifying the excess capacity adjustment and AP&L's financial condition in general. She concluded by saying:

> The Staff has thoroughly analyzed each aspect of the Stipulation and quantified the ratemaking effects of each provision. Having weighed the respective detriments and benefits of each point, I concluded that the Stipulation, as a whole is in the public interest. The stipulation offers AP&L an opportunity to significantly reduce costs, and ensures that the ratepayers will not suffer a rate increase for several years. I, therefore, recommend that the Commission approve the Stipulation as filed.

Dr. Jay B. Kennedy, President, Kennedy and Associates, testified on behalf of AEEC. He said that the sale of ISES 2 and Ritchie 2 at depreciated book value as proposed would not be advisable. He pointed out that the sale at $171 million amounted to a cost of $215 per kilowatt of capacity and that oil/gas capacity (Ritchie 2) probably cannot be replaced for less than $300 per KW. Further, he said that the replacement cost for ISES 2 coal capacity would be at least $1,500.00 per KW. Dr. Kennedy cited several examples of what it would cost to build replacement units. He estimated total replacement cost for the two units to be $561 million. He said that fair market value rather than depreciated book value should be the measure of price. He also disputed the results of a cost-of-service study AP&L conducted at the PSC staff's request. Kennedy stated in general terms that he had reservations about the remainder of the settlement's provision and also suggested calculating AP&L's return on equity at 12.35% instead of 13.00%, as used by staff.

Kennedy also testified during Phase II in rebuttal to AP&L and staff witnesses. In essence, Kennedy pointed out that nothing is certain in the future and that there is room for disagreement over whether or not the sale of the plants would be beneficial to ratepayers over the long run. His quarrel was general and not at all specific. Kennedy said that AEEC would prefer to take its chances on a general rate case and its outcome instead of having the ISES 2 and Ritchie 2 units sold and a rate case avoided.

Rodney Gilbreath, Manager of Revenue Requirements for AP&L, testified about Dr. Kennedy and Strode's analysis of AP&L's cost-of-service study. He pointed out that it was based on a 1988 test year and that, if AP&L filed a general rate case, the test year would be 1989 or later, carrying with it increased costs and, therefore, resulting in an even larger revenue deficiency. Gilbreath said he thought Strode's analysis was reflective of a minimum possible rate increase, not a maximum, and that Kennedy's position was untenable, in his opinion.

Jack T. Blakely, Manager, Pricing and Economic Analysis for AP&L, disputed Kennedy's analysis of AP&L's return on equity, which was 12.35%. His testimony criticized the methods and assumptions by which Kennedy calculated AP&L's cost of equity.

Basil L. Copeland, Jr., an Economist with Chesapeake Regulatory Consultants, Inc., of Annapolis, Maryland, was retained by the PSC staff to evaluate AP&L's evaluation study as to the market value of ISES 2 and Ritchie 2. The study concluded that the market value of ISES 2 and Ritchie 2 was not measurably in excess of depreciated book value. Copeland said that the study was flawed and did not actually measure the plants' value. "If the actual life of the units turns out to be greater than the life assumed in determining the recovery of book value through depreciation, the market value will be greater than the book value, a fact obscured by the Burns and McDonnell [AP&L's consultant] study," Copeland said. Copeland addressed costs and revenues under various scenarios with regard to the plants, along with related data.

William T. Clarke, Project Manager, Economic Studies Department, Burns and McDonnell Engineering Company, was hired by AP&L to provide an opinion as to the fair market value

of ISES 2 and Ritchie 2. Clarke went into a great deal of detail about this country's energy markets and how electric companies in particular go about their business. He discussed "market value" versus "book value" and how these figures, while usually close early in a generating plant's life, may diverge over time. The ultimate conclusion of the study was the market value of the combined generating capacity of 809 megawatts represented by ISES 2 and Ritchie 2 could range from $0.00 to $425,356,688, with a "weighted average" of $174,357,922. He noted that the net book value for ISES 2 is $150,090,800.27, and the net book value for Ritchie 2 is $20,239,675.44, for a combined total of $170,330,475.71. Thus, the study concluded that the market and book value of the generating plants did not differ substantially.

Tom D. Reagan, Manager, AP&L Energy Resource Planning, addressed the proposal to sell the plants and discussed options available for replacement of ISES 2 and Ritchie 2 capacity in the future. He said four supply-side alternatives were found acceptable in the event unexpected capacity additions become necessary, all involving more efficient generation technology than the two plants. Reagan testified extensively and sponsored numerous exhibits which illustrated in great detail AP&L's current generating capacity and projections for future needs in that regard.

Jack L. King, Senior Vice-President, System Executive-Operations, Entergy Corporation, testified about Entergy's proposal to establish a bulk power marketing subsidiary company (EPI) to own ISES 2 and Ritchie 2 along with other generators. He testified about the manner in which the company would operate in marketing the power capacity it acquires and addressed the effect on intercorporate relationships in the Entergy corporate structure.

Randall J. Falkenberg, Vice-President, Kennedy and Associates, Utility Consultant for AEEC, testified that the Settlement Agreement and transfer of generating units would not be in the ratepayers' best interests, that AP&L's studies were biased due to errors and incorrect or unreasonable assumptions, that PSC staff's position was based on incorrect analyses of the biased AP&L studies, and that the Commission should not approve the Agreement. Falkenberg's extensive testimony went into great

detail about the reasons for his conclusion and gave examples and numbers as to why he concluded as he did. He thoroughly criticized Reagan's analysis. Falkenberg said he thought that a ten-year study was too short a time frame within which to analyze the economics of selling versus retaining the two generating plants because the plants' useful lives exceeded that amount of time. He analyzed the variables in AP&L's study and disagreed with many of those used, such as capacity factors and cogeneration, and demonstrated how, with different variables AP&L's own study would conclude that the sale was ill-advised.

Charles Cicchetti, Managing Director, Putnam, Hayes & Bartlett, Inc., was hired by AP&L to respond to Kennedy and Falkenberg's assertions. Essentially, this witness testified that, in his opinion, Kennedy and Falkenberg's analyses were incorrect. He criticized Falkenberg's conclusions with regard to cogeneration options included in AP&L's study and testified that the Commission would still maintain a great deal of control over AP&L's activities even if it allowed the plants to be removed from its direct jurisdictional authority.

Lou Ann Westerfield testified for the PSC staff. She was questioned extensively by counsel for appellant about a meeting she attended with Jerrell Clark, of the PSC staff, Dr. Keith Berry, her supervisor at the PSC, Ralph Teed of AP&L, and Tom Reagan of AP&L, where the company presented its proposal to sell the plants. Westerfield testified about her instructions with regard to analyzing AP&L's proposal and said that her analysis essentially verified AP&L's position. Several alleged deficiencies in her testimony were pointed out by other witnesses, some of which she corrected or modified. Her position that the proposed sale was beneficial to ratepayers did not change, however.

For reversal, AEEC first contends that it was denied due process because of certain alleged *ex parte* contacts between AP&L and the Chairman of the PSC and the PSC staff before any application was filed. AEEC claims that, commencing in March of 1989 and over the following two months, there were numerous meetings between AP&L, the PSC staff, and the office of the Attorney General which culminated in execution of the Agreement at issue on June 5, 1989. The PSC staff and the Attorney General, in the agreement, agreed to support the

adoption of it by the Commission.

At the heart of AEEC's argument are the Supreme Court's comments in *General Tel. Co.* v. *Arkansas Public Service Commission*, 295 Ark. 595, 751 S.W.2d 1 (1988), where the Court said:

> The company argues that it was improper for the commission to allow its staff to seek the rehearing of its order which resulted in the reduction of the amount of new revenue it was to allow the company. The statute governing rehearings before the commission, Ark. Code Ann. § 23-2-422 (1987), provides, in subsection (a), that application for rehearing may be made by "[a]ny party. . .aggrieved by an order issued by the commission." The commission argues it has the power to make rules and that it has, by its Rule 1.05, provided that its staff is to be bound by the commission's rules as a party. In the first order issued in this case, the commission designated the staff as a party. The commission argues that the company waived its right to object to the staff being treated as a party before it by not raising the issue until it filed its motion to dismiss the staff's rehearing application.
>
> A quick look at the statutes providing for rate hearings before the commission shows the commission to be, without doubt, a quasi-judicial body. *See* Ark. Code Ann. §§ 23-2-401 through 23-4-424 (1987 and Supp. 1987). It is troublesome that an agency which is placed in a decision-making role can have its own staff before it as a party. Even if the internal operating procedures of the commission kept the commissioners totally isolated from their staff, and we assume that is not the case, we would find a serious appearance of impropriety in this situation. It is a little like a judge making his or her law clerk a party to a case even though the law clerk has a close association with the judge, is his or her employee, and has the judge's ear before and after the hearing.
>
> We have real doubts about this situation, especially now that the Arkansas Attorney General may represent the public interest in these cases, Ark. Code Ann. § 23-4-305 (1987). In this case, however, we find no specific,

> unfair prejudice in permitting the staff to ask for rehearing. Arkansas Code Ann. § 23-2-426(a) (1987) provides: "The commission may at any time, and from time to time, after notice, and after opportunity to be heard as provided in the case of complaints, rescind or amend by order any decision made by it."
>
> While we find no prejudice resulting from the treatment of the staff as an adverse party before the commission in this case, this opinion should not be read as generally approving a situation we regard as giving an appearance of impropriety. In other instances prejudice may be demonstrated to have resulted from this apparent conflict. For now, we will reserve judgment on the matter.

According to PSC chairman Sam Bratton's testimony, while he was legal counsel to Gov. Bill Clinton just prior to being named PSC Chairman, he was involved in a meeting with AP&L management and said he found the proposal "interesting" and "worth considering." AEEC argues that the effect of *ex parte* contacts may be seen in that the entire agreement was approved as submitted with only a few modifications, i.e., the "rate cap" and oversight provisions with regard to changing nuclear operations management. Essentially, AEEC claims the PSC staff, the Attorney General, and AP&L colluded to assure approval of the settlement.

Appellant also points out that Ark. Code Ann. § 23-4-305 (1987) provides as follows:

> The Consumer Utilities Rate Advocacy Division [of the office of Attorney General] shall represent the state, its subdivisions, and all classes of Arkansas utility rate payers and shall have the following functions, powers, and duties:
>
> (1) To provide effective and aggressive representation for the people of Arkansas in hearings before the Arkansas Public Service Commission and other state and federal courts or agencies concerning utility-related matters.
>
> (2) To disseminate information to all classes of rate payers concerning pertinent energy-related concepts.
>
> (3) To advocate the holding of utility rates to the

lowest reasonable level.

AEEC contends that, because the Attorney General bound himself to support the agreement, he was incompetent to perform his duty to provide aggressive representation for the people.

The APSC counters appellant's bias claim by first pointing out that AEEC never objected to the Commissioners hearing the case. It cites several cases in support of the proposition that any objection on the basis of bias was untimely. AP&L points out that the APSC chairman testified on the record at the outset of the proceedings about the March 1989 meeting, detailing those present and what was said. Further, appellee argues that, from the very words spoken, no possibility of bias was demonstrated to exist. As the APSC staff participation, it says:

> *Ex parte* communications, as defined by APSC procedural rule 1.06 are: "off-the-record communications *to any member of the Commission or hearing examiner* in such proceeding reasonably designed to influence a decision on any issue of fact in a contested proceeding." [Emphasis added.] The same rule defines "contested proceeding" to mean:
>
> > . . .in which a petition or notice to intervene in opposition to requested Commission action has been filed.

AP&L argues that there is no evidence any such contacts with Commissioners occurred and points out that Commission Order No. 18 in this proceeding states none occurred. Finally, AP&L points out that AEEC itself has joined the PSC staff in entering into settlements before the PSC.

On the issue of staff participation, PSC found the challenge to be untimely because AEEC could have filed its Motion as early as August 31, 1989, but did not file until February 6, 1990. The Commission said that AEEC had knowledge of all facts pertinent to the issue at the earlier date, and hence waived the issue. In Order No. 18, it discussed at great length the participation of agency staff in administrative agency proceedings and noted that no bias or detriment and been demonstrated.

The Supreme Court of the United States, in *Withrow* v. *Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), addressed a similar question and said:

Concededly, a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts. *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973). Not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, *supra*, at 136; cf. *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him. [Footnote omitted.]

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

* * *

That is not to say that there is nothing to the argument that those who have investigated should not then adjudicate. The issue is substantial, it is not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons. No single answer has been reached. Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely.

* * *

> It is not surprising, therefore, to find that "[t]he case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process. . . ." 2 K. Davis, Administrative Law Treatise § 13.02, p. 175 (1958). Similarly, our cases, although they reflect the substance of the problem, offer no support for the bald proposition applied in this case by the District Court that agency members who participate in an investigation are disqualified from adjudicating. The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle.

* * *

> That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high.

Withrow v. *Larkin*, 421 U.S. at 46-47, 51, 52, and 58.

Appellant, in attacking the procedure below as a denial of due process, has the burden of proving its invalidity. *Omni Farms* v. *AP&L*, 271 Ark. 61, 607 S.W.2d 363 (1980). In Public Service Commission proceedings, due process must be preserved to all whose legal rights are involved and concluded by the Commission's final order. *Public Service Commission* v. *Continental Telephone Company*, 262 Ark. 821, 561 S.W.2d 645 (1978). A fundamental requirement of due process in matters of public utility regulation is a full and fair hearing. *Shields* v. *Utah Idaho Central Railroad Co.*, 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111 (1938). An elementary element of a full and fair hearing is that all whose rights are involved have the opportunity to be heard, to submit evidence and testimony, to examine witnesses and present evidence or testimony in rebuttal to adverse positions. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 77 S.Ct. 502, 1 L.Ed.2d 438 (1957).

We have reviewed the voluminous record below and

cannot sustain appellant's claim that it was denied due process. The only evidence concerning pre-filing negotiations was that the PSC Chairman, prior to his appointment to that position, was privy to a conversation concerning AP&L's proposal to sell the plants and found it "interesting." The Chairman, who spoke on the record to the substance of his exposure to the proposal and was presumably susceptible of cross-examination by appellant, was not shown to have been biased or prejudiced by the conversation. Indeed, a fair reading of the plain language recalled by the Chairman demonstrates merely that he was receptive to hearing the particulars of the proposal and does not reveal a commitment about the matter on his part.

PSC staff witnesses Strode and Westerfield were extensively cross-examined about pre-filing contacts with AP&L. Neither expressed what could be construed as having a predetermined agenda prior to investigating the proposal, and their testimony shows that their assigned tasks were to verify or refute the validity of AP&L's proposal. The testimony reveals that there were other individuals from AP&L and the PSC staff involved in discussions which led to the agreement in issue here, all of whom could have been, but were not, called as witnesses on the issue of whether the pre-filing contacts violated appellant's due process rights.

We cannot agree that the record supports appellant's contention that the attorney general's support of the Agreement violates the statutory mandate of Ark. Code Ann. § 23-4-305 (1987). The record is devoid of any evidence that the attorney general failed to provide "effective and aggressive representation for the people of Arkansas" or failed "to advocate the holding of utility rates to the lowest reasonable level." To the contrary, a plain reading of the agreement discloses that the attorney general was in fact attempting to fulfill that mandate in signing the agreement. Throughout the agreement are recitations as to why the parties agree that the public interest would be best served by adoption of its provisions.

In sum, there was no evidence that the Commission proceedings were directed to a predetermined outcome or that they were tainted by the PSC staff's contacts with AP&L. The Commission was free to accept or reject the proposal in whole or

in part. Appellant was afforded every opportunity to participate in the proceedings below, and in fact did so with competent vigor. The simple fact that it did not achieve the result it sought is not tantamount to a denial of due process. We therefore reject appellant's claim that the proceedings below denied it due process.

Parenthetically, we observe that this case was filed with the Commission on June 21, 1989, and that appellant's first objection to staff's participation was in January 1990. Although appellant was thoroughly involved in the case from August of 1989, it did not object to the staff's participation for at least four months. The objection was untimely, and appellant cannot, for that reason alone, be afforded relief on its objection. *Pass Word, Inc.* v. *Federal Communications Commission*, 673 F.2d 1363 (D.C. Cir. 1982), *cert. den.* 459 U.S. 840 (1982). Moreover, although appellant has requested this court to disqualify the Commission and remand the matter for hearings before another Commission, it never requested any such relief until now. We do not consider arguments raised for the first time on appeal. *Mitchell* v. *Goodall*, 297 Ark. 332, 761 S.W.2d 919 (1988).

We also note that utility regulation is by its very nature a complicated, unconventional undertaking and that the various jurisdictions at both federal and state levels have created administrative systems not unlike Arkansas' for dealing with cases such as these.[5] We note that it has been emphasized repeatedly in the cases that the Public Service Commission is a creature of the legislature and performs, by delegation, legislative functions. As such, it possesses the same powers as the General Assembly while acting within its legislatively-delegated powers and has very broad discretion in exercising those powers. *City of Fort Smith* v. *Ark. Public Service Commission*, 278 Ark. 521, 648 S.W.2d 40 (1983). Because the Commission acts in a legislative capacity and not in a judicial one, orders of the Commission are viewed as having the same force and effect as

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[5] For an excellent, brief overview of regulatory systems and a discussion of issues similar to those in this case, see *Attorney General of the State of New Mexico* v. *New Mexico Public Service Commission and Public Service Company of New Mexico*, 808 P.2d 606 (1991).

would an enactment of the General Assembly. *Bluefield Water Works and Improvement Co.* v. *Public Service Commission*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923).

We hold that the appellant was afforded a full and fair opportunity to be heard and that appellant has failed to demonstrate a clear showing that the limits of due process have been overstepped or that an arbitrary result has been reached. Our inquiry, therefore, goes no further. *Arkansas Power & Light Co.* v. *Arkansas Public Service Commission*, 226 Ark. 225, 289 S.W.2d 668 (1956).

Next, AEEC contends for reversal that the Commission failed to consider fair market value in pricing the plants.

Arkansas Code Annotated § 23-3-102 (1987) provides in pertinent part:

> (a)(3) . . . [A]ny utility may sell, acquire, lease, or rent any . . . property constituting an operating unit. . . .
>
> (b)(2) . . . If [the PSC] finds that the proposed action is consistent with the public interest, it shall give its consent. . . .
>
> (3) In reaching its determination, the PSC shall take into consideration the reasonable value of the property, plant, equipment, or securities of the utility to be acquired or merged.

And, Rule 6.02(b) of the PSC's Rules of Practice and Procedure provides that an application by a utility to sell property shall include "[a]n accurate detailed description of the property to be sold or leased, together with the original cost to applicant and applicant's statement as to the present value thereof." AEEC contends that present market value rather than depreciated book value is the proper measure of cost and claims that there may be a "premium" on the plants which should inure to the benefit of ratepayers.

AP&L counters flatly that Ark. Code Ann. § 23-3-102(3) (1987) simply does not apply in this case because the statute's application "is limited to cases where property is acquired by or merged into another public utility," and that EPI, the proposed purchaser, is not a public utility. It points out that the practical

reason for this is that when a public utility buys property it affects its rate base and, consequently, rates, whereas when a public utility sells property, it removes it from rate base and, along with it, the ratepayers' obligation to pay a reasonable rate of return. AP&L also contends that, even if the statute applies, it does not mandate a valuation methodology but simply specifies that the Commission *consider* the reasonable value of the property to be transacted.

While the APSC's brief does not direct itself to the applicability of the statute, it essentially parallels AP&L's assertion that the statute simply requires that the Commission take into consideration the plant's reasonable value and affirms that is precisely what was done in this case. The PSC staff's brief also extensively addresses the "premium" issue and observes that the issue has been retained for full consideration in AP&L's next general rate case. It takes the position that, while the transfer price may be adequately determined at this time, the existence of a premium may not be and that, in any event, it would be more appropriately considered in a rate case where rates could be adjusted to allow for any premium.

With these same principles of statutory construction in mind, we cannot accept AEEC's argument that the Commission must, in assessing a proposed sale of utility assets, use "fair market value" as the only criterion of value in considering whether to allow its consummation. Section (b)(3) of the statute merely mandates that the "reasonable value" of the asset "shall" be considered by the Commission in reaching its decision. Appellant contends that the Commission failed to comply with its statutory mandate. We cannot agree. The record is replete with assessments of the plants' value and the bases and considerations underlying those assessments. Depending on which portion of which witnesses' testimony and supporting exhibits one chose to accept as valid, the plants' value is anywhere from zero to about a half billion dollars. The Commission chose to accept depreciated book value as a reasonable value of the property, and that decision was supported by ample competent evidence on the record before it. Simply because AEEC's witnesses disagree with the valuation at book instead of some other method is not enough for us to disturb the Commission's findings.

Moreover, we note that the Commission specifically reserved for the future the issue of whether there is some value over and above book value which should accrue to the benefit of AP&L's customers. Further, the Agreement, as approved with considerable modifications obviously designed to protect ratepayers, contains a "rate cap" provision designed to insure that no harm to AP&L customers, including appellant's membership, can occur in the form of higher rates because of the sale of the plants to EPI; indeed, we can find no quantifiable risk of harm to appellant or other ratepayers in the record before us.

Finally, AEEC claims this court should reverse the Commission because the settlement was not supported by substantial evidence. Appellant states that "[t]he critical issue is whether it will cost more to hold ISES 2 and Ritchie 2 until needed than to build replacement capacity." Inasmuch as the answer to the question is a matter of obvious dispute on the record below, we observe that there are probably several correct and supportable solutions, depending on one's viewpoint. One writer recently articulated an answer to a similar issue as follows:

> It depends. It depends on the size of the utility and its power needs; it depends on the rating agencies and how they will gauge buy vs. build decisions; and it depends on state public utility commissions (PUCS). In the final analysis, it depends on a whole host of issues, some of which a company can control, some of which it cannot.

C. Greenberger, "Buy, Build — or Save?" *Public Utilities Fortnightly*, Vol. 127, No. 9, p. 35 (May 1, 1991).

AEEC vigorously argues that staff witness Westerfield had committed some errors and miscalculations in fuel and maintenance calculations related to the long-term effects of selling ISES 2 and Ritchie 2 and that no reliance whatsoever may therefore be placed on the PSC staff's recommendation. The PSC counters that, while some errors were made, they were subsequently corrected in supplemental testimony for Phase II, and Westerfield's analysis still showed that transfer of the units would be beneficial. AP&L points out that the PSC Order itself says that, even if staff had not participated, it would have granted the application based on AP&L's and AEEC's evidence alone. Order No. 18 states at page 3697 of the record:

> It is possible to review the record in this Docket relying only on the testimony of two parties, AP&L and AEEC. Were we to make our decision on that basis, the Commission would find, as it did in Order No. 17, that AP&L has met the burden of proof that its Application should be granted and that there is substantial evidence of record that the Application of AP&L is in the public interest. Based upon the record in this proceeding without regard to Staff's testimony, it is our opinion that the record reflects that the Application of AP&L should be approved as in the best interest of all of AP&L's ratepayers.

Appellant, on the other hand, argues that, because Westerfield's original position contained some errors, the Commission erred in not adopting Falkenberg's recommendations. It also contends that, because Westerfield and Strode's testimony did not completely agree, the acceptance of the settlement was not supported by substantial evidence. The PSC staff contends, on the other hand, that AEEC is incorrectly comparing the two witnesses and points out that Westerfield's testimony went to the costs and effects of transferring the plants versus retaining them, whereas Strode addressed AP&L's present revenue situation if the plants were included or not included in the revenue requirement calculation. In other words, they argue that the two witnesses' testimony involved different issues altogether.

Arkansas Code Annotated Section 23-2-423(c)(3), (4), and (5) (1987) defines this court's scope of review with regard to appeals from the Arkansas Public Service Commission:

> (3) The finding of the commission as to the facts, if supported by substantial evidence, shall be conclusive.
>
> (4) The review shall not be extended further than to determine whether the commission's findings are supported by substantial evidence and whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violated any right of the petitioner under the laws or Constitution of the United State or of the State of Arkansas.
>
> (5) All evidence before the commission shall be

> considered by the court regardless of any technical rule which might have rendered the evidence inadmissible if originally offered in the trial of any action at law or inequity.

In *Arkansas Oklahoma Gas Corporation* v. *Arkansas Public Service Commission*, 27 Ark. App. 27, 770 S.W.2d 180 (1989), we said:

> On appeal, we give due regard to the expertise of the Commission, which derives its authority from the Arkansas General Assembly. *City of Fort Smith* v. *Arkansas Public Service Commission*, 278 Ark. 521, 648 S.W.2d 40 (1983). The Arkansas Public Service Commission has broad discretion in exercising its regulatory authority. *Associated Natural Gas Co.* v. *Arkansas Public Service Commission*, 25 Ark. App. 115, 752 S.W.2d 766 (1988); *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 19 Ark. App. 322, 720 S.W.2d 924 (1986); *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 18 Ark. App. 260, 715 S.W.2d 45 (1986); *Walnut Hill Telephone Co.* v. *Arkansas Public Service Commission*, 17 Ark. App. 259, 709 S.W.2d 96 (1986). Judicial inquiry terminates if the action of the Commission is supported by substantial evidence and its action is not unjust, unreasonable, unlawful or discriminatory. *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Commission*, 24 Ark. App. 142, 751 S.W.2d 8 (1988). It is the province of the Commission as the trier of fact, to assess the credibility of the witnesses, the reliability of their testimony, and the weight to be accorded the evidence presented. *Arkansas Public Service Commission* v. *Continental Telephone Co.*, 262 Ark. 821, 561 S.W.2d 645 (1978); *Associated Natural Gas Co.*, *supra*; *General Telephone Company of the Southwest* v. *Arkansas Public Service Commission*, 23 Ark. App. 73, 744 S.W.2d 392 (1988).

27 Ark. App. at 282.

> To establish an absence of substantial evidence to support the decision the appellant must demonstrate that the proof before the administrative tribunal was so nearly undis-

> puted that fair-minded men could not reach its conclusion. [citation omitted] . . . [T]he question is not whether the testimony would have supported a contrary finding but whether it supports the finding that was made.

Williams v. *Scott*, 278 Ark. 453, 455, 647 S.W.2d 115, 116 (1983). A decision of an administrative agency may be supported by substantial evidence even though this court might have reached a different conclusion had we heard the case *de novo* or sat as the trier of fact. *Fouch* v. *State, Alcoholic Beverage Control Division*, 10 Ark. App. 139, 662 S.W.2d 181 (1983). We observed in *General Telephone Co. of the Southwest* v. *Ark. Public Service Comm'n*, 23 Ark. App. 73, 744 S.W.2d 392 (1988):

> As the trier of fact in rate cases, it is within the province of the appellee to decide on the credibility of the witnesses, the reliability of their opinions, and the weight to be given their evidence. The appellee is never compelled to accept the opinion of any witness on any issue before it. The appellee is not bound to accept one or the other of any conflicting views, opinions, or methodologies. *Arkansas Public Service Commission* v. *Continental Telephone Co.*, 262 Ark. 821, 561 S.W.2d 645 (1978).

General Telephone, 23 Ark.App. at 83.

In *American Telegraph & Telephone Co., et al.* v. *United States, et al.*, 299 U.S. 232, 236 (1936), the United States Supreme Court said:

> This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the [administrative action] shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse.

After the hearings, the Commission issued a fifty-five-page order (No. 17), in which it found that, with the return of ISES 2 to AP&L, the company would have a revenue deficiency in excess of $21 million according to Strode's analysis and in excess of $14 million according to Kennedy. It noted that AEEC took the

position, however, that only a general rate case could yield reliable data but observed that the data was based on a cost-of-service study, which is the elementary component of a rate case. The PSC stated: "We find that the evidence of record presented by both Staff and AP&L conclusively supports the proposition that without approval of the Stipulation, AP&L would almost certainly seek and would probably be entitled to a significant rate increase." The Commission also concluded that the evidence "clearly establishes" that new technology generators would be less costly to ratepayers in net present value terms than retaining ISES 2 and Ritchie 2 should the need to build units arise. The PSC noted that Reagan testified the net present value benefit would be from $33 million to $62 million over the next ten years. The Order said that staff's analysis verified the results of AP&L's analysis that the sale of the generators would benefit ratepayers, lowering AP&L's revenue requirement by nearly $27 million and that the net present value would between $90 million and $107 million. It also found that ISES 2 and Ritchie 2 would not be needed to meet projected current loads for ten to thirteen years. The Commission concluded:

> The record in this proceeding clearly and substantially shows that ISES 2 and Ritchie 2 are not currently needed; that the 809 megawatts of capacity represented by those plants will not be needed until at least the year 2000 and probably even beyond; and, that it is substantially more economical to sell those plants now and replace them in the future as opposed to holding them in reserve as urged by AEEC. The evidence in this proceeding clearly shows that the only prudent course of action is to sell these plants and eliminate the financial threat they carry for AP&L's ratepayers. When additional capacity is needed, ten to fifteen years or more out in the future, more economical alternatives will be available. AP&L's ratepayers should not be expected or asked to foot the high cost now of plants which they don't need when more economical alternatives can be exercised in the future.

As noted, the proposed transfer was to be at depreciated book value of about $171 million, and some witnesses testified that the SEC requires transfers between subsidiaries of Public Utility holding companies to be accomplished at book. It appears

that the rationale for this is to prevent "churning" of assets among sibling corporations owned by a single parent.

Although the parties do not directly address the issue in their briefs, Section 10 of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79j (1982), has been interpreted to prohibit a sales transaction at profit between affiliates of companies regulated under the Act, with the price of such transactions limited to cost. *See e.g., In the Matter of Georgia Power Company*, S.E.C. Docket Release No. 23448 (Oct. 10, 1984); *see generally Kripke*, A Case Study in the Relationship of Law and Accounting: Uniform Accounts 100.5 and 107 (1944), 57 Harvard L. Rev. 693, 705-708. While the wisdom of requiring corporate books of affiliated corporations to reflect sales transactions among them at cost is obvious, we agree with counsel for appellant's observation at oral argument that the same is not necessarily true for ratemaking purposes. Indeed, the Commission's order in this case specifically reserved for future rate cases the matter of whether a "premium" inuring to the AP&L ratepayers' benefit exists. We think such a reservation is prudent.

The Commission found that market value and book value on Ritchie 2 and ISES 2 did not differ significantly. It specifically found the testimony of Copeland for the PSC staff and Falkenberg for AEEC, whose opinions differed considerably from AP&L's, to have been "thoroughly discredited" on cross-examination, and rejected a bidding procedure as a means to establish the value of the plants. The Commission specifically stated that, in reaching its decision, it had "taken into consideration the reasonable value" of ISES 2 and Ritchie 2 as required by Ark. Code Ann. § 23-3-102 (1987), and said:

> The evidence of record in this proceeding clearly establishes that the sale of ISES 2 and Ritchie 2, even at book value, is more economically beneficial to ratepayers than holding the plants for future use. Other aspects of the Stipulation, unrelated to the sale of ISES 2 and Ritchie 2 discussed hereinafter, further require a finding that approval of the Stipulation, taken in the aggregate, is in the public interest.
>
> AP&L may proceed with the sale of ISES 2 and Ritchie 2 to EPI at book value if it so desires. However, the

> Commission is not bound, *for ratemaking purposes*, by the book value transfer of these plants. The issue of whether or not the plants have a fair market value in excess of their book value and whether or not any such premium above book value should be shared with ratepayers is specifically reserved and will be deferred until such time as AP&L files its next general rate case proceeding.

The Order also approved the "rate cap" proposal as in the public interest and specified that (1) EPI would not serve retail or wholesale customers in Arkansas without approval, (2) that EPI would not enter into capacity sales with any Entergy affiliates without Commission approval, (3) reserved the right to inspect and audit EPI's books, (4) AP&L would retain a right of first refusal to repurchase ISES 2 and Ritchie 2 at depreciated book value should EPI desire to sell those units. The PSC also approved a rate moratorium proposed by AP&L, finding that it provided "significant potential economic benefit" to ratepayers and was in their best interests.

The Order outlines in great detail the proposal to transfer management of the nuclear plants to a management company and specified several complex and highly technical conditions which may be found at pages 37-40 of Order No. 17, appearing in the record at pages 3563-3566. It found that AEEC's objections to the management change were theoretical and stated that the conditions it imposed adequately addressed those concerns. It therefore approved the management change.

With regard to recovery of excess capacity deferrals, the Order said "AEEC has failed to offer any evidence which would demonstrate that AP&L's and Staff's projections regarding when the associated excess capacity will become used and useful are either based on unreliable data or unreasonable." It found that recovery of the deferrals was in the public interest and should be approved. Likewise, it found amortization of investment tax credits to be supported by the testimony and in the public interest and approved that proposal.

In essence, appellant disagrees with the Commission's acceptance of some testimony and rejection of other testimony, and in support of its position points out to the Court those issues where its witnesses disagreed with what the Commission adopted.

It has often been said that, if an order of the Commission is supported by substantial evidence and is neither unjust, arbitrary, unreasonable, unlawful, or discriminatory, then this court must affirm the Commission action. *Walnut Hill Telephone Co.* v. *Ark. Public Service Commission*, 17 Ark. App. 259, 709 S.W.2d 96 (1986); *City of Forth Smith, supra*; *Ark. Power and Light Co.* v. *Arkansas Public Service Commission*, 226 Ark. 225, 289 S.W.2d 668 (1956).

In *Williams* v. *Scott*, 278 Ark. 453, 455, 647 S.W.2d 115 (1983), the supreme court said:

> To establish an absence of substantial evidence to support the decision the appellant must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded men could not reach its conclusion. [citation omitted] . . .[T]he question is not whether the testimony would have supported a contrary finding but whether it supports the finding that was made.

And, the rule is that we view only the evidence most favorable to the appellee in cases presenting questions of substantial evidence. *General Telephone Co.* v. *Arkansas Public Service Commission*, 272 Ark. 440, 616 S.W.2d 1 (1981).

In consideration of the above, we simply cannot sustain appellant's position. As discussed earlier, we have reviewed all of the extensive evidence in this case. In consideration of appellee's evidence, we cannot find the evidence in support of the agreement to be anything short of substantial.

It is obvious that the various expert witnesses' approaches to the issues before the Commission diverged considerably. Certainly, not all of them could be correct, and in all probability, none of them are absolutely correct because no one or no system can accurately predict what the future may hold.

Public utility regulation, by its very nature ". . .involves judgment on a myriad of facts," and ". . .has no claim to an exact science." *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 589, 65 S.Ct. 829, 89 L.Ed. 1206 (1945); *Acme Brick Co.* v. *Arkansas Public Service Commission*, 227 Ark. 436, 450, 299 S.W.2d 208 (1957). The Commission here evaluated the diverse and conflicting predictions and analyses of

the many witnesses and found the proposed transaction to be of quantifiable benefit to the ratepayers of AP&L. We cannot, on the record before us, find that the decision is not supported by substantial evidence.

The decision below is affirmed in all respects.

Affirmed.

CRACRAFT, C.J., and COOPER, J., concur in the result.

CITY OF LITTLE ROCK, Arkansas *v.* Timothy QUINN

CA 90-279 811 S.W.2d 6

Court of Appeals of Arkansas
En Banc
Opinion delivered June 26, 1991
[Supplemental Opinion on Denial of Rehearing June 26, 1991]

Edward G. Adcock, for appellant.

Robert A. Newcomb, for appellee.

JOHN E. JENNINGS, Judge. Timothy Quinn was fired by the Little Rock Chief of Police for using excessive force against a suspect. The Civil Service Commission upheld the discharge, but on appeal the ciurcuit court reversed and ordered Quinn reinstated with back pay.

The city appealed to this court and Quinn cross-appealed, contending that the court erred in declining to award him attorney's fees. In an unpublished opinion delivered May 1, 1991, we affirmed on both direct and cross-appeal.

Quinn has now filed a petition for rehearing, contending that the supreme court's recent deicsion in *City of Fort Smith* v. *Driggers*, 305 Ark. 409, 808 S.W.2d 748 (1991), should cause us to alter our decision. We deny the petition.

In our original opinion we said:

> On cross-appeal, appellee argues that the trial court erred in failing to award him an attorney's fee. Clearly, under prior law the trial court was without authority to award attorney's fees in such a case. *Williams* v. *Little Rock Civil Serv. Comm'n*, 266 Ark. 599, 587 S.W.2d 42 (1979). Appellee argues, however, that the award of an attorney's fee is authorized by Ark. Code Ann. § 16-22-308 (Supp. 1989), which provides in part:
>
>> In any civil action to recover. . . 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.
>
> We do not think that this proceeding will fit within the language of the statute. Quinn did not bring a civil action against the city to recover for breach of contract; rather, he filed an appeal from a decision of the Little Rock Civil Service Commission which had upheld the termination of

his employment. Although it is true that in *City of Fayetteville* v. *Bibb*, 30 Ark. App. 31, 781 S.W.2d 493 (1989), we held that an attorney's fee could be awarded against the city under Ark. Code Ann. § 16-22-308, in *Bibb* the *action* fell within the language of the statute.

Driggers was like *Bibb*, in that the employee brought a civil action against the city that employed him. Here, Quinn appealed from a decision of the Civil Service Commission. Again, this proceeding does not fit within the language of the statute. Even if the statute could be extended beyond its literal language by means of a liberal construction to apply to the facts here, we could not so extend it. In *Williams* v. *Little Rock Civil Serv. Comm'n*, the court said "We have consistently, for many years, held that attorney's fees are not recoverable as an element of damages, except as *specifically* authorized by statute." (Emphasis added.) 266 Ark. at 600, 601, 587 S.W.2d at 43; *see also*, *Hall* v. *Thompson*, 283 Ark. 26, 669 S.W.2d 905 (1984). Statutes in derogation of the common law are not liberally construed or extended beyond their express language by logic or analogy; indeed, the supreme court has long held that they are to be given a strict construction. *See Wright* v. *Wright*, 248 Ark. 105, 449 S.W.2d 952 (1970).

Petition denied.

ROGERS, J., would grant.

Charles Robert CATE *v.* Janeece Ann CATE

CA 90-379 812 S.W.2d 697

Court of Appeals of Arkansas
En Banc
Opinion delivered July 3, 1991

Gocio & Dossey, by *Jerry B. Dossey*, and *Ball & Mourton*,

by: *Kenneth R. Mourton*, for appellant.

Mark Lindsay, P.A., by: *Mark Lindsay* and *Scott, Lashlee, & Watkins*, by: *Kim R. Lashlee*, for appellee.

JAMES R. COOPER, Judge. The parties in this marital property case were divorced by a decree dated October 30, 1989. In that decree, the chancellor specifically reserved the issue of property rights for later determination. Subsequently the parties entered into stipulations regarding the division of all marital property except 190,532 shares of common stock in Wal-Mart Stores, Inc. On January 24, 1990, a hearing was held on the sole issue of the division of those shares. The chancellor found that the appellant failed to meet his burden of proof in tracing the stock to his premarital profit sharing account, and that all the stock was acquired subsequent to the marriage. On the basis of those findings he concluded that the stock in question was marital property.

From that decision, comes this appeal.

For reversal, the appellant contends that the chancellor erred in finding that he failed to trace the stock to the premarital profit sharing account, and in ruling that the stock was entirely marital property. We agree, and we reverse and remand.

The record shows that the appellant began full-time employment with the Walton Management Company on June 1, 1956, and that he was a fully-vested participant in Walton Management Company's profit sharing trust when it was created on June 21, 1961, approximately five years prior to his marriage to the appellee on May 1, 1966. The appellant's fully-vested balance in the profit sharing trust on the date of his marriage to the appellee was $1,207.91. The appellant continued to work for Walton Management Company, Inc. until January 31, 1971, when he was hired by Wal-Mart Stores, Inc. The annual employer contributions to the Walton Management profit sharing trust subsequent to the marriage totaled $5,595.38 when the trust was frozen in 1972. The appellant did not elect to take distribution from the Walton Management profit sharing trust when he terminated his employment in 1971, but did take distribution from the Walton Management profit sharing trust on his retirement from Wal-Mart Stores, Inc., on July 31, 1981. It should be

noted that Walton Management Company and Wal-Mart stores are separate corporations with separate profit sharing trusts. The appellant recognized that the interest in the Wal-Mart profit sharing trust is marital property, and disbursements from the Wal-Mart profit sharing trust on his retirement are not at issue. Instead, the issues in the case at bar arise from the distribution from the Walton Management Co. profit sharing trust, in which the appellant elected to receive, in lieu of cash, 18,907 shares of Wal-Mart, Inc., stock issued in a single certificate in the name of the appellant, Charles Cate.

The stock split on July 9, 1982; on July 8, 1983; on October 4, 1985, and on July 10, 1987. The record also shows that, on occasion, some shares of stock derived from the original certificate were transferred to a brokerage account held jointly with the appellee to facilitate sales of portions of the stock. The appellant concedes that all shares held in the joint brokerage account at the time of the divorce were marital property. At trial, the appellant offered evidence consisting of various accounting methods employed to determine the increase in value, ruling that all the stock was marital property because it had been acquired during the marriage, and finding that the parties had made no effort to make a distinction between the marital stock and non-marital stock during the marriage.

We agree with the appellant's contention that the chancellor erred in ruling that the stock was entirely marital property because it was acquired subsequent to the marriage of the parties. The record shows that the appellant had a fully-vested interest in the Walton Management Company's profit sharing plan prior to his marriage to the appellee. In Arkansas, the time when a retirement plan vests is determinative in deciding whether it is acquired during the marriage. When a pension "vests" it becomes a right which cannot be unilaterally terminated by the employer without also terminating the employment relationship, *see Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984), and we have held that:

> the time that a right to property is acquired, rather than the time the property is actually received, is the determinative factor in deciding whether or not that property had been acquired during the marriage.

Wright v. *Wright*, 29 Ark. App. 20, 779 S.W.2d 183 (1989).

In the case at bar, the appellant's right to benefits under the profit sharing plan was fully vested *before* his marriage to the appellee. As a general rule, the right to receive pension benefits is a marital asset only insofar as that right was acquired during the marriage. *See* 24 Am. Jur. 2d *Divorce and Separation* § 905 (1983), *see also Donovan* v. *Donovan* 25 Wash. App. 691, 612 P.2d 387 (1980) (holding that retirement benefits which accrued prior to marriage were husbands' separate property). This principle was recognized by Arkansas Supreme Court in *Marshall* v. *Marshall*, 285 Ark. 426, 688 S.W.2d 279 (1985), which held that pension benefits based on contributions or services not made during the marriage constitute the separate property of the recipient. Clearly, the appellant's premarital interest in the plan is his separate property. *Marshall, supra,* Ark Code Ann. § 9-12-315(b)(1) (Repl. 1991).

Likewise, under Arkansas law, property acquired in exchange for property acquired prior to the marriage or in exchange therefore, is excluded from the definition of marital property. Ark. Code Ann § 9-15-315(b)(2), (5) (Repl. 1991). It is clear from the record that the stock in question was acquired in exchange for the balance existing in the Walton Management Company profit sharing trust on the date of the appellant's retirement, and that there were substantial increases in the value of both the profit sharing account prior to distribution and the stock obtained at the time of distribution. We hold that the chancellor erred in ruling that all of the stock was marital property under Arkansas law. *See Marshall, supra*; *Wright v. Wright*, 29 Ark. App. 20, 779 S.W.2d 183 (1989); Ark. Code Ann. § 9-15-315.

Furthermore, we hold that the chancellor erred in finding that the stock in question had been commingled with marital stock and was therefore not traceable to the appellant's premarital interest in the Walton Management profit sharing plan. Our review of the record shows that the stock in question was held in certificates issued only in the appellant's name, with new certificates issued only in the appellant's name, with new certificates being issued as each stock split occurred. Although some shares were transferred to a joint brokerage account for

sale, and were therefore arguably commingled, we need not decide whether those shares lost their separate character because the appellant has conceded for purposes of appeal that any shares which were transferred to the joint brokerage account are marital property. Likewise, we find no commingling in the fact that stock splits resulted in shares from the wholly marital Wal-Mart profit sharing plan being issued in certificates including shares from the Walton Management distribution, because the evidence clearly shows that all the certificates in the appellant's sole name representing the stock at issue can be traced to the first 18,907 share certificate that the appellant received as the distribution on his retirement from the Walton Management Company profit sharing trust.

We find no merit in the appellee's assertion that it is necessary to trace individual shares of stock, as opposed to the certificates in which the stock was issued. Through their experts, the parties agreed that all the stock in question has a zero cost basis, and all three experts agreed that the stock was traceable through the certificates. Moreover, after taking into account the appellant's concessions on appeal, the only stock now at issue consists of shares held in certificates originally issued to the appellant and always maintained in his individual name in his separate safe deposit box. We hold that the chancellor erred in finding that the appellant failed to maintain the identity of the 151,256 shares of stock at issue on appeal.

It would seem logical for our next step to be a determination of the extent of the appellant's non-marital interest in the 151,256 shares of Wal-Mart stock, *see Nowell v. Nowell*, 31 Ark. App. 78, 787 S.W.2d 698 (1990). The appellant offers three alternative formulas which he claims would be appropriate in performing this task. However, because the case must be remanded for reasons we will explain shortly, regardless of the extent of the appellant's non-marital interest in the stock, we decline to do so, leaving that task for the chancellor.

The case must be remanded because our holding that the 151,256 shares of stock are traceable to the Walton Management profit sharing trust and are *at least in part*, non-marital property, does not end the inquiry: the Arkansas Supreme Court has recognized that

> [T]racing is a tool, a means to an end, not an end in itself. The fact that one spouse made contributions to certain property does not necessarily require that those contributions be recognized in the property division upon divorce.

Canady v. *Canady*, 290 Ark. 551, 721 S.W.2d 650 (1986). Under Ark. Code Ann. § 9-12-315(a)(1) (Repl. 1991), all marital property is to be distributed one-half to each party *unless* the court finds such a division to be inequitable. *See Canady*, *supra.* Moreover, under Ark. Code Ann. § 9-12-315(a)(2) (Repl. 1991), all separate property is to be returned to the party who owned it prior to the marriage *unless* the court deems some other division to be equitable. Therefore, the chancellor's award on remand need not necessarily correspond to the findings regarding the extent of the separate and marital interests of the parties. *See Yokey* v. *Yokey*, 25 Ark. App. 321, 758 S.W.2d 421 (1988). Because the record is not fully developed regarding the equities relating to the property division, we remand for the chancellor to make this determination.

Reversed and remanded.

JENNINGS, J., dissents.

COLUMBIA MUTUAL CASUALTY INSURANCE COMPANY, ET. AL. *v.* Richard COGER and Kay COGER

CA 90-321 811 S.W.2d 345

Court of Appeals of Arkansas
Division II
Opinion delivered July 3, 1991
[Rehearing denied August 21, 1991.]

Davis & Goldie, by: *Steven B. Davis*; and *Rose Law Firm, A Professional Association*, by: *Vince Foster, Jr.* and *Sam P. Strange, Jr.*, for appellants.

Ball & Mourton, by: *Kenneth R. Mourton*, for appellees.

JAMES R. COOPER, Judge. The appellees in this chancery case are general partners in a business operated under the trade styles of Ace Hardware and Huntsville Lumber Company. On August 1, 1988, a truck owned by Huntsville Lumber Company and operated by the appellees' employees was delivering lumber on a State highway when part of the load fell off the truck, landed on the highway, and collided with a van traveling in the opposite direction, resulting in property damage to the van and personal injury to its occupants. The occupants of the van filed a negligence action against the appellees d/b/a Huntsville Lumber Company. At the time of the accident, the appellees' truck was an insured vehicle under an automobile liability policy issued by State Farm Mutual Automobile Insurance Company. On notification of the accident by the appellees, State Farm provided a defense and paid a portion of their policy limits. The appellees were also covered under a commercial general liability policy issued by the appellant, Columbia Mutual, covering the business premises occupied by the hardware store. The appellees made demand on Columbia, which asserted that the accident was excluded under the terms of its policy. The appellees then filed a declaratory judgment action against Columbia seeking a declaration that the accident was a covered occurrence under Columbia's policy. The trial court

concluded that Columbia was obligated to provide both a defense and coverage under the commercial liability policy. From that decision, comes this appeal.

The appellants contend that the trial court erred in concluding that the accident was not excluded under the auto exclusion of Columbia's commercial liability policy. We agree, and we reverse.

The automobile exception in question provided that the insurance did not apply to:

> "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading."

"Loading or unloading" is defined in the policy as follows:

> "Loading or unloading" means the handling of property:
>
> a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto;"
>
> b. While it is in or on an aircraft, watercraft or "auto;" to the place where it is finally delivered;
>
> c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

Finally, the policy defines "auto" as:

> a land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment.

The underlying lawsuits filed against the appellees allege negligence in the operation of the vehicle, in securing the load, and in maintenance of the straps used to secure the load. The trial judge concluded that the policy exception was ambiguous, and construed it against the appellant insurer. He found that, although the policy excluded coverage for the alleged negligence in the operation of the vehicle, the policy covered the alleged negligence in the maintenance of the straps used to secure the

load, and in securing the load.

We hold that the trial judge erred in ruling that the allegations of negligence gave rise to coverage and the duty to defend under the policy. The language in an insurance policy is to be construed in its plain, ordinary, popular sense. *CNA Insurance* v. *McGinnis*, 282 Ark. 90, 666 S.W.2d 689 (1984). Resort to rules of construction is unnecessary if the terms of an insurance contract are not ambiguous, and in such cases the policy will not be interpreted to bind the insurer to a risk which it plainly excluded and for which it was not paid. *Baskette* v. *Union Life Insurance Co.*, 9 Ark. App. 34, 652 S.W.2d 635 (1983). Significantly, the insurer in the case at bar did not limit coverage for injury or damage caused by the operation, maintenance, use, or entrustment of a vehicle, but instead excluded coverage for injuries "arising out of" such operation, maintenance, use or entrustment. This is virtually identical to the exclusionary language at issue in *Aetna Casualty & Surety Co.* v. *American Manufacturers Mutual Insurance Co.*, 261 Ark. 326, 547 S.W.2d 757 (1977), where a declaratory judgment action was brought to interpret a homeowner's insurance policy with a recreational motor vehicle exclusion. The underlying action in *Aetna* was premised on allegations that the homeowner negligently entrusted a minibike to a minor child who injured a person while operating the minibike on a sidewalk. The Supreme Court affirmed the trial court's finding of no coverage, stating that:

> Aetna's argument that the "negligent entrustment", rather than the "use" of the minibike, is the negligent act ignores the clear language of the exclusionary clause.

Aetna, 261 Ark. at 328. In the case at bar, whether or not the lumber briefly came to rest before being struck by the van, and whether the negligent act was the operation of the vehicle, the securing of the load, or the maintenance of the straps securing the load, the injury and damage clearly arose out of the ownership, maintenance, or use of the truck or attached equipment and was therefore not covered by the policy.

Reversed and dismissed.

DANIELSON and ROGERS, JJ., agree.

Mae J. DUNN *v.* Jimmie Guss DUNN

CA 90-400 811 S.W.2d 336

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

Hewett, Schock, VanWinkle, & Whitmire, by: *J. Randolph Shock*, for appellant.

Walters Law Firm, P.A., by: *James B. Pierce*, for appellee.

JAMES R. COOPER, Judge. The appellant and the appellee in this domestic relations case were married on August 5, 1972. On September 19, 1989, the appellant filed for divorce and a temporary order was entered requiring the appellee to pay the appellant $24,000.00 from the parties' joint savings account, $473.00 per month temporary support and $350.00 as a temporary attorney's fee. On February 23, 1990, the final divorce decree was entered and provided, in pertinent part, for the appellee to pay the appellant an additional $6,000.00 from their joint savings account and further specified that the appellee's disability income was not marital property. The appellant subsequently filed motions to amend the decree with regard to the disability income determination and the division of the savings account; however, the chancellor declined to modify his earlier determinations. From that decision, comes this appeal.

The appellant first argues that the chancellor erred in ruling that the apppellee's long-term disability insurance was nonmarital property, and second, that the chancellor erred by failing to divide the parties' joint bank account equally. Having deter-

mined that the appellant's first argument is meritorious, we do not reach the merits of her second argument and we reverse and remand.

On appeal from a chancery court case, we consider the evidence *de novo*, and we will not reverse the chancellor unless it is shown that the lower court's decision is clearly contrary to a preponderance of the evidence. *Kerby* v. *Kerby*, 31 Ark. App. 260, 792 S.W.2d 364 (1990). Furthermore, we recognize that the chancellor is given broad powers to distribute all of the parties' property in a divorce action, non-marital as well as marital, in order to achieve an equitable division. Ark. Code Ann. § 9-12-315; *Smith* v. *Smith*, 32 Ark. App. 175, 798 S.W. 2d 442 (1990).

Our review of the record shows that the parties had been married eighteen years and, at the time of their divorce in 1990, the appellee and the appellant were 55 and 59 years old, respectively. When the couple married in 1972 the appellee was employed by Pepsi Cola Bottling Company where he remained employed during the marriage. The appellee testified that, in 1984, he underwent bypass surgery and that he quit working and elected to collect disability benefits in 1987. The appellee explained that these benefits were paid pursuant to a company-sponsored long-term disability plan carried by Massachusetts Mutual. The appellee stated that the disability sick pay insurance plan was a non-contributory plan provided by the company to its executives in lieu of workers' compensation and that the plan was not tied to workers' compensation but paid benefits based on disability regardless of the circumstances of the disability provided that the disabled person was an employee. The appellee testified that, in addition to these benefits, he had a retirement plan with disability coverage (MEI pension plan). He testified that he was not receiving disability benefits provided under his pension plan.[1]

The first argument concerns the characterization of property. All property acquired during the marriage is marital property unless it falls under an exception to the statutory definition of marital property. *See* Ark. Code Ann. § 9-12-315 (b)

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[1] The Chancellor divided the pension plan as provided by Ark. Code Ann. § 9-12-315 (a)(1)(A) (1987), and on appeal, the division of that plan is not at issue.

(1987); *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984).

In considering whether or not the property at issue was acquired during the marriage, we recognize that the determinative factor is the time that the right to the property was acquired, *Wright* v. *Wright*, 29 Ark. App. 20, 779 S.W.2d 183 (1989) (citing *Bunt* v. *Bunt*, 294 Ark. 507, 744 S.W.2d 718 (1988)); *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986), and under the facts presented here, we find that the appellee's right to the disability benefits accrued during the marriage and therefore, the property was acquired during the marriage.

The appellee argues that the disability benefits he is receiving are sick pay, but, as noted, he testified that these benefits are derived from a non-contributory disability insurance plan which was provided by the company, for its executives, in lieu of workers' compensation. Under these circumstances, we think that the long-term disability plan under which the appellant was receiving benefits was consideration he received from the company in return for his services as a company executive. His coverage under the plan was consideration earned during the marriage. *See generally Young* v. *Young*, 288 Ark. 33, 701 S.W.2d 369 (1986) (finding that a noncontributory pension plan was marital property as it was consideration of employment which was earned during the marriage.) Furthermore, his right to claim these benefits was contingent upon a subsequent disability which also occurred during the marriage.

The occurrence of the appellant's disability during the marriage caused the appellee's eligibility for the disability benefits to become an enforceable right. We therefore find that the appellee's entitlement to the benefits accrued during the marriage and that his right to the benefits is certain even though the amount of these benefits is not.

The appellee also asserts that the benefits are not marital property because they were not acquired during the marriage in that they were not vested. He cites *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984), for the proposition that a vested pension is one which cannot be terminated unilaterally by the employer without terminating the employment relationship. Despite his assertion, we fail to see circumstances under which the appellee's employer could terminate the appellee's status as

an employee. The appellee argues that he could return to work and the benefit would cease, however, we do not find the possibility that he might choose to return to work and cause the benefit to cease to be the equivalent of his employer having the right to unilaterally terminate the benefit. Nor do we think that the appellee can defeat his entitlement to the benefits by choosing not to enforce his right to them.

Having concluded that the property at issue was acquired during the marriage, we still must determine whether or not the property is marital property. Marital property is all property acquired during the marriage unless it is specifically exempted by the statute. *See* Ark. Code Ann. § 9-12-315(b) (1987); *See also Bunt, supra; Day, supra.* Applying the statute to the facts of the case before us, we fail to see any applicable exemption specified. Even recognizing the appellee's assertion that the benefits are in lieu of workers' compensation, the benefits are not excepted under the statute as they are not for any degree of permanent disability nor are they for future medical expenses; moreover, the appellee testifies that he could return to work and the benefits would cease. *See* Ark. Code Ann § 9-12-315 (b)(6) (1987). We therefore hold, that these benefits are marital property to the extent that the appellee acquired an enforceable right in them during the marriage.

Under these circumstances, where the appellee's employer during the marriage provided a long-term disability insurance plan for its executives; where these benefits were in lieu of workers' compensation, and were not awarded as benefits for a permanent disability or for future medical costs; and where the disability entitling the appellee to collect the benefits provided by the plan occurred during the marriage; we hold that the property was acquired during the marriage and furthermore, is marital property as defined by the statute. *See* Ark. Code Ann.§ 9-12-315, *see also Wright* v. *Wright*, 29 Ark. App. 20, 779 S.W.2d 183 (1989); *Bunt* v. *Bunt*, 294 Ark. 507, 744 S.W.2d 718 (1988); *Young* v. *Young*, 288 Ark. 33, 701 S.W.2d 374 (1986); *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984).

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. *Bradford* v.

Bradford, 34 Ark. App. 247, 808 S.W.2d 794 (1991). However, we decline to do so in this case as only a portion of the marital assets are before us and because the benefits at issue are a significant marital asset, 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 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.

Having decided that we must remand the case we need not address the appellant's argument that the court erred in making an unequal division of the parties' joint savings account. The case is remanded to the chancellor for a complete resolution of the parties' property rights.

Reversed and remanded.

MAYFIELD, J., agrees.

JENNINGS, J., concurs.

Leon KOENIGHAIN *v.* SCHILLING MOTORS, INC.

CA 90-456 811 S.W.2d 342

Court of Appeals of Arkansas
En Banc
Opinion delivered July 3, 1991

Everett O. Martindale, for appellant.

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

JOHN E. JENNINGS, Judge. Appellant, Leon Koenighain, was employed as a new car salesman for appellee, Schilling Motors, Inc., from 1986 through 1989. It was appellant's practice to quote payments to prospective customers that did not include extended warranty, credit life insurance, or sales tax. It was Schilling's policy to require its salesmen to include such items in payments quoted to prospective buyers. After receiving complaints from two buyers about the difference between their actual payment and the payment they were quoted, Schilling fired Koenighain. Koenighain sued for wrongful discharge on the theory that his termination violated public policy and obtained a jury verdict for $5,000.00. The trial judge set the verdict aside on motion for judgment notwithstanding the verdict.

The sole issue raised on appeal is that "the court erred in finding insufficient evidence that defendant's discharge of plaintiff constituted a violation of a well-established public policy of the state." We find no error and affirm.

In reviewing the grant of a motion for judgment notwithstanding the verdict, we affirm only if we find there is no substantial evidence to support the jury verdict. *Lancaster* v. *Schilling Motors, Inc.*, 299 Ark. 365, 772 S.W.2d 349 (1989). In making that determination we review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the party who had obtained the jury verdict. *See McCuistion* v. *City of Siloam Springs*, 268 Ark. 148, 594 S.W.2d 233 (1980).

In *Sterling Drug, Inc.* v. *Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988), the supreme court traced the history in Arkansas of the employment-at-will doctrine. After a discussion of its earlier decisions and cases from other jurisdictions, the court said:

> We are now squarely faced with the decision of whether or not to recognize the public policy exception to the employment-at-will doctrine. Following our lead in *Counce*, *supra*, we acknowledge that an employer should not have an absolute and unfettered right to terminate an employee for an act done for the good of the public. Therefore, we hold that an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state. This is a limited exception to the employment-at-will doctrine. It is not meant to protect merely private or proprietary interests. *Wagner, supra.*
>
> . . . .
>
> It is generally recognized that the public policy of a state is found in its constitution and statutes. *Kirsey* v. *City of Fort Smith*, 227 Ark. 630, 300 S.W.2d 257 (1957).

The case at bar was sent to the jury on a general verdict. The jury was told nothing about public policy; it was instructed only that it might find for the plaintiff if his discharge was "wrongful." No law was provided to the court that indicated in any way that the practice of the appellee was against the public policy of the State of Arkansas. The only evidence which might be said to relate to public policy was the appellant's testimony that he read

an article somewhere that said quoting car payments which included credit life and warranty had been found to be "illegal" in California.

Certainly if there were any dispute at all, it would be for the jury to determine the *reason* for the plaintiff's termination. But whether that reason was "in violation of a well-established public policy of the state" would seem ordinarily to be a question of law for the court. *See Sterling Drug Inc.* v. *Oxford, supra; Smith* v. *American Greetings Corp.*, 304 Ark. 596, 804 S.W. 2d 683 (1991); *Jeffries* v. *State*, 212 Ark. 213, 205 S.W.2d 194 (1947). The jury is simply not equipped to research the statutes in order to determine public policy.

There was no evidence at trial that Schilling instructed Koenighain to conceal from prospective purchasers the fact that the quoted monthly payments included credit life or warranty and we must agree with the trial court that the appellee's instruction to include such amounts in monthly payment quotes does not violate any well-established policy of the State of Arkansas. Although we cannot agree with some of the statements made by the trial judge in his memorandum opinion, the statements do not mandate reversal. We will affirm a trial judge's ruling if correct, even if a wrong reason is given. *See West* v. *Searle & Co.*, 305 Ark. 33, 806 S.W.2d 608 (1991); *All City Glass and Mirror, Inc.* v. *McGraw Hill Information Sys. Co.*, 295 Ark. 520, 750 S.W.2d 395 (1988).

Affirmed.

COOPER and MAYFIELD, JJ, dissent.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree with the majority opinion in this case. In his letter opinion, the trial judge stated:

> The plaintiff in this case was discharged because of a disagreement with his employer concerning the amount to be included in the monthly payment quote to prospective customers. Basically, the plaintiff thought it was wrong to include certain items in that quote, and when he refused to do it, he claims he was fired. The question, thus, is very simply, under these circumstances do we have a violation of a "well established public policy of the state"? It is

> apparent that the discharge was not over the employee's refusal to violate a criminal statute. Nor was he discharged for exercising a statutory right or complying with a statutory duty. *Nor is there any well established public policy of the state saying that car dealers cannot mislead prospective purchasers in transactions, if in fact this was what was occurring.* [Emphasis added.]

With all due respect, I think the trial judge was mistaken about the law. He obviously did not think that there was any legislative act that made it unlawful for car dealers (as well as other entities) to mislead prospective purchasers in transactions. However, Arkansas Code Annotated, Title 4, Chapter 88 deals with "Deceptive Trade Practices." Ark. Code Ann § 4-88-107 (1987) provides:

> The act, use, or employment by any person of any deception, fraud, or false pretense, or the concealment, suppression, or omission of any material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the sale or advertisement of any goods or services is declared to be an unlawful practice.

And Ark. Code Ann. § 4-88-102 (1987) states:

> Any person, firm, partnership, corporation, or other entity who knowlingly and willfully commits an unlawful practice as defined in this chapter shall be guilty of a misdemeanor and, upon conviction in the circuit court of any county in which any portion of the unlawful practice occurred, shall be subject to a fine of not more than two hundred fifty dollars ($250) or imprisonment of not exceeding one (1) year, or both a fine and imprisonment.

The majority opinion recognizes that in the case of *Sterling Drug, Inc.* v. *Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988), the Arkansas Supreme Court held that "an at-will employee has a cause of action for wrongful discharge if he or she is fired in violation of a well-established public policy of the state." 294 Ark. at 249. The Court also said that "it is generally recognized that the public policy of a state is found in its constitution and statutes." *Id.* The above quoted statutes clearly state the public

policy of this state. They were sections of Act 92 of 1971, and Chapter 88 of Title 4 of Arkansas Code Annotated codifies that Act in its entirety. The whole Act deals with deceptive trade practices and creates a Consumer Protection Division within the Office of the Attorney General of this state. The Act is not limited to car dealers.

The real problem in this case is that the trial judge, as the majority opinion notes, gave no instruction to the jury about public policy. He simply let the jury decide for itself whether or not the appellant was wrongfully discharged. The jury, doing what juries often do, reached an arguably correct verdict without proper instructions drafted by the lawyers and read by the judge.

In my opinion, the trial court was wrong in granting the appellee's motion for judgment notwithstanding the verdict and finding for the appellee. This means that the employee's claim for wrongful discharge is dismissed with prejudice. The trial court did have the right, under Ark. R. Civ. P. 59 (e), to grant a new trial, on its own initiative "for any reason for which it might have granted a new trial on motion of a party." Section (a) of Rule 59 sets out the grounds for granting a new trial on motion of a party. One ground is "any irregularity in the proceedings . . . by which the party was prevented from having a fair trial." The order of the trial court granting appellee's motion for judgment notwithstanding the verdict was entered within 10 days after entry of the judgment. Within that same period the court could order a new trial under Ark. R. Civ. P. 59(e). I would agree, under the circumstances, to treat appellee's motion for judgment notwithstanding the verdict as a motion for new trial and, therefore, to remand this case for a new trial.

I do not, however, agree to affirm the trial court's granting of a judgment for appellee notwithstanding the verdict for appellant. That action should be taken only when there is no substantial evidence to support the jury verdict, and one party is entitled by law to a judgment in its favor. *McCuistion* v. *City of Siloam Springs*, 268 Ark. 148, 594 S.W.2d 233 (1980). I think there is a well established public policy against any person or corporation employing concealment, suppression, or omission of any material fact, with intent that it be relied upon by others, in connection with the sale or advertisement of any goods or services. In this

case there is evidence from which the jury could find that the appellant was fired because he would not violate the public policy just described. If we are not going to affirm the jury's verdict, we should at least remand for a new trial.

For the reasons stated above, I dissent.

COOPER, J., joins in this dissent.

Joyce Cook FERGUSON, Executrix of the Estate of Carter Ware Ferguson *v.* THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA

CA 90-218 814 S.W.2d 267*

Court of Appeals of Arkansas
En Banc
Supplemental Opinion on Denial of Rehearing July 3, 1991†

* Judge Jennings' dissent appears at 811 S.W.2d 768.

†Cracraft, C.J., Jennings, and Rogers, JJ., would grant rehearing. The original opinion was not designated for publication.

George H. Bailey, for appellant.

John E. Moore, for appellee.

MELVIN MAYFIELD, Judge. In an unpublished opinion issued by this court on April 3, 1991, a division of three judges reversed the trial court's order granting the appellee's motion for summary judgment. The appellee filed a motion for rehearing which three of the six judges of the court have voted to deny. Thus, the petition for rehearing, having not been granted by a majority of the court, is denied. *See* Ark. Code Ann. § 16-12-114 (1987). Because the judges are equally divided on the petition for rehearing and because the original opinion was not published, we issue this supplemental opinion.

The appellee is a fraternal benefit society incorporated under the laws of Ohio and licensed to do business in Arkansas. The appellant is a resident of Arkansas and the widow and executrix

of the estate of Carter Ware Ferguson who died in Pulaski County, Arkansas, on February 4, 1984. On August 27, 1973, the appellee issued a certificate of insurance to Mr. Ferguson providing for the payment of $20,000.00 in the event of his accidental death. In November of 1983, Ferguson was struck by an automobile and sustained injuries which were the alleged cause of his death on February 4, 1984. The appellant furnished the appellee a written proof of loss on February 27, 1984, but the appellee denied liability on the grounds that Mr. Ferguson's death was not accidental. Appellant filed suit on February 2, 1989, alleging that Ferguson's death was accidental and that the $20,000.00 was due and payable.

The appellee filed an answer and a motion to dismiss which alleged that appellant's suit was barred by limitations. After the motion to dismiss was denied, the appellee filed the motion for summary judgment which was granted. No affidavits were filed in support of the motion which stated that it relied upon the matters filed of record. Except for responses to requests for admissions which agreed that the exhibited certificate of insurance and proof of loss were true and accurate copies, nothing was filed of record other than the pleadings and motions. A response to the motion for summary judgment was filed by the appellant and each side submitted briefs. The trial court's order simply granted the motion and dismissed the appellant's complaint.

The appellee's argument in the trial court and on appeal is based upon paragraph 11 of a section of the provisions of the certificate of insurance. The pertinent part of the paragraph states:

> No action at law or equity shall be brought to recover on this certificate . . .after the expiration of three years after the time written proof of loss is required to be furnished.

Since the record shows that this suit was filed more than three years after the proof of loss was furnished, the appellee claims the trial court was correct in granting the motion for summary judgment. The appellant, however, stated in her response to the motion for summary judgment, and it is her argument on appeal, that paragraph 4 of the section of the certificate entitled "Addi-

tional Provisions" prevails over the above paragraph 11. Paragraph 4 provides:

> Any provision of this certificate which, on its effective date, is in conflict with the statutes of the state in which the member resides on such date, is hereby amended to conform to the minimum requirements of such statutes.

Appellant argues that it was error for the court to grant summary judgment on the basis that the three-year period of limitation provided in the certificate barred the action. She contends paragraph 11 of the certificate, which purports to limit the bringing of legal action on the certificate to a period of three years, was expressly waived by paragraph 4 which provides for conformity of the policy to the minimum statatutory provisions of the certificate holder's state of residence. It is the appellant's position that in Arkansas the minimum period of limitations for bringing suit on a written contract is five years as fixed by Ark. Code Ann. § 16-56-111 (1987). She says that if paragraph 4 of the certificate of insurance does not constitute an express waiver of the period of limitations set out in paragraph 11, the conflicting clauses in the certificate create an ambiguity which presents a question of fact to be decided.

Summary judgment is an extreme remedy which should only be granted when it is clear that there is no issue of fact to be litigated. *Johnson* v. *Stuckey & Speer, Inc.*, 11 Ark. App. 33, 665 S.W.2d 904 (1984). Motions for summary judgment are governed by some well-established principles of law. In *Walker* v. *Stephens*, 3 Ark. App. 205, 626 S.W.2d 200 (1981), we summarized:

> On such motions the moving party has the burden of demonstrating that there is no genuine issue of fact for trial and any evidence submitted in support of the motion must be viewed most favorably to the party against whom the relief is sought. Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable men might differ. *Henricks* v. *Burton*, 1 Ark. App. 159, 613 S.W.2d 609 (1981); *Dodrill* v. *Arkansas Democrat Co.*, 265 Ark. 628,

> 590 S.W.2d 840 (1979); *Braswell* v. *Gehl*, 263 Ark. 706, 567 S.W.2d 113 (1978). The object of summary judgment proceedings is not to try the issues, but to determine if there are any issues to be tried, and if there is any doubt whatsoever the motion should be denied. *Trace X Chemical, Inc.* v. *Highland Resources, Inc.*, 265 Ark. 468, 579 S.W.2d 89 (1979); *Ashley* v. *Eisele*, 247 Ark. 281, 445 S.W.2d 76 (1969). A motion for summary judgment cannot be used to submit a disputed question of fact to a trial judge. *Griffin* v. *Monsanto Co.*, 240 Ark. 420, 400 S.W.2d 492 (1966).

3 Ark. App. at 210. On motion for summary judgment, the court is authorized to ascertain the plain and ordinary meaning of a written instrument "after any doubts are resolved in favor of the party moved against," and if there is any doubt about the meaning, there is an issue of fact to be litigated. *Brooks* v. *Renner & Co. Inc.*, 243 Ark. 226, 228, 419 S.W.2d 305 (1967). When the intent of the parties as to the meaning of a contract is in issue, summary judgment is particularly inappropriate. *Camp* v. *Elmore*, 271 Ark. 407, 609 S.W.2d 86 (Ark. App. 1980).

Certain principles regarding contracts of insurance are also well settled. In *Home Indemnity Co.* v. *City of Marianna*, 297 Ark. 268, 761 S.W.2d 171 (1988), the Arkansas Supreme Court stated:

> We recognize that a contract of insurance is to be construed like other contracts, with the different clauses read together and an interpretation given that would harmonize all parts. However, an interpretation that will harmonize all parts is not always possible when there is ambiguity in the insurance policy because of two conflicting provisions. It is also established law in our state that provisions contained in a policy of insurance must be construed most strongly against the insurance company which prepared it, and if a reasonable construction may be given to the contract which would justify recovery, it is the duty of the court to do so. Further, this court has held that if there is doubt or uncertainty as to the policy's meaning and it is fairly susceptible of two interpretations, one favorable to the insured and the other favorable to the

insurer, the former will be adopted.

297 Ark. at 271-72 (citations omitted).

Appellee contends that it is a fraternal benefit society exempt by statute from the regular insurance statutes and governed only by Title 23, Chapter 74 of the Arkansas Code. *See* Ark Code Ann. § 23-74-103 (1987). Therefore, the appellee argues that paragraph 11 of its certificate of insurance does not conflict with the five-year general statute of limitations for actions on written policies (which has been in force since the late 1800's), because Ark. Code Ann. § 23-74-121(c)(1) (1987), applicable to fraternal benefit societies, provides that no life benefit certificate shall contain "any provision limiting the time within which any action at law or in equity may be commenced to less than two (2) years after the cause of action shall accrue." In fact, the appellee says that its contract could have provided that no cause of action could be maintained *two* years after proof of loss was furnished and still it would not conflict with Arkansas' minimum requirement for limitation periods for actions on contracts issued by fraternal benefit societies. The problem with that argument is that Ark. Code Ann. § 23-74-121(c)(1) *does not fix* the period of limitations on policies issued by fraternal benefit societies. It simply provides that "no life benefit certificate" of a fraternal benefit society shall fix the period of limitations at less than two years.

Thus, the provision in paragraph 11 of the certificate in this case limiting an action to three years after written proof of loss is furnished does appear to conflict with the minimum period of five years which Ark. Code Ann. § 16-56-111 provides for bringing an action on a written contract. This results from the fact that there is no minimum period provided for in the Arkansas statutes governing suits on policies issued by fraternal benefit societies. The provision in Ark. Code Ann. § 23-74-121(c)(1) only provides for the minimum period that the certificates issued by the societies may contain. At the very least, the appellee's certificate is ambiguous as to the period within which suit on the certificate may be brought. The appellant says that paragraph 4 waived the requirements of paragraph 11, and since this suit was filed within five years after the death of Mr. Ferguson, it was filed within the minimum requirements of Arkansas' general statute of

limitations on written contracts. According to *Home Indemnity Company* v. *City of Marianna, supra*, we must construe an insurance policy most strongly against the insurer and in favor of recovery. When we consider the certificate of insurance in this case in that light, we conclude that under the record before us the certificate is ambiguous as to the prevailing period of limitation, and the intent of the parties is a question of fact that should not have been decided by summary judgment.

The petition for rehearing is denied and this case is reversed and remanded.

CRACRAFT, C.J., JENNINGS and ROGERS, JJ., would grant the petition for rehearing and affirm the trial court's action.

JOHN E. JENNINGS, Judge, dissenting.* I would grant the petition for rehearing. In my view the case turns on two provisions contained in the policy and two statutes of this state. The policy provided:

> No action at law or equity shall be . . . brought after the expiration of three years after the time written proof of loss is required to be furnished.

The policy also stated:

> Any provision of this certificate which, on its effective date, is in conflict with the statutes of the state in which the member resides on such date, is hereby amended to conform to the minimum requirements of such statutes.

Arkansas Code Annotated Section 16-56-111 (Supp. 1989) is the general statute of limitations for notes, contracts, and other instruments in writing. It provides that suit must be brought within five years after the date the cause of action accrues. Also applicable at the time was Ark. Code Ann. § 23-74-121 (1987),[1] which specifically dealt with fraternal benefit societies, like the appellee here, and provided in pertinent part:

> (c) No life benefit certificate shall be delivered or issued for delivery in this state containing in substance any of the following provisions: (1) any provision limiting the time

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* 811 S.W.2d 768.

[1] This section was repealed by Act 881 of 1989, effective January 1, 1990.

> within which any action at law or in equity may be commenced to less than two (2) years after the cause of action shall accrue; . . . .

The general rule, in Arkansas and elsewhere, is that a contractual provision limiting the period of time within which suit may be brought to a period shorter than the general statute of limitations is valid, unless the provision violates a statute or public policy or is unreasonably short. *See Dwelling House Ins. Co.* v. *Brodie*, 52 Ark. 11, 11 S.W. 1016 (1889) (six-month contractual limitation to sue on insurance policy held valid); *Hafer* v. *St. Louis Southwestern Ry. Co.,* 101 Ark. 310, 142 S.W. 176 (1911) (six-month limitation contained in contract with common carrier upheld); 51 Am. Jur. 2d *Limitation of Actions* § 64 (1970). When a contract is unambiguous, its construction is a question of law for the court. *C.& A. Constr.* v. *Benning Constr. Co.,* 256 Ark. 621, 509 S.W.2d 302 (1974); *West* v. *Todd,* 207 Ark. 341, 180 S.W. 2d 522 (1944); *Floyd* v. *Otter Creek Homeowners Ass'n,* 23 Ark. App. 31, 742 S.W. 2d 120 (1988). Furthermore, the initial determination of whether or not a contract is ambiguous rests with the court. *C. & A. Constr. Co., supra.* In the case at bar, I fully agree with the trial court that the contract is not ambiguous. In seeking to harmonize different clauses of a contract, we should not give effect to one to the exclusion of another even though they seem conflicting or contradictory, nor should we adopt an interpretation which neutralizes a provision if the various clauses can be reconciled. *RAD-Razorback Ltd. Partnership* v. *B.G. Coney Co.,* 289 Ark. 550, 713 S.W.2d 462 (1986); *Floyd* v. *Otter Creek Homeowners Ass'n,* 23 Ark. App. 31, 742 S.W.2d 120 (1988). The object is to ascertain the intention of the parties, not from particular words or phrases, but from the entire context of the agreement. *Wynn* v. *Sklar & Phillips Oil Co.,* 254 Ark. 332, 493 S.W.2d 439 (1973); *Fowler* v. *Unionaid Life Ins. Co.,* 180 Ark. 140, 20 S.W.2d 611 (1929).

Here, the contract provided that suit must be brought within three years. As we have seen, such provisions are ordinarily valid. The provision did not conflict with Ark. Code Ann. § 23-74-121(c)(1), which provided that fraternal benefit societies may not deliver certificates of insurance which limit the time for filing suit to less than two years.

As I understand it, the ambiguity seen by those judges who vote to deny the petition for rehearing involves the five-year general statute of limitations, Ark. Code Ann. § 16-56-111. However, the supreme court has held that a general statute does not apply when there is a specific statute covering a particular subject matter. *Cogburn* v. *State,* 292 Ark. 564, 732 S.W.2d 807 (1987). *See also Williams* v. *City of Pine Bluff,* 284 Ark. 551, 683 S.W.2d 923 (1985); *Valley Nat'l Bank* v. *Stroud,* 289 Ark. 284, 711 S.W.2d 785 (1986); *Thomas* v. *Easley,* 277 Ark. 222, 640 S.W. 2d 797 (1982). Finally, for cases in which summary judgments were affirmed under virtually identical circumstances, see *Stroud* v. *Northwestern Nat'l Ins. Co.,* 360 So.2d 528 (La Ct. App. 1978), and *S.E.A. Towing Co.* v. *Great Atl. Ins. Co.,* 688 F.2d 1000 (5th Cir. 1982).

I respectfully dissent from the denial of the petition for rehearing.

CRACRAFT, C.J., and ROGERS, J., join in this dissent.

George LOCKEBY *v.* MASSEY PULPWOOD, INC.

CA 90-409 812 S.W.2d 700

Court of Appeals of Arkansas
Division I
Opinions delivered July 3, 1991
[Rehearing denied August 21, 1991.]

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

Laser, Sharp, Mayes, Wilson, Bufford & Watts, P.A., by: *Ralph R. Wilson*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Workers' Compensation Commission. The administrative law judge found that the appellant was permanently and totally disabled as a result of a gradual work-related injury to his back. The Commission reversed and dismissed the claim on the basis that it was not work-related. The appellant claims the Commission's decision is contrary to the law and evidence. We agree.

The appellant testified by deposition that he is a 61-year-old man who left school after the fourth grade and worked in the logging industry all his working life. He said that when he was 12 years old he began working with his dad driving a team of mules and skidding logs. For the last 20 years, he worked for appellee driving a service truck and a log skidder. He said it took him only thirty minutes to an hour a day to service the equipment and fill the trucks with gasoline, and the rest of the time, 10-12 hours a day, five days a week, he was operating the log skidder. Appellant described the log skidder as a 518 Caterpillar with winch controls. He said his job was to drive to an area where trees had been cut down, pull the cable out of the winch (which for the last couple of years, had been hard to pull) and hook up six logs. Once the logs are hooked up, the skidder pulls them to the truck where another machine picks them up and stacks them on the truck. Appellant said riding the skidder was very rough, going over stumps and ditches, whipping the driver backward and forward, with the skidder seat, which was steel with a short back, constantly hitting him low in the center of his back.

According to appellant, on weekends he rested and went to church. He said if he did anything at all on weekends he would go into the woods to repair his employer's equipment. Appellant said he has no hobbies, does not hunt or fish, and the only thing he does around the house is mow the lawn on a riding mower. Appellant testified that before his back surgery, he had never been ill in his life, had never been in a hospital, had never been in an automobile accident or had trouble with his back or neck, and had never filed a workers' compensation claim.

Appellant could not relate a specific injury to his back or just when it started to bother him. At first he thought he might have bumped it, but it kept getting worse. Finally he went to see his family doctor, Dr. Phillip L. White, in Murphreesboro, who eventually referred him to Dr. James Arthur, a neurosurgeon in Hot Springs.

Dr. Arthur testified by deposition that he first examined appellant on January 27, 1988, and ordered a lumbar CT scan and myelogram. He reviewed the results of those tests and diagnosed appellant as having degenerative and osteoarthritic changes involving the facets at virtually every level, most signifi-

cantly at L3-4 where a significant stenosis was seen and at L4-5 where a very severe stenosis was suspected related to disc bulging, lateral facet hypertrophy and spurring of the facets as well as thickening of the longitudinal ligaments. Dr. Arthur testified he thought that the degeneration in appellant's spine had been going on for some time, and could have been going on as long as ten years. He was then asked what was the most common cause of degeneration and he said:

> Repeated trauma as well as a breakdown in supporting structure such as ligaments; a breakdown in joint function in the form of loss of synovial fluid in the joint that allows the bones instead of being lubricated and no friction being present, to rub together and form calcification; a general thickening of ligaments and shortening of ligaments and thinning of discs in the back; and production of calcium spurs.

When questioned as to the cause of appellant's condition and whether or not it was a function of age, Dr. Arthur stated:

> The narrowing in his back was due to a certain extent to the arthritis in these facet joints on the side, that's true; and that is partly at least a result of the aging process. But it was also due to a significant amount of bulging of the disc at the L5 level which would be more traumatic in other words than the facet arthritis was. In addition, the ligament on the back was very thick, which is not a result of the aging process but rather is something that we see in men that work very hard during their life, do a lot of lifting and pulling and take a lot of trauma to their back. So there were a couple of things about this narrowing that weren't due to the arthritic process of aging, although some of the narrowing I'm sure is due to that as well.

When questioned as to whether an individual could suffer from the condition without any trauma whatsoever, even if he had a sedentary job, Dr. Arthur said the appellant's case was interesting from the standpoint of "why he has this," and explained:

> I haven't ever treated a doctor that had this or a lawyer or an accountant or anyone who does a sedentary-type job. Those people are very susceptible to getting acute ruptured

> disc because of what I said. They're sedentary during the week and they go out on the weekend and do something. On the other hand, the man that carries the 100-pound sack of cement or feed or picks up a cross tie and does it for 20, 30, 40 years, a man that operates — in this case — a log skidder, which is very rough, one of the roughest machines you can operate, he's getting a repeated trauma to his back. That's the man that'll develop lumbar canal stenosis from the bony changes and the ligament hypertrophy and the bulging disc. He also had arthritis in his spine which might have contributed somewhat to this condition but certainly all these other things were a result, I believe, of his job.

Dr. Arthur performed surgery on appellant's back and testified he expected appellant's healing period to end approximately July 1, 1988. He estimated appellant would have a 25% disability rating to the body as a whole as a result of his residual decreased range of motion and pain.

The deposition of Dr. Thomas M. Fletcher, a Little Rock neurosurgeon, who examined appellant at the request of the employer's insurance carrier, was introduced into evidence. He related that appellant gave him a history of gradual onset of burning back pain with no specific incident of trauma. He said appellant is a heavy man, weighing about 230 pounds, with a surgical scar in his lower back and restriction of motion. He testified that from X-ray studies he determined that appellant's difficulty was spinal stenosis, which is the narrowing of the spinal canal diameter due to thickening of the bone. In association with this, he had a disc protrusion at L4-5. Dr. Fletcher said the thickening is caused by wear and tear, thickening and bending due to arthritis and takes several years to develop. When asked whether the cause was appellant's weight, Dr. Fletcher said there were several factors involved including weight, posture, work activity, and family history. The following question and answer then occurred:

> Q Insofar as the relationship of the problems you observed and which are described in your report, can you state to any kind of medical certainty or degree or probability that they were related to his work activities?
>
> A Well, I don't specifically relate it to a specific incident

> of trauma. I think that repeated trauma and activity over a long period , it can certainly be related to that. I mean, for instance, in working a log skidder, for instance.

When asked on cross-examination by appellant's counsel if the history of driving a log skidder 10, 12, 14 hours a day, five days a week for 20 years would contribute to appellant's disease process, Dr. Fletcher answered, "I would say that it may contribute, and probably did contribute." Asked about the jarring and the seat hitting appellant in the back, Dr. Fletcher answered, "Yes, sir. I think that that type of activity is more likely to produce. It doesn't produce it in all people, but it can aggravate it." Dr. Fletcher also testified, "I would say that the—that the work activity would be as important as the age factor." Dr. Fletcher was asked by the employer's attorney:

> Q And you're not testifying that if this man hadn't worked on a log skidder in his life, if he had gone into some other occupation, he wouldn't have the problems that he is having today, are you?
>
> A No, sir. I am not saying that.
>
> Q Okay.
>
> A I think that it occurs in people with other types of physical activity and even lighter forms of activity. But I stated that I thought that that type of work was more strenuous and therefore more likely to contribute to it.

Then when questioned again by appellant's attorney:

> Q Can you say with a reasonable degree of medical certainty that the disc bulging or protruding is work related in this case, given the history of skidder operation?
>
> A I would—it would be my opinion that it would be work related. The disc protrusion.

The medical records included in the transcript show that appellant first consulted Dr. White complaining of back pain on August 16, 1986. Dr. Arthur's hospital discharge summary of appellant relates that he first saw appellant on January 27, 1988; that he had been referred by Dr. White; that he was admitted to the hospital for surgical intervention; that he had an L4, 5

laminotomy and foraminotomy bilaterally on January 28, 1988; and that he was discharged on February 1, 1988. In a letter dated March 28, 1988, written to Silvey Companies (which apparently is the employer's insurance agent or carrier), Dr. White stated:

> I strongly disagree with your determination that Mr. Lockeby's back problem is not work related. I drove a log skidder before I went to medical school, and the mechanic's involved, etc., will cause back problems in the form of strain/bulging discs, etc. In addition, these machines are very rough to ride, have no shock absorbers other than in the seat, and generally will eventually cause and/or aggravate degenerative spine changes.
>
> Any of the activities involved in this gentleman's daily work routine could have caused his ruptured disc. Please reconsider this case. I will be happy to talk with you about this and/or explain my reasons for feeling that this is a workers' compensation case.

On the above evidence the administrative law judge held that the appellant had "more than adequately established" that he had sustained an injury of gradual onset out of and during the course and scope of his employment; that he was permanently and totally disabled; and that his healing period ended on June 30, 1988. On appeal the Commission reversed, with one commissioner dissenting. The majority opinion, signed by the two commissioners who agreed, concluded as follows:

> In summary, the medical testimony is that Lockeby's work might or might not have caused the injury. Although it is possible that the employment activities were responsible, there are other possible explanations, and we are not allowed to speculate as to what precipitated the medical disc protrusion.

We believe that the above summary by the Commission reveals three conclusions that are not supported by the evidence and the law.

First, the Commission finds that the medical testimony only opines that appellant's work might or might not have caused his injury. We do not think that this is a correct evaluation of the medical testimony. We have already set out portions of testimony

from the three doctors who testified, in which they express the opinion that the disabling condition of the appellant's back was work-related.

Dr. Arthur, a neurosurgeon who did a lumbar laminectomy on appellant, said the narrowing in his back "was due to a certain extent to the arthritis in these facet joints on the side. . . and that is partly at least a result of the aging process. But it was also due to a significant amount of bulging of the disc at the L5 level which would be more traumatic in other words than the facet arthritis was." Dr. Arthur also said that appellant's arthritis "might have contributed somewhat to this condition but certainly all these other things were a result, I believe, of his job."

Dr. Fletcher, a neurosurgeon who examined appellant at the request of the appellee's insurance carrier, was asked if he could say "with a reasonable degree of medical certainty that the disc bulging or protruding is work-related in this case, given the history of skidder operation, " and the doctor's answer was "it would be my opinion that it would be work-related."

Dr. White, appellant's family doctor, wrote the insurance carrier's representative and said, "I strongly disagree with your determination that Mr. Lockeby's back problem is not work-related."

Thus, the Commission's first conclusion that the medical testimony is that appellant's work *might or might not* have caused his injury is not supported by the record. Each doctor testified that in his opinion the disabling condition of appellant's back *was* work-related.

Second, the Commission's summary states that while "it is possible" that appellant's employment activities were responsible for his back condition, there were "other possible" explanations. Here, we think the Commission erred in its application of the law. It is not necessary that employment activities be the *sole* cause of a worker's injury in order to receive compensation benefits. It is enough if there is "a substantially contributory casual connection between the injury and the business in which the employer employs the claimant." *American Red Cross* v. *Wilson,* 257 Ark. 647, 649, 519 S.W.2d 60 (1975). *See also McGregor & Pickett* v. *Arrington,* 206 Ark. 921, 175 S.W.2d 210 (1943). But the

Commission's real problem here, we think, is its failure to accept the proposition that an accidental injury may result from repeated trauma upon the worker's body over an extended period of time. This is the problem that the third member of the Commission spoke of, in her dissent, when she said "the majority could deny benefits only by abandoning the long-standing recognition of gradual onset injuries."

This has been a long-standing rule in Arkansas. In *Batesville White Lime Company* v. *Bell,* 212 Ark. 23, 205 S.W.2d 31 (1947), the court said:

> [T]here is much authority for a holding that an injury, not necessarily the result of one impact alone, but caused by a continuation of irritation upon some part of the body by foreign substances may properly be said to be accidental.

212 Ark. at 26. In that case the medical evidence was that inhalation of dust over a twenty-three year period had aggravated the employee's heart condition. The Commission found that there was no trauma; therefore, there was no accidental injury. On appeal to circuit court, the Commission's denial of compensation was reversed. That action affirmed by the Arkansas Supreme Court, "even though," the opinion stated, "the evidence did not show the exact instant at which the disability of appellee could be said to have occurred . . . ."

In *Bryant Stave & Heading Company* v. *White,* 227 Ark. 147, 296 S.W. 2d 436 (1956), the employee was engaged in his usual job of loading stave bolts when he noticed a pain in his right side, leg and back. The next morning he could "hardly get out of bed." His problem was diagnosed as an aggravation of a preexisting back condition, and the Commission awarded compensation. In affirming, the Arkansas Supreme Court reviewed its prior cases, and many other authorities, and concluded:

> Notwithstanding anything we may have said in prior cases, we hold that an accidental injury arises out of employment when the required exertion producing the injury is too great for the person undertaking the work, whatever the degree of exertion or the condition of his health, provided the exertion is either the sole or a contributing cause of the injury.

227 Ark. at 155. *See also Tri State Insurance Company* v. *Mutual Liability Insurance Company,* 254 Ark. 944, 497 S.W.2d 39 (1973). And in *St. Vincent Infirmary* v. *Carpenter,* 268 Ark. 951, 597 S.W.2d 126 (Ark. App. 1980), we said:

> The Arkansas case law has long upheld the compensability of gradual injuries which arise out of and in the course of employment. In *W. Stanhouse & Sons, Inc.* v. *Simms*, 224 Ark. 86, 272 S.W.2d 68 (1954), the Supreme Court said:
>
> > We have long adhered to the rule that an accidental injury may stem not only from a specific incident or a single impact, but also may result by a continuation of irritation upon some part of the body. — Neither do we require the injured workman to make inescapable proof that said accidental injury occurred on a date certain. A reasonable definite time is all that is required.

268 Ark. at 955

We believe the Commission's second conclusion "although it is possible that the employment activities were responsible, there are other possible explanations" demonstrates a failure to apply the law which we have just discussed.

Finally, the third conclusion in the Commission's summary is that "we are not allowed to speculate as to what precipitated the medical disc protrusion." Although the word "medical" may be a typographical error, the answer to the statement is that no speculation is required. When deciding appeals from the Arkansas 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). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Phillips* v. *State,* 271 Ark. 96, 607 S.W.2d 664 (1980). However, those standards must not totally insulate the Commission from judicial review and render this

court's function in these cases meaningless. *Boyd* v. *General Industries,* 22 Ark. App. 103, 733 S.W.2d 750 (1987). Before we will reverse a decision of the Commission, the court must be convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. *International Paper Co.* v. *Tuberville*, 302 Ark. 22, 786 S.W.2d 830 (1990). When viewed in the light of the rules just stated and the law we have discussed, we do not think the Commission's decision is supported by substantial evidence.

The decision of the Commission is reversed and this matter is remanded for further proceedings consistent with this opinion.

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

Max SHAVER and Shelia Shaver *v.* Luther SPANN, Jr., and Rosalie Spann

CA 90-444 813 S.W.2d 280

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

Odell Pollard, P.A., and *Margaret Bunn Mead*, for appellants.

Brazil, Clawson & Adlong, by: *Charles E. Clawson, Jr.*, for appellees.

MELVIN MAYFIELD, Judge. This is the second appeal of this case. Max and Shelia Shaver were also the appellants in the first appeal, where an unpublished opinion was handed down February 28, 1990, by a division of this court, which reversed and remanded the case to the chancery court from which it came. It is from the order of the chancery court on remand that the appellants bring this new appeal.

As required by Rule 9(d) of the Rules of the Arkansas Supreme Court and Court of Appeals, the appellant has also abstracted in this second appeal the pertinent portions of the record filed in the first appeal. Based upon the abstract and our

opinion in the first appeal, we make the following statement of the matters now before us.

The original suit concerned appellants' purchase on July 11, 1987, of a dairy farm, 137 head of cattle, and various items of personal property and equipment for the sum of $300,000.00. Appellants testified that shortly after purchase, they discovered the dairy herd was heavily infected with mastitis, and the entire herd was sold for slaughter by court order in January of 1988. In December of 1987, the appellants filed suit alleging breach of express and implied warranties and seeking rescission and reimbursement for their down payment and necessary expenses. After appellants presented their evidence, the chancellor granted appellees' motion for a "directed verdict."

In the first appeal, we reversed the trial court's order granting the "directed verdict" and remanded the case. Our opinion simply stated "Reversed and Remanded." However, the mandate issued by our clerk stated that the case was remanded "for further proceedings . . . not inconsistent" with our opinion.

In the early case of *Rushing* v. *Horner*, 135 Ark. 201, 204 S.W. 1145 (1918), the court in a second appeal from chancery court, construed its remand for a new trial in the first appeal as follows:

> When a cause is remanded broadly for a new trial, all the issues in the case are open for trial anew, the same as if there had been no trial. "The case stands as if no action had been taken by the lower court."

135 Ark. at 205 (citations omitted). But in *Ferguson* v. *Green*, 266 Ark. 556, 587 S.W.2d 18 (1979), the court reviewed cases relating to remand of chancery cases for further proof and then held:

> Where a judgment [or decree] is reversed for error in the proceedings in the court below and remanded for proceedings according to law and not inconsistent with the opinion of the court, it is always understood that the proceedings in the court below, prior to the fault or error which is ascertained by this court to exist, are in no wise reversed or vacated by the adjudication of the appellate court, but the fault or error adjudicated is the point from

> which the cause is to progress anew . . . .

266 Ark. at 568 (citation omitted). As the court explained in *Ferguson*, the above rule results from the fact that chancery cases are reviewed de novo on appeal and all the issues raised in the court below are before the appellate court, and it determines what the decision of the chancellor should have been and renders the decree the chancellor should have made. 266 Ark. at 564. But, the opinion in *Ferguson* also pointed out that the appellate court has the power to remand "any case in equity or further proceedings, including hearing additional evidence." *Id.* at 565.

In our unpublished opinion in the first appeal, we discussed the "test" which the appellate courts in this state have said should be used to determine whether a motion for "directed verdict" should be granted. We also pointed out that since we were reviewing an appeal from a chancery court, where there was no jury, the motion before us was "technically a motion to dismiss" the claim filed by plaintiff below; however, we said the "test" was the same as used when a motion for "directed verdict" was made in a case being tried by a jury. We then pointed to comments made by the chancellor when granting the motion for "directed verdict" in the first trial of the present case and said the judge's statements revealed that he "weighed" the plaintiff's evidence instead of giving that evidence its "strongest probative force," and we said this demonstrated that the judge failed to "apply the proper test" to the evidence.

Apparently relying upon the mandate, the appellees filed a new motion in the trial court stating that the court should use the test which we referred to in our opinion and make a new determination of whether the court should grant a directed verdict or dismiss the appellants' complaint on the grounds that they had not established a prima facie case at the first trial. The appellants filed a response asking that the trial court deny appellees' motion.

Appellants also filed an amended complaint stating that when the court dismissed their complaint at the first trial, the court also entered a judgment against appellants on the promissory note given for the purchase of the dairy farm and cattle and ordered for payment of the note a sale of the property purchased upon which appellees held a security interest. Appellants also

alleged that the collateral had been sold at public auction; that at this point there could be no rescission of the purchase agreement; that appellees were liable to appellants for express and implied warranties as to the condition of the cattle sold to appellants; and that they should have judgement against appellees for damages and expenses incurred.

At the same time the amended complaint was filed, appellants also filed a motion to transfer this case from chancery to circuit court for the reason that the amended complaint stated a claim for money damages only and that was a claim exclusively cognizable in a court of law.

The appellees filed a response to the amended complaint generally denying the allegations in the complaint with regard to the right to recover damages but admitting the allegations of the amended complaint in regard to the judgment rendered against appellants and the sale at public auction of the dairy farm and equipment which had been purchased by appellants. The appellees also filed a response to appellants' motion to transfer to law, alleging that the motion should be denied.

After the above matters had been filed, a hearing was had at which the chancellor first considered appellees' motion for directed verdict. No additional testimony was taken and after hearing arguments of counsel, the trial judge stated that, in explaining his reasoning at the first trial, it did look as if he was weighing the evidence, but he did intend to apply the proper test. Stating that he was now applying the proper test, the judge reached the same conclusion and again granted the appellees' motion.

Appellants then asked the chancellor to consider their motion to transfer, stating that some indication was needed in that regard since they intended to appeal and would argue there that the matter should be transferred. The judge, however, said he did not think he could give a ruling "which is strictly prospective" but added that if the case came back he did not feel that a transfer to circuit court would be warranted.

We now address the arguments presented by the parties in this new appeal. The appellants first argue that the trial court erred in dismissing their complaint. They say, given its strongest

probative force, their evidence established a prima facie case of breach of express warranty (Ark. Code Ann. § 4-2-313(1) (1987)), breach of implied warranty of good health (Ark. Code Ann. § 4-2-316(3)(d)(ii)), and breach of implied warranty of merchantability and fitness for a particular purpose (Ark. Code Ann. § 4-2-314). Appellants contend the appellees' representations about the health of the herd were express warranties that all 137 head of cattle were healthy, except four which were identified as having mastitis; that the appellees knew of the disease or sickness; that the appellees knew appellants would use the cattle for milk production to make their living; and that the appellants relied upon appellees' word in proceeding with the purchase.

At trial, appellant Shelia Shaver testified that appellee Luther Spann stated the cattle were relatively young, that he was treating three cows for mastitis, and that the cattle had an occasional flare-up of mastitis. She said she asked about a cow out in the field with a swollen quarter, and Mr. Spann stated that cow could not be cured of mastitis and it would have to be sold; that when Mrs. Shaver asked for the records on the herd, Mr. Spann said he didn't bother keeping any; and that when she asked for the State Health Department records, the appellees said they had burned them. Max Shaver testified that when his wife asked Mr. Spann why he hadn't told them the truth, he replied, "If I had, you wouldn't have bought it."

Also, there was evidence that the appellees had requested laboratory testing of six special milk samples pulled from their herd during June 1987; that the samples contained excessive counts on the Wisconsin Mastitis Test (WMT) and Direct Microscopic Somatic Cell Count (DMSCC) during the month prior to the sale; that the health department had sent appellees a warning letter on June 2, 1987, advising of the unacceptable DMSCC; and advising them that if the health department received three out of five regular samples in violation of the acceptable count, it would suspend the dairy's permit to sell Grade A milk.

In *Henley's Wholesale Meats, Inc.* v. *Walt Bennett Ford, Inc.*, 4 Ark. App. 362, 631 S.W.2d 316 (1982), we set out the following test to determine when a "directed verdict" should be granted at the close of the plaintiff's evidence:

> The test is to take that view of the evidence that is most favorable to the party against whom the verdict is sought and to give it its highest probative value, taking into account all reasonable inferences deducible from it, and to grant the motion only if the evidence viewed in that light would be so [in]substantial as to require that a jury verdict for the party be set aside. *Bradford* v. *Verkler*, 273 Ark. 317, 619 S.W.2d 636 (1981). The applicable rule, stated in other terms, is that the duty of the trial court, sitting without a jury, when asked to give a "directed verdict" at the close of the plaintiff's case, is to consider whether the plaintiff's evidence, given its strongest probative force, presents a *prima facie* case. *McCollough* v. *Ogan*, 268 Ark. 881, 596 S.W.2d 356 (Ark. App. 1980), and *Werbe* v. *Holt*, 217 Ark. 198, 229 S.W.2d 225 (1950). As was pointed out in *Minton* v. *McGowan*, 253 Ark. 945, 490 S.W.2d 136 (1973), it is not proper for the court to weigh the facts at the time the plaintiff completes his case, and the motion should be denied if it is necessary to consider the weight of the testimony before determining whether the motion should be granted.

4 Ark. App. at 363. The above quotation comes from an opinion in a case appealed from a nonjury trial in circuit court, and the present case is an appeal from chancery court. However, the test is the same. *See* Newbern, *Arkansas Civil Practice and Procedure* § 23-12 (1985), which makes the following explanation:

> Either party may challenge the sufficiency of the other's evidence by moving for a directed verdict, in a jury trial, or dismissal, in a bench trial. The directed verdict and this sort of dismissal are provided in Ark. R. Civ. P. 50(a). While the case law which formerly provided for directed verdict and the statute provided for chancery dismissal were different in several respects from the rule, the rule does not specifically address the test for determining the sufficiency of the evidence, and, as the rule has thus not changed the law with respect to the test, cases decided prior to the advent of the rule should still be authoritative on that point.

The case of *Minton* v. *McGowan*, 253 Ark. 945, 490 S.W.2d

136 (1973), cited as authority in *Henley's Wholesale Meats* v. *Walt Bennett Ford*, *supra*, was an appeal from a chancery court. The test set out in the opinion of *Minton* v. *McGowan*, is as follows:

> Since this case involves a demurrer to the evidence, it is the duty of the trial court to give the evidence its strongest probative force in favor of the plaintiff and to rule against the plaintiff only if his evidence, when so considered, fails to make a *prima facie* case. . . . At the time the plaintiff completes his case, it is not proper for the court to weigh the facts, and the motion should be denied if it is necessary to consider the weight of the testimony before determining whether the motion should be granted.

253 Ark. at 946 (citations omitted). *See also Werbe* v. *Holt*, 217 Ark. 198, 229 S.W.2d 225 (1950).

We think appellants' evidence when viewed in the light of the above decisions is sufficient to establish a prima facie case and the trial court erred in granting the appellees' "motion for directed verdict" or motion to dismiss.

The second point argued by the appellants in the brief in this court is that this matter should be transferred from chancery to circuit court. In considering this point, we must keep in mind our role in the appeal of chancery cases. In *Hall* v. *Staha*, 303 Ark. 673, 800 S.W.2d 396 (1990), the Arkansas Supreme Court said:

> Chancery cases are tried de novo on appeal, and we will not reverse the chancellor's findings unless clearly erroneous. *Conway Corp* v. *Construction Engineers, Inc.*, 300 Ark. 225, 782 S.W.2d 36 (1989), *cert. denied*, 494 U.S 1080, 110 S.Ct. 1809 (1990). This court does not normally remand a case to chancery court, but rather we try the case de novo and render the decree that should be rendered below. The usual practice is to end the controversy by final judgment or by directions to the trial court to enter a final decree. This rule, however, is not imperative and this court, in the furtherance of justice, has the power to remand any case in equity for further proceedings, including hearing additional evidence. *Walt Bennett Ford* v. *Pulaski County*

Special School District, 274 Ark. 208, 624 S.W.2d 426 (1981).

303 Ark. at 679. See also *Ferguson* v. *Green*, *supra*. As we must reverse the chancellor again, we know from the last proceedings that the question of transferring this case to circuit court is bound to be presented again. Thus, we believe we should follow the usual practice, deciding in this de novo appeal all the issues presented that the record demonstrates are at this point ready for decision.

We find the case of *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986), on the question of whether this case should be transferred to circuit court, instructive. In that case, an attorney who had represented the appellee in a divorce action, argued that the chancellor lacked jurisdiction to award appellee damages for the fraud the attorney was found to have perpetrated against the appellee in connection with the divorce litigation. The attorney had in chancery court made no motion to transfer the claim to circuit court and had not demanded a trial by jury. The Arkansas Supreme Court stated that the issue for determination on appeal was whether the chancellor had the *power* to determine the matter.

In its opinion, the court discussed *Chamberlain* v. *Newton County*, 266 Ark. 516, 587 S.W.2d 4 (1979). In that case the appellant filed suit for an injunction but ultimately amended her complaint to ask only for damages. On appeal, the supreme court said appellant no longer claimed the right to an equitable remedy and therefore the chancery court lacked jurisdiction because there was no equitable relief being sought to which the tort claim might have been considered incidental for the purpose of exercising the clean-up doctrine.

In *Liles*, the court also cited *Bierbaum* v. *City of Hamburg*, 262 Ark. 532, 559 S.W.2d 20 (1977). That case also began as a suit for an injunction. The chancellor denied the injunction and, recognizing that the only issue remaining was the amount of compensation to which the appellant was entitled, transferred the case to the circuit court. On appeal the appellant argued the chancellor should have retained the case to determine the damages. The supreme court held that the chancellor not only could determine the damages aspect of the case but that he must do so *absent any request* that the case be transferred and must do

so despite the prospect that the granting of any equitable remedy might have "faded away."

And in *Liles* the court cited in its opinion *Crittenden County* v. *Williford*, 283 Ark. 289, 675 S.W.2d 631 (1984), which said it is only when the court of equity is "wholly incompetent" to consider the matter that "we will permit the issue of competency to be raised for the first time on appeal."

The Arkansas Supreme Court in *Liles* then summed up its holding on this issue as follows.

> Viewed together, these cases demonstrate that we have come to the position that unless the chancery court has no tenable nexus whatever to the claim in question we will consider the matter of whether the claim should have been heard there to be one of propriety rather than one of subject matter jurisdiction. We will not raise the issue ourselves, and we will not permit a party to raise it here unless it was raised in the trial court.

289 Ark. at 175-76.

In the instant case, appellants first sought rescission of their contract. Later, appellants amended their complaint to one for money damages only and made a written motion to transfer their cause of action to circuit court. The appellees argue that if this case is remanded, the chancery court would still have jurisdiction under the clean-up doctrine to determine the issues of damages. While we do not think our supreme court has decided that precise issue, we do not think we have to know the answer to that point in order to determine the transfer issue in this case.

We think the question here is whether this case should be transferred to law in the furtherance of justice. This issue is not based on the power of either the chancery or circuit court but is one of discretion. The court in *Liles* clearly did not foreclose this time-honored procedure. The opinion in that case said unless the chancery court has no tenable nexus the question of transfer to circuit court will be considered "one of propriety" and "we will not permit a party to raise it here unless it was raised in the trial court." And in *UHS of Arkansas* v. *Charter Hospital of Little Rock*, 297 Ark. 8, 759 S.W.2d 204 (1988), the supreme court said "it is clear that the chancery court abused its discretion in

exercising jurisdiction." 297 Ark. at 13. To make the point clear, in the case of *In re Porter*, 298 Ark. 121, 765 S.W.2d 944 (1989), the court cited *UHS of Arkansas* and said:

> There we required a chancery court to transfer to the circuit court a case in which a declaratory judgment had been sought with respect to the same issues pending in a circuit court proceeding. In that case neither court had been assigned exclusive jurisdiction by statute of the issues in question.

298 Ark. at 124. Thus, the supreme court has twice held, since the *Liles* decision, that cases may be transferred between chancery and circuit court based upon the proper exercise of discretion. In the present case the appellants filed a motion to transfer to circuit court and they argue on appeal that the chancellor erred in failing to grant the motion. In that connection, we need to consider a final point.

The record discloses that counsel for appellants and appellees also disagree as to what matters should be open if this case is remanded again. Counsel for appellants thought a new trial would be proper. He explained that two years have already elapsed since the evidence was first presented and that two more years would likely elapse before it could proceed further in the trial court. He pointed out that not only has the cause of action changed from one for rescission to one for damages but the extent of damage and the proof thereof have changed.

In *Rushing* v. *Horner*, *supra*, the court said:

> On a reversal of a cause by this court it seldom occurs that the same is remanded for a new trial, but when such is the direction of this court, then the case stands for trial precisely the same as if there had never been any trial.

135 Ark. 206.

In the present case because of the lapse of time, the nature of the claim and the relief now sought, we think this case should be remanded for a new trial. To go back to and try to finish a four-year old case would be courting disaster. It also seems proper for both sides to be able to present what is now a suit for money damages only to a jury if either side so desires. Since we

remand for a new trial, and for many of the same reasons, we also find in this de novo review that this court should, in the exercise of our discretion and in the furtherance of justice, transfer this case to circuit court.

Reversed and remanded for a new trial, with directions that the chancery court transfer this case to circuit court for the new trial.

COOPER and JENNINGS, JJ., agree.

Jeffery WOODBERRY *v.* STATE of Arkansas

CA CR 90-210 811 S.W.2d 339

Court of Appeals of Arkansas
Opinion delivered July 3, 1991

Don E. Glover, for appellant.

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

MELVIN MAYFIELD, Judge. Jeffery Woodberry has appealed a conviction of failing to support his dependent spouse. Appellant was first convicted in Crossett Municipal Court. He then appealed to the Ashley County Circuit Court. Upon an appeal from municipal court to circuit court, a defendant "shall be tried anew as if no judgment had been rendered." Ark. Code Ann. § 16-96-507 (1987). *See also Hogan* v. *State*, 289 Ark. 402, 712 S.W.2d 295 (1986). This means that the trial in circuit court is de novo; the parties are in the same position as if there had been no trial in municipal court; all the evidence must be produced anew in circuit court; and the decision in circuit court must be based on the evidence introduced in that court. *Strickbine* v. *State*, 201 Ark. 1031, 148 S.W.2d 180 (1941).

This case was tried in circuit court without a jury in February of 1990. The evidence and the court's ruling is abstracted in appellant's brief as follows:

> *Direct Examination of Donna Woodberry*
>
> I am Donna Woodberry; married Jeffery Woodberry in November 1987. We separated in May or June 1989. I can not work because I have high blood pressure and back problems. (T. 28-29) Mr. Woodberry does not work and has not supported me since our separation. He works for Carl J. Bierbaumb when he is able to work. (T. 30)
>
> I have had to go the doctor three (3) times since our separation. I worked a little while we were living together and quit because he didn't want me working at night. (T. 33)
>
> *Cross Examination of Donna Woodberry*

> I have not filed for Social Security and am not under the care of a doctor. I just have to take high blood pressure medicine. (T. 33)
>
> Mr. Woodberry has been ill or sick as a result of an injury, and I don't know whether he is drawing compensation or not.
>
> . . . .
>
> *Redirect Examination of Donna Woodberry*
>
> I received $162.00 per month for AFDC for my little girl, and Mr. Woodberry is not the father. (T. 39)
>
> *Findings, Application of Law and Judgment*
>
> The Court: Now, its the order of the court that the order of the Municipal Court of Crossett be affirmed. I don't know what Mr. Woodberry's condition is, but if he has been injured on the job, certainly he is drawing compensation. Now, Mrs. Woodberry is entitled to the same type of support as long as she's married to Mr. Woodberry and he is able to provide that support. I have no proof here that he is not able, so the Municipal Judge's judgment will be affirmed. (T. 42)

The offense of which appellant was convicted is set out in Ark. Code Ann. § 5-26-401 (1987) as follows:

> (a) A person commits the offense of nonsupport if, without just cause, he fails to provide support to:
>
> (1) his spouse who is physically or mentally infirm, or financially dependent; . . . .

The only argument for reversal is that the evidence is insufficient to sustain the conviction. Appellant contends he was found guilty on evidence which did not establish that he was able to work or had any source of income. The appellant says "speculation cannot serve as a substitute for proof," and his conviction should be reversed. He also contends that the trial court has erroneously shifted the burden of proof to appellant.

The state responds by citing *Nelke* v. *State*, 19 Ark. App. 292, 295, 720 S.W.2d 719 (1986), which held that the phrase

"without just cause," used in Ark. Code Ann. § 5-26-401(a), means "the inability to pay," and that the inability cannot be brought about intentionally and willfully by the defaulting party. The state also argues that it introduced evidence from which the trial court could find that the appellant had the duty and ability to provide support to his spouse but had failed to do so. The state does not think it should be required to "negate any possible excuses for nonpayment" because this "would create a burden it could never meet." Our case of *Reese* v. *State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988), and the case of *Wisconsin* v. *Duprey*, 149 Wis. 2d 655, 439 N.W.2d 837 (Wis. Ct. App. 1989), are cited in support of the state's position.

In *Reese* the issue was whether the defendant's suspended sentence should be revoked for inexcusably failing to make monthly payments on his restitution and fine as required by the conditions of his suspension. We said "once the state has introduced evidence of non-payment, the burden of going forward does shift to the defendant to offer some reasonable excuse for his failure to pay." 26 Ark. App. at 44. The case of *Wisconson* v. *Duprey* relied upon *Davis* v. *Barber*, 853 F.2d 1418 (7th Cir. 1988), for the statement in *Duprey* that "[a] state may require a defendant to prove an affirmative defense provided it does not serve to negate any elements of the crime that the state is to prove in order to convict." 439 N.W.2d at 839.

In reaching our decision in the present case, we do not need to discuss the question of "shifting the burden of proof" or the problems associated with requiring a defendant to prove an affirmative defense. Here, the case was tried without a jury and the question before us is whether there is substantial evidence to support the appellant's conviction. On appeal in criminal cases, whether tried by a judge or jury, we review the evidence in the light most favorable to the state and affirm if there is any substantial evidence to support the trial court's judgment. *Ryan* v. *State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990). Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* Based upon our standard of review, we do not believe the judgment in this case is supported by substantial evidence.

According to *Nelke* v. *State*, *supra*, the phrase "without just cause," used in Ark. Code Ann. § 5-26-401, means "the inability to pay" and that cannot be brought about "intentionally and willfully." There is testimony in the record to support a finding that the appellant and his spouse were separated, that she was dependent, and that he had not supported her since the separation. However, on the issue of whether he had the ability to pay and whether any inability in that regard was intentionally or willfully caused by appellant, the evidence produced by the state simply is not, in our judgment, "of sufficient force and character that it will, with reasonable certainty, compel [the trial judge's conclusion] without resorting to speculation or conjecture."

The problem is that appellant's spouse testified that appellant "has been ill or sick as a result of an injury, and I don't know whether he is drawing compensation or not." She also testified that "he works for Carl J. Bierbaumb when he is able to work." Obviously that testimony will not support a finding that appellant has been intentionally or willfully failing to work. And as to whether the appellant has been drawing some kind of compensation while he has been unable to work—the trial judge's finding that "if he has been injured on the job, certainly he's drawing compensation" is clearly speculation or conjecture. Although appellant's spouse testified he had been ill or sick as a result of an injury, we do not know whether or not the injury was job-related. And even if it was job-related, we can take judicial notice of the fact that there are reasons why one who is hurt on the job may not draw compensation. Therefore, we do not think the trial court's decision is supported by substantial evidence.

■ In *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), the court held that where the appellate court finds the evidence insufficient to support the judgment of conviction it would be double jeopardy to allow the case to be tried again.

Reversed and dismissed.

CRACRAFT, C.J., agrees.

JENNINGS, J., concurs.

AMERICAN STATES INSURANCE CO. *v.* TRI TECH, INC.

CA 90-424 812 S.W.2d 490

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

Friday, Eldredge & Clark, by: *M. Gayle Corley*, for appellant.

Elcan & Sprott, by: *Franck C. Elcan II*, for appellee.

JUDITH ROGERS, Judge. Appellee, Tri Tech, Inc., filed suit against appellant, American States Insurance Co., seeking to recover on a payment bond issued by American in favor of E.M. Rader, Inc., as principal, pursuant to Ark. Code Ann. § 18-44-503 (Supp. 1989). Both parties moved for summary judgment, and the case was submitted to the trial court for decision based on an agreed statement of facts. The trial court granted Tri Tech's motion, and awarded it judgment in the amount of $41,042.42, in addition to an attorney's fee of $2,000.

American raises five issues for reversal, the first four of which can be pared down to the single issue of whether the trial court erred in holding American liable to Tri Tech as surety on the bond. In its remaining issue, American challenges the award of attorney's fees. We reverse.

According to the stipulation, E.M. Rader, Inc., was the prime contractor on an expansion project of the Wastewater Treatment Plant in Harrison, Arkansas. Rader contracted with B&D Welding Co. for B&D to supply "miscellaneous" metals for use in the project, including certain prefabricated handrails. B&D in turn entered into a contract with Tri Tech to furnish the handrails. The job specifications required the handrail drawings to be approved by both Rader and the project architect/engineers. The drawings were drafted by Tri Tech, and gained the necessary approval. The handrails were shipped by Tri Tech directly to the project site with the bill of lading bearing the notation of Tri Tech as shipper. Neither B&D nor Tri Tech was required to provide any labor or to take part in the installation of any materials on the project, and neither did, in fact, perform labor or install any materials at the job site. Rader paid B&D for these materials; however, B&D failed to pay Tri Tech for the handrails.

Recovery on bond in this situation is based on the concept of privity between the supplier seeking recourse and the original contractor. *Sweetser Construction Co.* v. *Newman Brothers, Inc.*, 236 Ark. 939, 371 S.W.2d 515 (1963). In *Sweetser*, the supreme court observed:

> While the privity of contract is necessary it need not be directly with the original contract but it must spring out of it. That it is not derived directly from the original contractor does not destroy the privity. It may come through contract with the subcontractor, as, in mechanic's lien cases it frequently does. The contract and bond require the principal and surety to respond for claims for labor and material furnished under the contract, and whether that claim for labor and material comes directly from the original contractor or from a subcontractor, or from a laborer or materialman under the subcontractor is immaterial, so long as its origin is called for in the original contract and grows out of the original contract.
>
> . . .
>
> But it is at this point that privity of contract ends, and one who supplies material to materialman, who in turn supplies the subcontractor, is to be relegated to the status of a stranger to the original contract, since such person's contract or undertaking is neither with the principal contractor, or with the one who, as in the case of a subcontractor, deals directly with the principal contractor. Such person's contract is therefore but indirect and collateral to the original contract, and for want of privity does not serve to bring such party within the purview of the principal contractor's bond.
>
> In this opinion we do not mean to hold that a person who furnishes material to a subcontractor is not in privy with the prime contractor, but just the contrary. . . It is generally held that persons supplying materials and labor to a subcontractor, rather than directly to the general contractor, may recover on a bond given pursuant to such a statute.

Id. at 943-44, 371 S.W.2d at 517-18.

Thus, two general principles emerge from the *Sweetser* decision: A materialman who furnishes material to a materialman has no recourse against the bond for lack of privity with the prime contractor, while a materialman who supplies material to a subcontractor in privity with the contractor may recover on the bond. As said by the *Sweetser* court, the rationale supporting these principles is to afford a reasonable degree of certainty with regard to the extent of liability under the bond.

The parties are in agreement as to the governing law, but disagree on its application to the facts of this case. As do the parties, we acknowledge that Tri Tech's recovery is dependant on the status of B&D; thus, the issue here is whether B&D is to be considered a materialman or a subcontractor. The holding in *Sweetser* has been followed in subsequent cases; however, these decisions offer no real guidance in determining whether one occupies the status of either a subcontractor or materialman. *See e.g. River Valley, Inc.* v. *American States Insurance Co.*, 287 Ark. 386, 699 S.W.2d 745 (1985); *Valley Metal Works, Inc.* v. *A.O. Smith-Inland, Inc.*, 264 Ark. 341, 572 S.W.2d 138 (1978); *General Electric Supply Co.* v. *Downtown Church of Christ*, 24 Ark. App. 1, 746 S.W.2d 386 (1988).

Where a distinction is made between a subcontractor and a materialman, a person, to become a subcontractor rather than a materialman, must generally do something more than merely furnish materials. 53 Am. Jur. 2d *Mechanics' Liens* § 72 (1970). Under the authorities, one who takes no part in the construction of a building, but merely furnishes material for use in a building, is not a subcontractor, and if the claimant is employed to furnish material only, whether fabricated or made ready for use or not, he cannot be regarded as a subcontractor. *J.W. Thompson Co.* v. *Welles Products Corp.*, 243 Kan. 503, 758 P.2d 738 (1988). One who is simply employed to furnish materials, whether such materials be manufactured or not and whether he be required to transform or fabricate such materials into a condition where it meets the requirements of the contract, or the specifications, is nonetheless a materialman. *Leonard B. Herbert, Jr. & Co., Inc.*, 336 So. 2d 922 (La. Ct. App. 1976). Conversely, one who not only furnishes materials, but installs them, is a contractor or a subcontractor, and not a materialman, within the meaning of mechanics' lien laws. *American Buildings*

Co. v. *Wheelers Stores*, 585 P.2d 845 (Wyo. 1978).

A case factually similar to the one at bar is *J.W. Thompson Co.* v. *Welles Products Corp.*, *supra*. The case involved the construction of an additional "digester" for operation at a city wastewater treatment plant. Penta Construction Company, Inc., was the principal contractor on the project, which contracted with Welles Products Corp. to provide materials and equipment, including the necessary compressor systems. These systems were to be made to specification with the requirement that shop drawings be approved by the engineering firm in charge of the project. Penta was responsible for installing the entire system, although Welles was to provide a representative to inspect the installation and to train city personnel in use of the equipment. Welles contracted with J.W. Thompson Co. to supply certain components needed to fulfill its purchase order with Penta. Thompson shipped the equipment to the project site. At issue was whether Thompson could recover on Penta's bond, the resolution of which depended on the legal relationship between Penta and Welles. On these facts, the court held that Welles was a materialman, and thus denied recovery.

We do not set aside findings of fact by a circuit judge sitting as a jury unless they are clearly erroneous. *Taylor's Marine, Inc.* v. *Waco Manufacturing, Inc.*, 302 Ark. 521, 792 S.W.2d 286 (1990). A finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Sugarloaf Development Co., Inc.* v. *Heber Springs Sewer Improvement District.*, 34 Ark. App. 28, 805 S.W.2d 88 (1991). Based on the authorities mentioned above, we conclude that B&D was a materialman, and not a subcontractor; therefore, the trial court erred in allowing Tri Tech recovery under the bond.

American's final argument questions the authority of the trial court to award an attorney's fee in this case under Ark. Code Ann. § 16-22-308 (Supp. 1989), which provides for an award of a fee to the prevailing party in certain civil actions. Since the judgment in favor of Tri Tech is reversed, the award of the attorney's fee is also reversed. *Brookside Village Mobile Homes* v. *Meyers*, 301 Ark. 139, 782 S.W.2d 365 (1990). Therefore, we

do not reach the merits of American's argument.

Reversed.

COOPER and DANIELSON, JJ., agree.

Porter EVERETT, Mr. Bass of Arkansas, and Boat and Tackle Mart *v.* Mike WINGERTER

CA 91-231 816 S.W.2d 613

Court of Appeals of Arkansas
En Banc
Opinion delivered August 21, 1991

Walter A. Murray, for appellant.

Dale West, for appellee.

PER CURIAM. Porter Everett, Mr. Bass of Arkansas, and Boat and Tackle Mart have appealed from a judgment in favor of appellee Mike Wingerter in the amount of $3,458.00 plus costs. The judgment was not superseded, and appellee caused a writ of garnishment to be served on a banking institution, which has in its hands assets and things of value belonging to appellants. The garnishee is now holding those assets subject to further proceed-

ings to foreclose the lien of that attachment.

The transcript has now been lodged in this court. Appellants have filed with the clerk a cashier's check in the amount of $3,750.00 and petition us to approve the deposit as a supersedeas bond, authorize the issuance of an order staying all proceedings pending appeal, and direct the garnishee to release appellants' assets from the lien of the garnishment.

The issuance of an order staying proceedings pending appeal is governed by Ark. R. App. P. 8(c), which requires that one seeking such supersedeas file a bond having "such surety or sureties as the court may require." The rule further provides that the bond be to the effect that the appellant shall pay to the appellee all costs and damages, and otherwise perform the judgment or order, if the case is affirmed on appeal, or if the appellant fails to prosecute the appeal or it is dismissed. In *Ryder Truck Rental, Inc.* v. *Sutton*, 305 Ark. 374, 807 S.W.2d 909 (1991), the supreme court held that the language of the rule allows the court discretion as to the type of surety it will require for a supersedeas bond, and that sureties other than personal or corporate bonds may be considered, including a pledge of collateral so long as the property pledged is deemed of sufficient value to adequately secure the payment of the judgment. A pledge of cash in an amount sufficient to satisfy the judgment if affirmed on appeal is such an alternative to a personal or corporate bond. We therefore approve the cash bond and authorize the issuance of a supersedeas by the clerk.

Appellants' motion for an order directing the garnishee to release appellants' assets from the lien of the garnishment, however, is denied. The effect of a valid supersedeas bond does not have the effect of releasing the lien of prior attachments. Where, as here, the lien of the writ of garnishment has attached before a supersedeas bond is filed, the bond has only the effect of staying further proceedings to enforce the lien. *See Ryder Truck Rental, Inc.* v. *Sutton, supra.*

Harold Wayne CARROLL *v.* STATE of Arkansas

CA CR 90-225 814 S.W.2d 913

Court of Appeals of Arkansas
Division II
Opinion delivered September 4, 1991

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

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

ELIZABETH W. DANIELSON, Judge. Appellant Harold Wayne Carroll appeals the ruling of the Garland County Circuit Court which found him guilty of refusing a breathalyzer test and suspended his driver's license for six months. Carroll claims he was confused by the actions of the sheriff's deputies as to whether he had the right to consult an attorney prior to taking a breathalyzer test and should therefore not be held criminally responsible for refusing to take the test. We find no error and affirm.

Carroll was returning to Little Rock from Hot Springs when he was stopped by the state police and charged with speeding, passing on a double yellow line, and driving while intoxicated. He was later acquitted of the driving while intoxicated charge and paid fines for speeding and passing on a double yellow line. At the Garland County Sheriff's Department, Carroll was handed a form stating his *Miranda* rights, which he read, and then wrote at the bottom of the form, "I have an attorney." Immediately after Carroll read his *Miranda* rights, the state trooper read Carroll

the implied consent form, based on Ark. Code Ann. § 5-65-202 (1987), which explains that one who operates a motor vehicle in Arkansas is deemed to give his consent to a breathalyzer test to determine if he is legally intoxicated, explains the punishment for refusing to submit to such a test, and also explains that he does not have the right to speak with an attorney prior to deciding whether to take the test. Carroll subsequently refused to take the test.

Carroll claims that he was confused by the conduct of the law enforcement officers in that after being given his *Miranda* rights he was then read his rights under the implied consent statute and told that he did not have a right to consult with his attorney prior to taking the breathalyzer test. Carroll was then allowed to consult with a companion, an attorney, who was with him at the time he was arrested. This attorney was allowed to offer counsel to Carroll and on several occasions to consult another attorney by telephone. After about an hour, while the attorney was on the telephone, Carroll was again asked if he was going to take the test. Carroll asked to speak with his attorney and was told she had said he would have to make up his own mind about taking the test. Carroll claims that the officers' actions were inconsistent, confusing him as to his right to counsel before a breathalyzer test, and because of this he should not be held criminally liable for the refusal to submit to the breathalyzer test. According to *Marx* v. *State*, 291 Ark. 325, 724 S.W.2d 456 (1987), there is no constitutional right to counsel in connection with the test.

Appellant relies on *Wright* v. *State*, 288 Ark. 209, 703 S.W.2d 850 (1986), but there are important distinctions between that case and the one at bar. In *Wright*, the defendant was read his *Miranda* rights in connection with a law enforcement officer's own explanation of the implied consent law, which did not inform the defendant that he did not have the right to counsel before deciding to take the test. Confusion resulted when the defendant in *Wright* was given two opportunities to reach his attorney, which confirmed his mistaken notion that he had a right to consult his attorney prior to taking a blood alcohol test. The supreme court held that the defendant in *Wright* should not be held accountable for a refusal to take the test because of the inherent confusion caused by reading the *Miranda* rights together with the officer's version of the implied consent form.

Although appellant Carroll was read his *Miranda* rights and allowed to consult with his attorney companion, he was also explicitly told he did not have the right to consult an attorney before taking the breathalyzer test. The "inherent confusion" present in *Wright* was therefore not present in this case and the conviction is affirmed.

Affirmed.

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

Marcus Deshon JOHNSON *v.* STATE of Arkansas

CA CR 90-264 814 S.W.2d 915

Court of Appeals of Arkansas
Division I
Opinion delivered September 4, 1991

James P. Clouette, for appellant.

Winston Bryant, Att'y Gen., *Catherine Templeton*, Ass't Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Appellant Marcus Johnson was found guilty in a jury trial of possession of cocaine with intent to deliver, and he was sentenced to serve 30 years in the Arkansas Department of Correction.

Wayne Bewley of the Little Rock Police Department testified that at approximately 10:50 p.m. on November 19, 1989, he stopped a vehicle for speeding. The officer pulled up behind the stopped vehicle where he could see its license plate. While the officer was talking on his radio, checking out the stopped vehicle, he saw a plastic bag come out the passenger's window of the vehicle and land on the ground by the sidewalk. Right after that the driver's door opened and the appellant stepped out of the vehicle. The officer said there was a street light at the location and he got a good look at appellant's face. He also testified that there were two passengers in the car; a female in the back seat and a male in the front. Officer Bewley testified he asked appellant to stay in the car and he would be there in just a second. He testified that appellant sat back in the car and about thirty seconds later drove off, throwing gravel and rocks all over the officer's car. A chase ensued, but the officer was unable to keep up with appellant's vehicle and the pursuit was abandoned. Officer Bewley testified that he turned around at 20th and Oak and returned to 22nd and Oak where he had stopped the vehicle driven by appellant, and the officer picked up the plastic bag that

had been thrown out of that vehicle. Bewley also said there was no foot or car traffic around the plastic bag and that the streets were empty at that time. The bag contained about 15 white rocks which later proved to be almost 20 grams of cocaine.

Approximately an hour later, Officer Larry Ringgold received a call that two men were pushing a car up an alley on 21st street. Officer Ringgold testified that when he arrived at the location the vehicle had been involved in a single-car accident and that it fit the description of the vehicle that had been stopped by Officer Bewley approximately one hour earlier. Officer Ringgold said he saw two men, one of whom Ringgold identified as the appellant, in the yard of a house approximately 30 feet from the vehicle. The officer took appellant and the other man into custody and called Officer Bewley to the scene. When Bewley arrived, he identified appellant as the driver of the vehicle he had pursued.

On appeal the appellant argues that (1) the trial court erred in failing to grant his motions for directed verdict; (2) the evidence was insufficient to allow a conviction for possession of cocaine with intent to deliver; and (3) the verdict was against the law and the weight of the evidence. Each of these arguments challenges the sufficiency of the evidence.

It is appellant's contention that he was convicted upon purely circumstantial evidence; that his conviction is based upon mere suspicion, speculation, and conjecture; that the contraband was not found in the vehicle but in an area from which the officer had been absent for several minutes; and that anyone could have dropped the plastic bag. Appellant also argues it cannot be reasonably inferred that because he was the driver of the car, he knew that passengers possessed drugs or that he exercised dominion or control over the drugs. Appellant admits that his actions of speeding off and eluding the police are suspicious, but argues that he was also charged with theft by receiving a stolen automobile and therefore his suspicious behavior is not substantial evidence linking him to the contraband drugs.

In resolving a question of the sufficiency of the evidence in a criminal case, we view the evidence in the light most favorable to the appellee and affirm if there is substantial evidence to support the decision 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 and precision, 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, supra*. The fact that evidence is circumstantial does not render it insubstantial. *Small* v. *State*, 5 Ark. App. 87, 632 S.W.2d 448 (1982).

The gist of appellant's argument is that the state failed to prove the cocaine was in appellant's joint or constructive possession. In order to sustain a conviction for possession of a controlled substance, the case law is clear that actual or physical possession is not required. *Sweat* v. *State*, 25 Ark. App. 60, 752 S.W.2d 49 (1988). Constructive possession is the control, or right to control, the contraband in question, and constructive possession is sufficient for conviction. *Osborne* v. *State*, 278 Ark. 45, 643 S.W.2d 251 (1982).

In *Plotts* v. *State*, 297 Ark. 66, 759 S.W.2d 793 (1988), our supreme court held that where there is joint occupancy of the premises where contraband is found, some additional factor must be present linking the accused to the contraband. In such cases the state must prove that the accused exercised care, control and management over the contraband and that the accused knew the matter possessed was contraband. 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), this court applied the *Plotts* rationale to affirm a conviction in a case where the appellant was driving a truck which

neither he nor the passenger owned. After a legal stop the officer noticed a grocery sack containing green vegetable matter, which later proved to be marijuana, in plain view on the floorboard on the passenger's side of the truck. This court held the evidence that Nowden was exercising dominion over the vehicle by driving it, coupled with his nervous behavior after he was stopped, and the fact that the contraband was in his immediate vicinity was enough to sustain his conviction for possession of a controlled substance.

Applying the *Plotts* rationale to the instant case, in addition to the joint occupancy of the vehicle, there is at least one additional factor which links appellant to the cocaine and from which constructive possession can be inferred. Appellant was exercising dominion and control over the vehicle by driving it. Moreover appellant exhibited suspicious behavior by speeding away after he was stopped. Indeed, the evidence in the instant case is stronger than that in *Nowden* where the appellant "was just very nervous." Nervousness during an arrest and search can be expected. See *Cerda* v. *State*, 303 Ark. 241, 795 S.W.2d 358 (1990). Although appellant argues his suspicious behavior is not substantial evidence linking him to the contraband drugs as he was also charged with theft by receiving the stolen auto, the jury had the right to conclude that appellant's behavior was the result of the presence of a controlled substance in the vehicle.

We are not unmindful of appellant's reliance upon *Williams* v. *State*, 289 Ark. 443, 711 S.W.2d 825 (1986). However, in *Plotts*, our supreme court in finding the facts sufficient to establish possession stated that its decision in *Williams* would have been decided differently under its current analysis.

As to appellant's argument that anyone could have dropped the bag at that location and that the policeman was absent from the area for several minutes, Officer Bewley testified that he saw the bag come out of the window and saw where it landed. When he returned to the area the plastic bag was the only thing lying on the ground, there was no foot or car traffic at the time, and the streets were empty. Moreover, the officer ended pursuit after only two blocks. We think Officer Bewley's testimony presents sufficient evidence from which the jury could find that the plastic bag found on the ground at 22nd and Oak was the

bag that Officer Bewley saw thrown from the vehicle driven by the appellant.

Also, there is evidence that the plastic bag contained approximately 20 grams of cocaine. Possession of more than 1 gram of cocaine gives rise to the presumption that it was possessed with intent to deliver. Ark. Code Ann. §5-64-401(d) (1987).

Finally, although appellant produced several witnesses who testified appellant was inside a house when the vehicle was discovered by Officer Ringgold, thus disputing Ringgold's testimony that appellant was in the yard of a house approximately 30 feet from the vehicle, inconsistencies in the testimony are matters for the jury to resolve. *Ronning* v. *State*, 295 Ark. 228, 748 S.W.2d 633 (1988).

Considering the evidence in the light most favorable to the appellee we think the evidence is sufficient to support appellant's conviction, and the trial court did not err in refusing to grant appellant's motion for a directed verdict.

Affirmed.

JENNINGS and COOPER, JJ., agree.

Jerry Lee WARD *v.* STATE of Arkansas

CA CR 90-319 816 S.W.2d 173

Court of Appeals of Arkansas
Division I
Opinion delivered September 11, 1991

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

Winston Bryant, Att'y Gen., by: *Pamela Rumpz*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Chief Judge. Jerry Lee Ward appeals from his conviction of criminal attempt to commit burglary for which he was sentenced as a habitual offender to a term of twenty years in the Arkansas Department of Correction. He contends that the evidence was insufficient to support his conviction and that the trial court erred in permitting the introduction of physical evidence found near the scene of the crime. We find no error and affirm.

Where the sufficiency of the evidence is challenged on appeal of a criminal conviction, our rule requires a review of that issue prior to consideration of asserted trial error. This rule is based on double jeopardy considerations, which would preclude a second trial where a conviction is reversed for insufficient evidence. *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984). On appeal, this court views the evidence and all permissible inferences deducible therefrom in the light most favorable to the State, and will affirm if there is any substantial evidence to support the findings of the factfinder. *Sullivan* v. *State*, 32 Ark. App. 124, 798 S.W.2d 110 (1990); *Harris* v. *State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985). In making this determination, we do not weigh evidence on one side against the other but simply determine whether the evidence presented by the State will support the

verdict. *Ricketts* v. *State*, 292 Ark. 256, 729 S.W.2d 400 (1987).

Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without requiring one to resort to speculation or conjecture. *Booth* v. *State,* 26 Ark. App. 115, 761 S.W.2d 607 (1989). The fact that evidence is circumstantial does not render it insubstantial. *Sweat* v. *State*, 25 Ark. App. 60, 752 S.W.2d 49 (1988). When circumstantial evidence alone is relied upon, it must indicate the accused's guilt and exclude every other reasonable hypothesis. It is only when the circumstantial evidence leaves the jury solely to speculation and conjecture that it is insufficient as a matter of law. *Cristee* v. *State* 25 Ark. App. 303, 757 S.W.2d 565 (1988). The action of an accused fleeing from the scene of a crime is a circumstance that may be considered with other evidence in determining guilt. *Murphy* v. *State*, 255 Ark. 90, 498 S.W.2d 884 (1973); *Cristee* v. *State, supra.*

Arkansas Code Annotated § 5-3-201(a)(2) (1987) provides that a person attempts to commit an offense if he purposely engages in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense, whether or not the attendant circumstances are as he believes them to be. 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. Ark. Code Ann. § 5-39-201 (1987).

Here, the evidence viewed in the light most favorable to the State discloses that Lafayette Champagne lived across the street from the Sonic Drive-In on Highway 161 in North Little Rock. Champagne testified that he is a "volunteer neighborhood-watcher" and that on February 19, 1990, at approximately 3:00 a.m., he saw appellant walking in his (Champagne's) neighborhood, in an "alley" that runs between a pawn shop and an apartment building. Champagne stated that appellant stopped and looked inside the pawn shop, but made no effort to enter the building. Champagne then observed a white pickup truck come out of the same alley and pass by appellant. Appellant waved at the driver who waved back at appellant as if they were communicating in some way. Champagne testified that he observed

appellant carrying a set of keys and "something long" in his hand. Within minutes, the white pickup truck again passed by, and appellant and the driver waved to each other. Champagne testified that appellant then went to the front of the Sonic Drive-In and stood there for several minutes looking inside. Suspicious that appellant was about to break into the Sonic, Champagne called the police.

Champagne testified that the area around the Sonic was well-lighted and that he could see clearly from his vantage point. He stated that he saw appellant put a key into the door lock, shake the door, and then proceed to walk around to the back of the building. At about that time, a police car arrived. When appellant saw the lights on the car, he crouched down, "crawled like a jackrabbit," and jumped over a chain-link fence into the yard of the residence next to the Sonic, where he was apprehended by the police.

Officer Scott Hasselbach testified that he was in the immediate area when he got a call regarding suspicious activity at the Sonic and was there "in a matter of seconds." He stated that Officer Laurie Robinson arrived shortly thereafter. Hasselbach first saw appellant running toward a chain-link fence separating the Sonic property from the backyard of an adjacent private residence. He and Officer Robinson apprehended appellant in the backyard of that residence. Officer Hasselbach testified that the area was well-lighted and that he did not observe appellant carrying anything in his hands.

After apprehending appellant, Officer Hasselbach found a white pickup truck matching the description given by Champagne parked at an apartment building "just to the south of the pawn shop and the Sonic." The officer testified that he determined from the heat of the engine and the absence of dew on the hood that the pickup truck had been driven a short time before he found it. Appellant's automobile was found at the same location. There was evidence that appellant made a statement to Officer Eugene Tyree that, on the night of his arrest, appellant had gone for a walk and was sitting in the driveway of the Sonic when he saw some headlights and ran. Appellant told the officer that he was walking from a friend's house located on Taylor Street. Appellant advised that the white pickup truck, which had been

observed in the area, belonged to his friend who lived on Taylor Street. Officer Tyree testified without objection that Champagne told him that he had seen appellant exit the white pickup truck "just prior to him prowling around the area."

Flora Mae Whitlock testified that she lived next door to the Sonic Drive-In but was unaware of the events of February 19 until a few days later. She stated that the first time she went into her backyard after that date she found a screwdriver, chisel, hammer, and pair of black socks near the fence adjacent to the Sonic Drive-In. She testified that the items brought to the courtroom that morning by police officers were the ones that she had found in her yard, even though she could not testify to any identifying marks.

Appellant makes two sufficiency arguments. First, he argues that there was insufficient evidence that he took a substantial step toward unlawfully entering the building. We disagree. There was evidence that appellant made an attempt to enter the Sonic by the use of a key and that he had no permission to make such an entry. We conclude that this evidence is sufficient to support the finding that appellant took a substantial step toward committing the offense of burglary.

Second, appellant argues that there was insufficient evidence that he had attempted to enter the Sonic for the purpose of committing an offense punishable by imprisonment. We cannot agree.

In *Grays* v. *State*, 264 Ark. 564, 572 S.W.2d 847 (1978), the supreme court stated that "the fundamental theory, in absence of other intent or explanation for breaking or entering an occupiable structure at night, is that the usual object or purpose of burglarizing an occupiable structure at night is theft." 264 Ark. at 568, 572 S.W.2d at 849. There, the court upheld a burglary conviction where the appellant had illegally entered a seed company when it was not open for business and fled from the premises when he was discovered by the police. The court concluded that, "even when we consider the facts in the light most favorable to appellant, we can find no rational basis for a verdict acquitting him of the offense of burglary." 264 Ark. at 568, 572 S.W.2d at 849.

In *Norton* v. *State*, 271 Ark. 451, 609 S.W.2d 1 (1988), the

supreme court stated that due process requires that the prosecution prove beyond a reasonable doubt every element of the crime charged. As specific criminal intent and illegal entry are both elements of the crime of burglary, the existence of intent may not be presumed from the mere showing of the illegal entry. In Norton, the court reversed a burglary conviction because there was no evidence from which a jury could find that the appellant had entered the building for an illegal purpose, noting that "[a]t most, the evidence revealed that appellant was 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." 271 Ark. at 454, 609 S.W.2d at 3. The court recognized its decision in *Grays,* pointing out that in *Grays,* unlike in *Norton,* the appellant fled the scene when he was discovered by the police.

In *Cristee* v. *State*, *supra,* a burglar alarm at a lumber company was activated and the appellant was observed trying to climb over the fence that enclosed the lumberyard. When a witness yelled at him, the appellant started running but was apprehended by the police shortly thereafter. The appellant was observed wearing gloves and carrying a crowbar just prior to his arrest and a large hole was discovered in the side of the lumber company office building the next morning. The appellant was convicted of attempted burglary and the main issue on appeal was whether the evidence was sufficient to support a finding that the appellant had attempted to enter the lumber company's office building with the intent to commit an offense punishable by imprisonment. Affirming the conviction, this court recognized the proof requirements outlined in *Norton* and the fact that, as in *Grays,* the accused fled from the scene. Following *Grays,* we found no rational basis for the appellant in *Cristee* to enter the building during the night that would warrant acquittal.

Here, even when we consider the facts in the light most favorable to appellant, we can find no rational basis for a verdict acquitting appellant of the offense of burglary. Appellant attempted to enter the Sonic at 3:00 a.m. As this was in the middle of the night when the Sonic was closed to the public, appellant could not have been seeking to enter the building for the purpose of purchasing food. It cannot be said that his purpose was to seek a place to make a telephone call or to sleep as there is evidence from which the jury could find that appellant had an acquaintance in

the area with whom he had been seen only a short time prior to his arrest. Nor was there any evidence that the weather was such that would require him to seek shelter. It is undisputed that appellant fled the scene immediately upon the arrival of the police. When all of the facts and circumstances in this case are considered, we cannot conclude that there was any reasonable basis for the attempted illegal entry other than for the purpose of committing a theft therein or that the evidence is insufficient to support that conviction.

Appellant next contends that the trial court erred in admitting into evidence the hammer, screwdriver, chisel, and pair of socks that were found by Ms. Whitlock. He argues that because these items were not discovered until several days after the incident, there was no evidence of any attempted entry other than with a key, and the tools were found in a high-crime area, their probative value is greatly outweighed by their prejudicial effect, and that they should have been excluded under Ark. R. Evid. 403. We find no error.

■ "Relevant evidence" is any evidence having the tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *Flowers* v. *State*, 30 Ark. App. 204, 785 S.W.2d 242 (1990); Ark. R. Evid. 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Ark. R. Evid. 403. Determining whether the probative value of the evidence is outweighed by its prejudicial impact is within the sound discretion of the trial court, and we will not reverse its decision absent a showing of an abuse of that discretion. *Flowers* v. *State, supra; Miller* v. *State,* 19 Ark. App. 36, 715 S.W.2d 885 (1986).

■ Here, there was evidence that appellant scaled a chain-link fence adjacent to the Sonic and was apprehended within that enclosure, and that the items in question were found along a chain-link fence adjacent to the Sonic. Officer Tyree testified that appellant was arrested in the backyard of 2116 Highway 161, the address of Ms. Whitlock's residence. Although Officer Robinson testified that appellant was arrested at 2122 Highway 161, there was evidence that Officer Hasselbach was standing on the other

side of a chain-link fence, in a neighboring backyard, when he apprehended appellant. Although the record indicates that appellant attempted to enter the Sonic with a key, as opposed to a tool such as one of those found by Ms. Whitlock, there was evidence that appellant was carrying a long object just prior to his flight from the police. Although the items were not discovered by Ms. Whitlock until "a few" days after the incident, the record indicates that she lived at a private residence not open to the general public and that she discovered the items the first time that she went into her backyard after the incident. When all of these facts and circumstances are considered, we cannot conclude that the trial judge abused his discretion in admitting the items into evidence for the consideration of the jury.

Affirmed.

COOPER and ROGERS, JJ., agree.

Donaldson BROWN *v.* STATE of Arkansas

CA CR 90-331 814 S.W.2d 918

Court of Appeals of Arkansas
Division II
Opinion delivered September 11, 1991

William R. Simpson, Jr., Public Defender, *Judy Rudd Dodson,* Deputy Public Defender, by: *Thomas B. Devine,* III, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Elizabeth Vines,* Asst. Att'y Gen., for appellee.

ELIZABETH W. DANIELSON, Judge. Appellant Donaldson Brown was convicted of burglary, felon in possession of a firearm, and theft of property. He was sentenced to ten years on each count, with the three ten-year terms to be served concurrently. On appeal, appellant argues there was insufficient evidence to support the burglary conviction. We affirm.

On November 13, 1989, three police officers of the North Little Rock Police Department observed appellant pushing a shopping cart through an alley between the 1900 block of

Magnolia and Olive Streets in North Little Rock. Because appellant's description fit that of a suspect they were seeking at that time, they approached him in the unmarked police car. As the police car turned toward him, appellant deserted the shopping cart and fled. Two of the officers, one in uniform, pursued appellant on foot and the third pursued him in the car.

Appellant was apprehended nearby and the shopping cart was recovered. The cart contained a crossbow and a rifle, which were visible to an officer when appellant was initially sighted in the alley, and other items, including a cable box from Storer Cable, a hunting knife, arrows, .22 shells, a Nintendo game, a cassette player, items of jewelry, and items of clothing.

The police traced the registration number on the cable box to 318 East 21st Street, which was about two blocks from where the shopping cart was located. The police proceeded to that address and discovered the door locks had been pried open. The residents were contacted and verified, upon arrival, that the house had been broken into and that several items of personal property were missing. The residents later identified as theirs the items found in the shopping cart appellant was pushing.

Appellant testified that he did not burglarize the residence, but instead found the items in a dumpster and carried them away in a shopping cart he had taken from a nearby grocery store lot. Appellant admitted to fleeing from the police but claimed he only ran from them because he was on parole and was supposed to be in Oklahoma rather than in Arkansas.

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. Ark. Code Ann. § 5-39-201(a) (1987). Appellant contends the evidence was insufficient to prove beyond a reasonable doubt that he had entered the residence from which the property was taken.

When the sufficiency of the evidence is challenged on appeal, we review the evidence in the light most favorable to the appellee, and affirm if there is any substantial evidence to support the verdict. *Williams* v. *State*, 304 Ark. 509, 804 S.W.2d 346 (1991). Substantial evidence is evidence of sufficient force and character

that it will compel reasonable minds to reach a conclusion without resort to speculation and conjecture. *Id.*

Circumstantial evidence may constitute substantial evidence and be sufficient to sustain a conviction. *Summers* v. *State,* 300 Ark. 525, 780 S.W.2d 540 (1989). When circumstantial evidence alone is relied upon, it must indicate the accused's guilt and exclude every other reasonable hypothesis. *Hutcherson* v. *State,* 34 Ark. App. 113, 806 S.W.2d 29 (1991) . Whether the evidence excludes every other reasonable hypothesis is for the factfinder to decide. *Summers*, 300 Ark. 525, 780 S.W.2d 540.

Appellant was in possession of the stolen property when he was first observed by the officers. Unless there is a satisfactory accounting for the property being in one's possession, possession of recently stolen property is prima facie evidence of guilt of burglary, even if there is no direct evidence of breaking or entering by the appellant. *Stout* v. *State,* 304 Ark. 610, 804 S.W.2d 686 (1991). Appellant contends he gave a satisfactory accounting when he testified that he found the items in a dumpster and that he never entered the residence. However, decisions regarding the credibility of a witness are for the trier of fact. The judge was not required to believe the explanation given by appellant, who was the person most interested in the outcome of the trial. *Muhammed* v. *State,* 27 Ark. App. 188, 769 S.W.2d 33, *cert. denied,* ___ U.S. ___, 110 S. Ct. 142, 107 L. Ed. 2d 101 (1989).

Appellant also abandoned the shopping cart and fled when he saw the police car. In *Cristee* v. *State*, 25 Ark. App. 303, 757 S.W.2d 565 (1988), the court stated that the action of an accused in fleeing from the scene of a crime is a circumstance that may be considered with other evidence in determining probable guilt. Appellant claimed that he was running because he was on parole and supposed to be in Oklahoma; again, this presented a credibility question for the judge to decide.

Appellant relies on *Ward* v. *Lockhart,* 841 F.2d 844 (8th Cir. 1988), in which the Eighth Circuit reversed a decision of the Arkansas Supreme Court and found that the evidence was insufficient to support a burglary conviction. As in this case, the appellant in *Ward* had been convicted of burglary based on circumstantial evidence. Here, however, there are additional

corroborating circumstances of appellant's guilt. In *Ward* the burglary took place sometime between Friday afternoon and the following Monday morning in West Memphis, and appellant was found in possession of the stolen property on that Monday, as he attempted to sell it at a pawn shop in Memphis. Here appellant was first observed with the shopping cart full of stolen property at about 9:30 a.m. on November 13, 1989. The residence from which the property was taken was burglarized on November 13, 1989, between 7:45 a.m., when the residents left for work, and 10:45 a.m., when the police arrived at the house. Also, the shopping cart appellant was pushing was located about two blocks from the residence that was burglarized.

Because the due process clause of the fourteenth amendment requires that the prosecution prove beyond a reasonable doubt every essential element of the crime charged, it was necessary in this case to prove beyond a reasonable doubt that appellant unlawfully entered the residence in question with the intent to commit an offense punishable by imprisonment. Ark. Code Ann. § 5-39-201 (1987). As phrased by the Eighth Circuit in Ward, the question before us is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could prove found beyond a reasonable doubt that it was appellant who made the unlawful entry into the residence and that he did so with the intent to commit theft. *See Ward,* 841 F.2d 844 at 847.

The court in *Ward* held that the circumstantial evidence in that case was not sufficient to establish the essential element of entry. In *Ward* it was not known exactly when the burglary took place, only that it took place sometime over the weekend between the time the school was locked up on Friday and the time it was reopened on Monday. There was, therefore, no established proximity between the time of the burglary and the time Ward was found in possession of the stolen property. Additionally, the burglary took place in one city and the defendant was found in possession of the stolen property within the three-hour time frame in which the burglary occurred and within a couple of blocks of the burglarized residence. We find that these additional factors provide sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that it was appellant Brown who had unlawfully entered the residence, and appellant's due

process rights were therefore not violated.

Given appellant's possession of the stolen property, his flight from the police, and the close proximity in time and distance linking the appellant, the stolen property, and the burglarized residence, we believe the evidence is sufficient to support the burglary conviction.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

Reginald REED *v.* STATE of Arkansas

CA CR 90-243 814 S.W.2d 560

Court of Appeals of Arkansas
Division I
Opinion delivered September 18, 1991

Gibson & Deen, by: *Thomas D. Deen*, for appellant.

Winston Bryant, Att'y Gen., by: *Olan W. Reeves*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Chief Judge. Reginald Reed appeals from his convictions of burglary and theft of property, for which he was fined $5,000.00. He contends that the trial court erred in denying his motion to dismiss for failure to grant him a trial within twelve months of the date of his arrest. We agree and reverse.

Appellant was charged by separate informations with having committed two counts of both burglary and theft. One episode occurred on November 23, 1988, and was referred to in the proceedings as the "Andrews burglary." The second one, which is the subject of this appeal, occurred on November 30, 1988, and was referred to as the "Wells Oil Company burglary." Appellant

was arrested for both criminal episodes on December 7, 1988, and both parties agree that the twelve-month period allowed for a speedy trial began running on that date, subject to any excludable periods as provided in the Arkansas Rules of Criminal Procedure.

The Andrews burglary and theft charges were tried first and resulted in a hung jury and mistrial on October 24, 1989. There, after the court had declared the mistrial, the question of the continuance of the existing bond was discussed. The court stated:

> Now, the — Is there anything else really that we need to do? I guess the next move is up to the State, if any, *as to whether or not to ask for another trial after a new jury is impaneled after the first of the year.*
>
> . . . .
>
> Mr. Reed [appellant], you've been in the courtroom. You've heard that the jury has been unable to reach any verdict one way or the other in your case. You are not discharged. You are still subject to possible retrial on *this case* [Andrews burglary]. But Mr. Deen [appellant's attorney] will notify you when and if any order for another jury trial in *this case* [Andrews burglary] is entered.
>
> That trial could not occur until after January 1st when we impanel a brand new jury in this county.
>
> All right. Ladies and gentlemen, court is adjourned, then. Thank you very much. [Emphasis added.]

The trial judge then made an entry, not in the official criminal docket, but in his so-called "pocket docket," which he maintained for his own use in order to keep him abreast of the status of the cases in the various counties of his district. That "pocket docket" entry *to the Andrews case*, dated October 24, 1989, provided: "10/24/89—2/21/90 excluded to permit trial of R. Reed in CR-89-11-2MC [Wells Oil Company burglary]."

On January 10, 1990, appellant filed his motion to dismiss the Wells Oil Company charges for failure to afford him a trial within twelve months as required by Ark. R. Crim. P. 28.1(c). At a hearing held on appellant's motion on February 15, 1990, it was shown that no written orders had been entered or docket entries

made on the official criminal docket excluding any period of time for purposes of extending the time for speedy trial. At that same hearing, however, the record in this case (Wells Oil) was supplemented by including those portions of the record from the Andrews burglary trial quoted in the preceding paragraph. At the conclusion of the hearing, the trial court denied appellant's motion to dismiss, excluding the period of time from October 24, 1989 to February 20, 1990, on the following finding:

> This case [Wells Oil Company burglary] and defendant's companion felony case [Andrews burglary] were both set for trial October 24, 1989. The other case [Andrews] was tried to the jury, necessitating a continuance in this case [Wells Oil] until a new jury panel was available after January 1, 1990.
>
> This court's first time to be in the McGehee District of Desha County after January 1 will be February 20, 1990. Trial of this case [Wells Oil] is set for February 21, 1990.
>
> Per the court's order entered today, 119 days from October 24, 1989, to February 20, 1990, are excluded from "speedy trial" in this case [Wells Oil], extending the deadline for trial to April 5, 1990.

On the same date that appellant's motion was denied, February 15, 1990, the trial court made the following entry to the Wells Oil Company burglary case in his "pocket docket": "10/24/89—2/20/90 excluded from S.T. due to trial of 89-14-2MC [Andrews burglary] & need for new jury panel for 89-11-2MC [Wells Oil Company burglary]." On February 21, 1990, appellant was tried, convicted, and sentenced for the Wells Oil Company burglary and theft, and this appeal follows.

Appellant contends that the court's oral ruling and pocket-docket entry made at the February 15, 1990, hearing on his motion to dismiss were insufficient to extend the speedy-trial period because they were not made until after the period had expired and after the appellant's motion to dismiss was filed. We agree.

When compared to the facts of this case, the applicable

rules are relatively clearly established. Rule 28.1(c) of the Arkansas Rules of Criminal Procedure provides:

> Any defendant charged after October 1, 1987, in circuit court and held to bail, or otherwise lawfully set at liberty, including released from incarceration pursuant to subsection (a) hereof, shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2, excluding only such periods of *necessary* delay as are authorized in Rule 28.3. [Emphasis added.]

Rule 28.2 provides in pertinent part:

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

Rule 28.3 provides in pertinent part:

> The following periods shall be excluded in computing the time for trial:
>
> (a) The period of delay *resulting from* other proceedings concerning the defendant, including but not limited to an examination and hearing on the competency of the defendant and the period during which he is incompetent to stand trial, hearings on pretrial motions, interlocutory appeals, and trials of other charges against the defendant. [Emphasis added.]
>
> . . . .
>
> (i) All excluded periods shall be set forth by the court in a written order or docket entry.

Once it has been shown that the trial is to be held after the speedy trial period has expired, the State has the burden of showing that

any delay was the result of the appellant's conduct or that it was otherwise legally justified. *McConaughy* v. *State*, 301 Ark. 446, 784 S.W.2d 768 (1990).

Here, we do not need to decide whether the court's February 15, 1990, "pocket docket" entry to the Wells Oil case was a "docket" entry of the type contemplated by Ark. R. Crim. P. 28.3(i). Although not expressly stated in the rule, the supreme court has said that "a court should enter written orders or make docket notations *at the time continuances are granted to detail the reasons for the continuances* and to specify, to a day certain, the time covered by such excluded periods." *Hicks* v. *State*, 305 Ark. 393, 397, 808 S.W.2d 348, 351 (1991) (emphasis in original); *see also McConaughy* v. *State*, 301 Ark. 446, 784 S.W.2d 768 (1990). The court has also said that this language must be adhered to in order to provide any impetus behind Rule 28.3 *Hicks* v. *State, supra.* Here, the entry was made several months after the delay occurred, two months after the twelve-month period had elapsed, and six weeks after appellant filed his motion to dismiss. As such, it was untimely and ineffectual. *See Hicks* v. *State, supra.*

The State contends that the lack of any timely written orders or docket entries is not fatal in this case. It argues that the court's pronouncements at the close of the Andrews case and the pocket-docket entry relative thereto were sufficient to constitute a "memorialization in the record" within the meaning of *Key* v. *State*, 300 Ark. 66, 776 S.W.2d 820 (1989). We cannot agree.

Key holds that when a case is delayed *by the accused* and that delaying act is memorialized by a record taken at the time it occurred, that record may be sufficient to satisfy Ark. R. Crim. P. 28.3(i) and to allow the time to be attributed to the defendant. *See also Hicks* v. *State, supra.* Here, trial of the Wells Oil case was not delayed by appellant. While it might be prudent in some instances for a defendant to request a continuance of this trial in one case because of a hung jury in a separate case, that was not done here. The continuance was ordered on the court's own motion in a proceeding entirely unrelated to the case now on appeal. The fact that appellant did not affirmatively object to the court's statement does not alter our conclusion. *See Hicks* v. *State, supra.* In the first place, the statement itself referred not to

the Wells Oil case, which is on appeal, but only to "this case," i.e., the Andrews case. Therefore, appellant was not given cause to object with regard to the Wells Oil.[1] Secondly, this case is to be contrasted on its facts with those cases that have held delays to be attributable to defendants. *See, e.g., Key* v. *State, supra* (defendant was asked about and agreed to a continuance requested by a co-defendant); *Cox* v. *State*, 299 Ark. 312, 772 S.W.2d 336 (1989) (defendant explicitly agreed to continue his case and expressly waived any speedy trial claims).

Nor can we agree with the State's argument that the delay in this case was permissible under Ark. R. Crim. P. 28.3(a) as we cannot conclude that the delay "result[ed] from" the trial of appellant on the Andrews charges, as required by that rule, or that the delay was "necessary" under Ark. R. Crim. P. 28.1(c). The only case cited by the State in support of its proposition, *Allen* v. *State*, 294 Ark. 209, 742 S.W.2d 886 (1988), is clearly distinguishable. In *Allen*, the appellant was arrested in Texas for a robbery committed in Arkansas and an aggravated robbery committed in Tennessee. He was extradited to Tennessee, where he was held for approximately six months before being tried for and acquitted of the Tennessee offense. When he was finally returned to Arkansas, the supreme court held that that six-month period during which the appellant was held outside this jurisdiction was excludable from the speedy trial period for the Arkansas offense under Ark. R. Crim. 28.3(a). Here, on the other hand, appellant was charged with two sets of crimes in the same county and in the same court. Aside from the court's *sua sponte* decision, there was no reason why appellant could not have been tried for the Wells Oil burglary and theft before the speedy trial period elapsed.

We conclude that the trial court's exclusion of the period from October 24, 1989, to February 20, 1990, cannot be sustained, and that appellant's motion to dismiss should have been granted. Therefore, his convictions for the Wells Oil Company

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[1] It is significant to note that as a mistrial had been declared, the speedy trial period for the Andrews burglary case was extended for a period of a full year under Rule 28.2(c). It did not result in such an extension for the case now being reviewed.

burglary an theft are reversed and the case is dismissed.

COOPER and ROGERS, JJ., agree.

AM CREDIT CORPORATION *v.* Steve A. RILEY and Susann Riley

CA 91-67 815 S.W.2d 392

Court of Appeals of Arkansas
Division II
Opinion delivered September 18, 1991

Faber D. Jenkins, for appellant.

Jerry Ryan, for appellee.

ELIZABETH W. DANIELSON, Judge. AM Credit Corporation appeals from an order of the Polk County Circuit Court denying it a deficiency judgment against appellees. We find no error and affirm.

In March 1986, appellees leased an automobile from Mid-American Motors in Hot Springs, and Mid-American Motors subsequently assigned its rights in the lease agreement to AM

Credit Corporation (also known as Chrysler Credit Corporation). In April 1988, the appellees prematurely terminated their lease agreement with the appellant and surrendered possession of the vehicle to Mid-American Motors. Appellees subsequently received written notice from the appellant that a sale of the vehicle would take place on or after the 14th day of April, 1988, at the offices of Chrysler Credit Corporation, 10801 Executive Center Drive, in Little Rock, Arkansas. However, the vehicle was actually sold at a dealer's-only auction in North Little Rock on May 3, 1988. Appellant then filed suit against the appellees seeking to recover the balance of the debt owed after deducting the proceeds of the sale of the vehicle. The circuit judge found that, because the vehicle was actually sold at a location different from that listed in the notice, the sale was not commercially reasonable pursuant to the requirements of Ark. Code Ann. § 4-9-504(3) (1987). He therefore denied appellant's claim for a deficiency judgment.

It was not disputed at trial that the disposition of the collateral in question was made at a location different from the one listed in the notice to the appellees and at a time unknown to appellees. The record does not reflect that there was any attempt made to notify appellees of the location and date of the auction. Appellant maintains, however, that, because the sale of the vehicle was by "private sale," it was not necessary to inform appellees of the location of the sale and the notice sent complied with section 4-9-504(3), which provides in pertinent part:

> Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale.

The distinction between the notice requirement of a private sale and public sale was recognized by the Arkansas Supreme Court in *Barker* v. *Horn*, 245 Ark. 315, 316, 432 S.W.2d 21, 22 (1968), where the court stated that, although the statute requires notice of the time and place of public sale, only reasonable notification of

the time after which a private sale will be made is required.

Based on the record, there is no evidence to support the appellant's contention that appellees were notified that the disposition was to be by private sale and not public sale. The notice itself was not introduced into evidence, and Kay Kusenberger, an employee of AM Credit Corporation testified she did not know whether the notice provided for "public" or "private" sale. The appellate court will not consider arguments based on matters not contained in the record or reverse a trial judge on facts outside the record. *See Gen. Electric Credit Auto Lease, Inc.* v. *Paty*, 29 Ark. App. 30, 32, 776 S.W.2d 829, 831 (1989). Even if we assume without deciding that a dealers-only auction is a private sale, appellant's argument still must fail as appellant has not shown that appellees were notified that the disposition would be by private sale.

"When the code provisions have delineated the guidelines and procedures governing statutorily created liability, then those requirements must be consistently adhered to when that liability is determined." *First Nat'l Bank of Wynne* v. *Hess*, 23 Ark. App. 129, 134, 743 S.W.2d 825, 827 (1988), quoting *First State Bank of Morrilton* v. *Hallett*, 291 Ark. 37, 41, 722 S.W.2d 555, 557 (1986). "If the secured creditor wishes a deficiency judgment he must obey the law. If he does not obey the law, he may not have his deficiency judgment." *First State Bank of Morrilton*, 291 Ark. at 41, 722 S.W.2d at 557, quoting *Atlas Thrift Co.* v. *Horan*, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315, 321 (1972).

We agree with the circuit judge that this notice was not in compliance with the requirements of Ark. Code Ann. § 4-9-504(3) (1987). The appellant is therefore barred from obtaining a deficiency judgment against the appellees.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

Ira THURMAN *v.* CLARKE INDUSTRIES, INC. and Transamerica Insurance Company

CA 91-4 819 S.W.2d 286

Court of Appeals of Arkansas
Division I
Opinion delivered September 25, 1991

Evelyn E. Brooks, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this workers' compensation case injured his left knee in the course of his employment as a material handler with the appellee, Clarke Industries, Inc. The appellant received temporary total disability benefits through November 13, 1989, but those benefits were discontinued when the appellant refused to undergo arthroscopic surgery recommended by his treating physicians. The appellant then filed the claim which is the subject of this appeal, contending that he was entitled to additional temporary total disability benefits from November 13, 1989, through a date yet to be determined. In an opinion dated October 30, 1990, the workers' compensation commission denied the appellant's claim on a finding that the appellant unreasonably refused to undergo the recommended surgical procedure. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in finding that the appellant's refusal of surgery was

unreasonable. We agree, and we reverse.

Arkansas Code Annotated § 11-9-512 (1987) provides that:

> Except in cases of hernia, which are specifically covered by § 11-9-523, where an injured person unreasonably refuses to submit to a surgical operation which has been advised by at least two (2) qualified physicians and where the recommended operation does not involve unreasonable risk of life or additional serious physical impairment, the Commission, in fixing the amount of compensation, may take into consideration such refusal to submit to the advised operation.

The appellant in the case at bar was injured when he stepped down from his fork lift and twisted his left knee. Dr. Randall Oates, the company doctor for Clarke Industries, Inc., treated the appellant for three weeks before referring him to Dr. Jim Arnold, a knee specialist. The appellant developed phlebitis and saphenous vein thrombosis during the early weeks of his injury. The appellant also suffers from diabetes and hypertension, for which he was treated by his family doctor, Dr. Philip Duncan. In addition, the appellant saw Dr. Marvin E. Mumme for an evaluation of his knee injury. All four of these physicians advised the appellant to submit to arthroscopic surgery for treatment of his injury. However, the appellant is afraid of surgery and has refused to submit to the procedure. It is undisputed that the appellant's fear of arthroscopic surgery is genuine.

The appellant contends that the Commission erred in applying Ark. Code Ann. § 11-9-512 to the case at bar for a variety of reasons. Because we find it dispositive, we need only address the appellant's contention that Ark. Code Ann. § 11-9-512 is inapplicable because the appellant's doctors concur that a surgical procedure should not be performed on the appellant at this time. The Commission found that the medical evidence in this case is clear that arthroscopic surgery is recommended, but that the operation could not be performed due to the appellant's fear. Although we agree that the record supports a finding that all four of the appellant's physicians at one time recommended arthroscopic surgery as the preferred treatment for the appellant's condition, we find no substantial evidence to support a finding that arthroscopic surgery had been advised by at least two

qualified physicians at the time of the hearing. Instead, the record unequivocally shows that three of the appellant's physicians later retracted their recommendation of surgery on the ground that the appellant's subjective fear of surgery was so great as to jeopardize the chances of success. In a medical report dated January 17, 1990, Dr. Arnold withdrew his recommendation of surgery because the appellant "has a preconceived notion that a complication will occur. Patients are often prophetic and I am afraid that his complication rate would be higher if he indeed has his mind set on the same." In a subsequent memo, Dr. Arnold stated that "I simply will not operate on someone who anticipates a poor result." The appellant's family physician, Dr. Duncan, stated in a medical report of January 5, 1990, that the appellant's fear of surgery made it medically inadvisable for him to undergo the procedure. Even the company physician, Dr. Oates, stated in a report of January 8, 1990, that the appellant "would not be a surgical candidate presently due to his attitude and phobias." Therefore, three of the four physicians who initially recommended the surgery had withdrawn their recommendations by the time of the hearing. On this record, we do not think that reasonable minds could conclude that arthroscopic surgery had in fact been recommended by two qualified physicians, and, in the absence of substantial evidence to support such a finding, we hold that the Commission erred in taking the appellant's refusal to submit to surgery into consideration in fixing the amount of his compensation. We therefore reverse and remand to the Commission for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

H.T. LAZELERE *v.* Roger REED and Phil Stratton

CA 91-40 816 S.W.2d 614

Court of Appeals of Arkansas
Division II
Opinion delivered September 25, 1991
[Rehearing denied October 23, 1991.]

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

Phil Stratton, for appellee.

ELIZABETH W. DANIELSON, Judge. In this case, appellee Roger Reed and his attorney, appellee Phil Stratton, attempted to collect unpaid judgments that were awarded to Reed by the Arkansas Workers' Compensation Commission. Appellees sought recovery of these judgments against appellant H. T. Larzelere, the chief executive officer and chairman of the board of Vidare Manufacturing, Inc., Reed's uninsured employer. In the

trial below, appellees prevailed as the jury found that the appellant actively participated in the operation of Vidare at a time when the Vidare corporate charter had been revoked due to nonpayment of its corporate franchise taxes. We affirm.

Reed was injured on November 15, 1984, while in the course of his employment for Vidare. He timely filed his claim for temporary total, medical, and permanent benefits with the Arkansas Workers' Compensation Commission. His medical expenses were incurred during the time the Vidare corporate charter was revoked.

In a controverted case, the commission ordered Vidare to pay accrued medical and related expenses in the sum of $10,836.99, permanent partial benefits equal to 20% to the body as a whole in the sum of $13,860.00, and maximum attorney's fees on all the sums due. Vidare did not pay the judgments.

Appellees filed suit in Faulkner County Circuit Court seeking to collect the judgments from the appellant. At trial, the case was submitted to the jury on interrogatories. The jury found that the claims arose between November 15, 1984, and July 19, 1985, which was a period when Vidare's corporate charter was revoked, and that the appellant actively participated in the operation of business activities at Vidare during this period of time.

The appellant's appeal is based on his contention that it was error for the trial court to allow this case to go to the jury. He raises several points in support of his argument that the trial judge should have issued a directed verdict in his favor.

Appellant first argues that it was error for the trial judge to deny his motion for a directed verdict because the statute of limitations for bringing a workers' compensation claim had run. The work related injury occurred in November of 1984. Three years later, the case now on appeal was brought against appellant as a shareholder and an officer of the corporation to recover payment for an earlier judgment. Appellant's reliance on Ark. Code Ann. § 11-9-702 (1987) is not applicable as Reed's workers' compensation claim was timely filed within two years of his injury. The suit against the appellant, a director and officer of the corporation, was brought in order to enforce payment of the

judgments rendered by the Arkansas Workers' Compensation Commission. We find no error in failing to grant a directed verdict.

Second, appellant argues that the trial court erred in denying his motion for a directed verdict on the basis that he is not individually liable for the debts of the corporation. It is clear from appellant's testimony that he actively participated in the operation of Vidare during the time when the corporate charter was revoked. Appellant participated in a special meeting of the board of directors of Vidare on May 21, 1985, during the period that the corporate charter was revoked, and purchased, along with William Cook, 51% of the capital stock of Vidare. Shortly after his stock purchase, and before the corporate charter was restored, appellant was elected chairman of the board of directors and chief executive officer of Vidare. Appellant testified that he was very involved in securing additional funds to avoid bankruptcy and participated in management decisions during the period the corporate charter was revoked.

Officers and directors of a corporation who actively participate in its operation during the time when the corporate charter is revoked for failure to pay corporate franchise taxes are individually liable for debts incurred during the period of revocation. *Mullenax* v. *Edward Sheet Metal Works, Inc.*, 279 Ark. 247, 650 S.W.2d 582 (1983); *Moore* v. *Rommel*, 233 Ark. 989, 350 S.W.2d 190 (1961). It was not error for the trial court to deny appellant's motion for directed verdict.

Appellant next contends that the trial court erred in denying his motion for directed verdict because shareholders are not individually liable for debts or obligations of a corporation while the corporate charter is temporarily suspended. Appellant's argument is based on the law governing administrative dissolution of a corporation, found in Ark. Code Ann. § 4-27-1422 (Supp. 1987), which is not applicable in this case. The applicable law is based on forfeiture of a corporate charter for failure to pay franchise taxes, found in Ark. Code Ann. § 26-54-111 (1987). Thus appellant's argument is without merit.

In appellant's next point, he argues that it was error to not grant a directed verdict because appellant was not an active participant at the time the workers' compensation claim arose.

Again, there was ample evidence presented that the appellant was actively participating in the corporation's business affairs during the time Reed's workers' compensation claim was maturing, which coincided with the time the corporate charter was revoked. We find no merit in appellant's argument.

Appellant argues in his fifth point that the trial court erred in denying his motion for a directed verdict under the "incoming partner" law, Ark. Code Ann. § 4-42-309 (1987). He argues that since the workers' compensation claim arose six months before he became a shareholder, liability on his part would be limited to only the assets of the "partnership." Also, appellant argues that since all assets of Vidare were marshaled pursuant to Chapter 7 bankruptcy proceedings, appellees are limited to the assets of Vidare and may not seek additional liability from appellant.

Again, citing *Mullenax* and *Moore*, the appellant incurred personal liability when he actively participated in the operation of Vidare during the time when the corporation charter was revoked. Appellant did not enter into a partnership with the other directors and officers of Vidare. The board of directors of Vidare followed the procedures set by Arkansas law and filed articles of incorporation with the Secretary of State's office, purchased or were allocated shares of stock, and as officers and directors, actively operated the corporate business during the period when the corporate charter was revoked for non-payment of franchise tax. Again, appellant would have us view the revoked status of the corporation the same as if it was a corporation which was experiencing administrative dissolution. Revocation for non-payment of corporate taxes is totally different from dissolution of a corporation as noted in appellant's fourth argument. The law which governs these two types of corporate status are different as is the status of its shareholders, officers, and directors. There is no merit to appellant's argument on this point.

For his next point, appellant argues that the trial court erred in denying his motion for directed verdict based on estoppel. Appellant argues that when appellees sued the corporation based on the workers' compensation claim, appellees were estopped from later suing the appellant as an officer and director of the corporation and holding him personally liable because doing so would "deny the corporate existence." Appellant argues that

appellee Reed waived any action against appellant by not suing him as an officer and director on the workers' compensation claim in the first place. Estoppel arises by a detrimental change of position of one party resulting from the conduct of another. *Beeson* v. *Beeson*, 11 Ark. App. 79, 667 S.W.2d 368 (1984).

Appellant, although he may suffer financial setbacks when ordered to pay the judgment ordered below, has not pointed out an inequitable circumstance which resulted from appellees Reed and Stratton bringing their action against him as a shareholder and director or any detrimental change in appellant's position caused by relying on the conduct of Reed and Stratton. *See Id.* Reed would not have had to sue the appellant if appellant would have seen to it that the corporation paid for Reed's medical bills. Reed's suit against the appellant as an officer and director of the corporation was to enforce payment of his medical expenses after the corporation would not pay them. The trial judge acted properly in denying appellant's motion for a directed verdict.

Moving to appellant's seventh point, he argues that the trial court erred in denying his motion for directed verdict based on election of remedies. The appellant contends that because appellee Reed elected to recover against the corporation initially, it was error for the trial court to allow him to later seek to enforce the workers' compensation judgments against the appellant as an officer and director of Vidare since Reed had already elected his remedy against the corporation.

There was no election. The action brought against the appellant as an officer and director of Vidare was an attempt by appellees to collect the judgments that were awarded them by the Arkansas Workers' Compensation Commission. When the corporation would not pay these judgments, appellees sought payment against those individual officers and directors who actively participated in the operation of the business during the period of time the corporate charter had been forfeited and these judgments were entered. There is no merit in appellant's argument.

Finally, appellant argues that the trial court erred in submitting interrogatories #1 and #3 to the jury. Interrogatory #1 stated:

> Do you find by a preponderance of the evidence that the

> claims of Roger Reed and Phil Stratton arose between November 15, 1984 and July 19, 1985 when the corporate charter was restored?

Interrogatory #3 stated:

> Do you find from the preponderance of the evidence that H. T. Larzelere actively participated in the operation of the business known as Vidare Corporation between November 15, 1984 and July 19, 1985 when the corporate charter was restored?

After reviewing the evidence, it is clear that the content of both of these interrogatories raised questions of fact. It is also clear that because of the somewhat complicated corporate details of this case, submitting interrogatories to the jury to determine if the jury understood the evidence presented was a good idea. Thus, the trial judge acted properly in submitting these interrogatories to the jury to determine the outcome of the case.

In reviewing the denial of a motion for a directed verdict, we give the proof its strongest probative force. *Grendell* v. *Kiehl*, 291 Ark. 228, 723 S.W.2d 830 (1987). Such proof, with all reasonable inferences, is examined in the light most favorable to the party against whom the motion is sought; if there is any substantial evidence to support the verdict, we affirm the trial court. *Id.*; Ark. R. Civ. P. 50. There is substantial evidence to support the verdict.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

Rodney Maurice RAGLIN *v.* STATE of Arkansas

CA CR 90-287 816 S.W.2d 618

Court of Appeals of Arkansas
Division I
Opinion delivered October 2, 1991

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

Winston Bryant, Att'y Gen., by: *Catherine Templeton*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Chief Judge. Rodney Maurice Raglin appeals from his conviction of the crime of possession of a controlled substance with intent to deliver. The sole issue on

appeal is whether he was denied his right to a speedy trial under the Arkansas Rules of Criminal Procedure. We conclude that he was and reverse the conviction.

It is undisputed that appellant was arrested for possession of a controlled substance with intent to deliver on May 12, 1989. On October 18, 1989, while on bail, appellant was arrested for an unrelated homicide. On January 2, 1990, appellant was arraigned on both charges and entered pleas of not guilty by reason of mental disease or defect. As a result, a psychiatric examination of appellant was ordered. On January 30, 1990, the psychiatric evaluation of appellant was received by the court and the court found him fit to proceed. On April 25, 1990, appellant was tried for the homicide, convicted of murder, and sentenced to forty years in the Arkansas Department of Correction.

At some point thereafter, appellant's trial on the charge of possession with intent to deliver was set for August 3, 1990. On August 2, 1990, appellant filed a motion to dismiss that charge for lack of a speedy trial. Although the court's reasons are not clearly stated in the record, appellant's motion was denied after a hearing on August 3. Appellant was thereafter tried and convicted of possession with intent to deliver, and this appeal followed.

The parties agree that, under Ark. R. Crim. P. 28.1(c) and 28.2(a), appellant was entitled to have the drug charge dismissed with an absolute bar to prosecution if not brought to trial within twelve months of the date of his arrest, May 12, 1989, subject only to any excludable periods authorized under Rule 28.3. It is undisputed that appellant's trial on this charge was not held until eighty-three days after the twelve-month period had elapsed. The parties further agree that the twenty-eight day period between January 2 and January 30, 1990, was properly excludable. Therefore, it is the exclusion of an additional fifty-five days that is at issue on this appeal.

Appellant contends that the trial court erred in denying his motion to dismiss. He argues that, because no written orders were entered or docket entries made concerning any delays in trying him on the drug charge, the court erred in excluding the additional fifty-five days. We agree.

Once it has been shown that a trial is to be held after

the speedy trial period has expired, the State has the burden of showing that any delay was the result of the defendant's conduct or that it was otherwise legally justified. *McConaughy* v. *State*, 301 Ark. 446, 784 S.W.2d 768 (1990). Rule 28.3(i) of the Arkansas Rules of Criminal Procedure provides that "[a]ll excluded periods shall be set forth by the court in a written order or docket entry." Although not expressly stated in the rule, the supreme court has said that "a court should enter written orders or make docket notations at the time continuances are granted to detail the reasons for the continuances and to specify, to a day certain, the time covered by such excluded periods." *Hicks* v. *State*, 305 Ark. 393, 397, 808 S.W.2d 348, 351 (1991). Our courts have also said that this language must be adhered to in order to provide any impetus behind Rule 28.3. *Hicks* v. *State, supra; Reed* v. *State*, 35 Ark. App. 161, 814 S.W.2d 560 (1991). Here, although appellant failed to abstract the docket sheet, it is clear from the court clerk's extensive testimony from the docket and the statements made by the trial judge at the hearing on the motion to dismiss that no such orders were entered or docket entries made.

The State contends that the trial court's ruling was correct because the eighty-five day period between January 30, 1990, and April 25, 1990, was excludable despite the lack of any appropriate written orders or docket entries. According to the transcript of the hearing of January 30, the trial court stated that it was going to set appellant's murder trial first. The transcript of a short hearing held on February 2, 1990, shows that the court set the murder trial for April 25. The State argues that, because appellant failed to object when these statements were made, he "tacitly agreed" to the delay caused by holding the murder trial first and, thereby, lost his right to contend that the delay violated his right to a speedy trial. We cannot agree.

The State's reliance on *Jenkins* v. *State*, 301 Ark. 586, 786 S.W.2d 566 (1990), and *Key* v. *State*, 300 Ark. 66, 776 S.W.2d 820 (1989), is misplaced. Those cases hold that when a case is delayed *by the accused* and that delaying act is memorialized by a record taken at the time it occurred, that record may be sufficient to satisfy the requirements of Ark. R. Crim. P. 28.3(i). In *Jenkins*, the defendant had been offered a speedy trial but his attorney requested and received a continuance to a date beyond

the end of the twelve-month period. In *Key*, upon being asked by the court for her views, the defendant's attorney stated that she "had no problems with" the court granting a continuance requested by a co-defendant. *See also McConaughy* v. *State, supra* (defendant delayed the proceedings by changing his plea to not guilty by reason of mental defect on the original trial date, thus necessitating an excludable committment to the State Hospital); *Cox* v. *State*, 299 Ark. 312, 772 S.W.2d 336 (1989) (defendant explicitly agreed to continue his case and expressly waived any speedy trial claims). Here, on the other hand, appellant's trial on the drug charge was not delayed by him. He made no request for a continuance in either this case or the murder case. The record is clear that holding the murder trial first was ordered on the court's own motion. Appellant was not consulted. *See Reed* v. *State, supra.*

The fact that appellant did not affirmatively object to the court's statements in question does not alter our conclusion. Rule 28.2 provides that the speedy trial period commences to run "without demand by the defendant." The State's argument that a defendant must protest court-ordered delays, whether or not he is responsible for the delays or is even consulted about them, would place the burden on the accused to demand a speedy trial at every stage of the proceedings. Moreover, the court's decision to hold appellant's murder trial on April 25 would not cause appellant to know that his drug case would be continued past the required time period. *See Hicks* v. *State, supra; Reed* v. *State, supra.* In light of the admittedly excludable twenty-eight day period in January 1990, appellant's trial in this case would have been timely if held at any time prior to June 10, 1990.

It was argued at the hearing on appellant's motion to dismiss that appellant's failure to appear for his originally scheduled arraignment in this case created an additional excludable period. However, the evidence showed, and the prosecuting attorney had conceded at a previous hearing, that appellant was not properly notified of that arraignment. Appellant's notice had been sent to the wrong address. In any event, the argument is not presented on appeal, and we need not address it further.

We conclude that the State failed to show that the remaining fifty-five day delay was attributable to appellant or

was otherwise legally justified. Therefore, appellant's conviction for possession of a controlled substance with intent to deliver is reversed and the case is dismissed.

COOPER and ROGERS, JJ., agree.

Ricky Levon TERRELL *v.* STATE of Arkansas

CA CR 90-335 818 S.W.2d 579

Court of Appeals of Arkansas
Division II
Opinion delivered October 2, 1991

Linda P. Collier, for appellant.

Winston Bryant, Att'y Gen., *Catherine Templeton*, Ass't Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Ricky Levon Terrell was found guilty by a Faulkner County jury of possession of cocaine in violation of Ark. Code Ann. § 5-64-401 (1987) and possession of drug paraphernalia. He was sentenced to a term of twenty years imprisonment. On appeal, Terrell contends that the trial court erred in denying a motion in limine, erred in denying his motion for directed verdict, and erred in refusing a requested instruction. We find no error and affirm.

On August 26, 1989, Conway police officers, responding to a domestic disturbance call, encountered Mr. Terrell and a woman arguing on the street. Appellant agreed to let officers search a pouch he was wearing around his waist. When an officer pulled some tissue paper from the pouch, appellant grabbed it and stuck it in his mouth. There was testimony that during the ensuing struggle a "powdery substance" fell out of Terrell's mouth and he finally spit out the tissue. The state crime laboratory subsequently determined that the tissue contained .01 grams of crack cocaine. A glass vial and a plastic straw were also found on the appellant. Both contained cocaine residue.

Prior to trial, appellant's counsel told the court: "[W]e therefore move in limine . . . that the state be prohibited from going into all the possession evidence, if they . . . know they don't have . . . any proof of the impact [of cocaine] on the human system." The court denied the motion and at trial both a narcotics officer and a chemist with the state crime lab testified that, in their opinion, .01 grams of crack cocaine was a "usable amount." The state chemist testified that the quantity was "enough to light and get a hit off of."

Appellant contends that *Harbison* v. *State*, 302 Ark. 315, 790 S.W.2d 146 (1990), stands for the proposition that only a toxicologist who is able to testify as to the effect of a given quantity of drugs on the human body is qualified to give an opinion as to whether the amount is "usable." We do not agree that this is what the court in Harbison held. The court held only that "possession of a controlled substance must be of a measurable or usable amount to constitute a violation of § 5-64-401." The *Harbison* court was not required to decide whether, and under

what circumstances, expert testimony might be necessary to establish that a given amount of a drug is a "usable" quantity.

Whether a witness may give expert testimony rests largely with the sound discretion of the trial court and that decision will not be reversed absent an abuse of discretion. *Dildine* v. *Clark Equipment Co.*, 282 Ark. 130, 666 S.W.2d 692 (1984). Rule 702 of the Arkansas Rules of Evidence provides:

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

Generally, the tendency is to permit the jury to hear the testimony of the person with superior knowledge in a given field unless clearly lacking in either training or experience, and too rigid a standard should be avoided. If some reasonable basis exists from which it can be said the witness has knowledge of the subject beyond that of persons of ordinary knowledge, his evidence is admissible. *Mine Creek Contractors, Inc.* v. *Grandstaff*, 300 Ark. 516, 780 S.W.2d 543 (1989). We find no abuse of the trial judge's discretion in the admission of the opinion evidence and no error in denying the motion in limine.

Terrell's argument that the trial court erred in denying his motion for directed verdict, and erred in refusing to instruct the jury that for a quantity of drugs to constitute a usable amount it must be sufficient "to have an effect on the human system," are based on a similar misinterpretation of *Harbison.* In the case at bar, the trial judge instructed the jury that the state had to prove beyond a reasonable doubt that the defendant "possessed a usable amount of cocaine." Although the court in *Harbison* did not consider or decide what might be an appropriate jury instruction under these circumstances, the instruction the trial judge gave here is similar to that approved in *State* v. *Moreno*, 92 Ariz. 116, 374 P.2d 872 (1962). The same argument made in the case at bar was rejected by the Arizona Court of Appeals in *State* v. *Murray*, 162 Ariz. 211, 782 P.2d 329 (Ariz. Ct. App. 1989). Appellant was entitled to neither a directed verdict nor the giving of his requested jury instruction.

Affirmed.

DANIELSON and MAYFIELD, JJ., agree.

Randy Dwight ARMSTRONG *v.* STATE of Arkansas

CA CR 90-341 816 S.W.2d 620

Court of Appeals of Arkansas
Division II
Opinion delivered October 2, 1991

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

Winston Bryant, Att'y Gen., by: *Elizabeth A. Vines*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Appellant, Randy Dwight Armstrong, was convicted in a bench trial of terroristic threatening and second degree battery and was sentenced to five years in the Arkansas Department of Correction on each charge, to be served concurrently. On appeal he argues only that the evidence was insufficient to support the conviction of battery, second degree.

The charges arose out of an incident which began at a Little Rock restaurant on October 29, 1989. The appellant was involved in some kind of altercation with a woman inside the restaurant and was asked to leave. After appellant got to the parking lot, Deputy Sheriff Eddy Madden, who was working off duty that evening, attempted to arrest him. Madden testified that appellant resisted, became violent, abusive, and threatening to him and Corporal McNeely, who was helping Madden handcuff appellant, and a struggle ensued in which Madden and McNeely wrestled appellant to the ground.

Deputy Sheriffs Cryer and Kesterson happened to be driving past, saw the struggle, and stopped. Deputy Cryer testified that after the appellant was handcuffed and placed under arrest, he immediately began to curse and threaten to kill the officers. Cryer said he placed appellant in the back seat of the patrol car that Deputy Kesterson was driving and Cryer got into the front seat. He said the car did not have a "cage" separating the front and back seats, and before they even got out of the parking lot appellant had lunged over the seat trying to get in the front, all the while yelling, screaming and threatening both officers and their families. Cryer said he crawled over the seat and held appellant in the back seat so Deputy Kesterson could drive.

When they got to the Pulaski County Jail, the appellant was taken to the booking room where he was searched and the handcuffs were removed, then to a room where an Arkansas Arrest and Disposition Report was filled out. Cryer said that while the form was being completed the appellant continued to yell and scream, then became enraged, and managed to kick Kesterson in the leg. While Cryer was attempting to subdue him, appellant hit Cryer in the abdomen and tried to bite his right hand. Cryer testified that even after the appellant was subdued, he continued to make threats. As a result of the scuffle, Cryer had a bruise on his right shin which lasted about four days.

Deputy Kesterson testified that appellant had threatened to kill him and his family and that he took the threats very seriously. He said appellant kicked him in the right shin, which resulted in a knot about the size of a quarter that turned blue, was puffed out about a quarter of an inch, and was tender for three to four weeks.

Ark. Code Ann. § 5-13-202 (1987) defines the offense of

battery in the second degree as follows:

> (a) A person commits Battery in the Second Degree if:
>
> . . . .
>
> (4) He intentionally or knowingly without legal justification causes physical injury to one he knows to be:
>
> > (A) A law enforcement officer or firefighter, while such officer or firefighter is acting in the line of duty;

Appellant does not deny that he knew Deputies Cryer and Kesterson were law enforcement officers who were acting in the line of duty; however, he argues that the officers did not suffer physical injury as defined by Ark. Code Ann. § 5-1-102(14) (1987). That section provides: " 'Physical injury' means the impairment of a physical condition or the infliction of substantial pain." Appellant contends that the evidence does not show that either officer suffered "substantial pain."

In resolving the question of the sufficiency of the evidence in a criminal case, this court views the evidence in the light most favorable to the appellee and affirms the judgment if there is 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 appellant cites *Kelley* v. *State*, 7 Ark. App. 130, 644 S.W.2d 638 (1983), where we held the evidence insufficient to support a conviction of battery in the third degree because we found the evidence did not show that the injuries to the victim caused him "substantial pain." In that case the injury did not require medical attention and was described by one witness as a "fingernail scratch." By contrast, in *Holmes* v. *State*, 15 Ark. App. 163, 690 S.W.2d 738 (1985), we affirmed a conviction for second degree battery where the victim, a 10-year-old child, was choked, his tongue was pulled, and he was thrown down. The child testified that this hurt at the time it was done, but testified that he was not cut, did not bleed, and he did not hurt after it was over.

We stated:

> In determining whether an injury inflicts substantial pain the trier of fact must consider all of the testimony and may consider the severity of the attack and the sensitivity of the area of the body to which the injury is inflicted. The finder of fact is not required to set aside its common knowledge and may consider the evidence in the light of its observations and experiences in the affairs of life.

15 Ark. App. at 166.

The offense of battery is divided into first, second, and third degrees. "To sustain a conviction of first degree battery, 'life-endangering conduct' must generally be involved." *Bolden* v. *State*, 267 Ark. 504, 505, 593 S.W.2d 156 (1980). That is a Class B felony. Third degree battery only requires "physical injury" and is a Class B misdemeanor. *See* Ark. Code Ann.§ 5-13-203 (1987). Second degree battery is a Class D felony and is divided into four classifications. *See* Ark. Code Ann. § 5-13-202 (1987). The first three are concerned with "*serious* physical injury." However, the fourth classification only requires "physical injury" if the victim is (A) a law enforcement officer or firefighter acting in the line of duty, (B) a teacher or other school employee upon, or adjacent to school grounds or in a building used for school purposes, (C) a person 60 years of age or older or one 12 years old or younger, or (D) an officer or employee of the state acting in the performance of his lawful duty. Thus, in the instant case only a "physical injury" was required. While "physical injury" is defined in Ark. Code Ann. § 5-1-102(14) (1987) as the "impairment of physical condition or the infliction of substantial pain," we believe there is substantial evidence from which the fact finder, considering the evidence in the light of his own observations and experiences in the affairs of life, could find that the injuries to the law enforcement officers caused them substantial pain.

Affirmed.

JENNINGS and DANIELSON, JJ., agree.

Barbara Loftin LEE *v.* Robert J. LEE, Jr.

CA 90-479 816 S.W.2d 625

Court of Appeals of Arkansas
Division I
Opinion delivered October 9, 1991

Truman H. Smith, for appellant.

John C. Everett, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Barbara Loftin Lee appeals from a decree of divorce entered in Washington County Chancery Court. She contends that the chancellor erred in enforcing an antenuptial agreement and, in the alternative, that the chancellor erred in his determination of the amount of property that she was entitled to receive under the agreement. Appellee, Robert J. Lee, Jr., cross-appeals, contending that the chancellor erred in dividing certain nonmarital property. We affirm the decree to the extent that the chancellor found the

antenuptial agreement to be valid and enforceable, but we find sufficient merit in appellant's second point on appeal to warrant reversal and remand. We find no merit in appellee's cross-appeal.

[redacted] This court reviews chancery cases *de novo* on the record. However, we will not reverse the findings of the chancellor unless they are clearly erroneous or clearly against the preponderance of the evidence, giving due deference to the superior position of the chancellor to judge the credibility of witnesses and the weight to be given their testimony. *Walker* v. *Hubbard*, 31 Ark. App. 43, 787 S.W.2d 251 (1990); Ark. R. Civ. P. 52(a).

The record indicates that the parties were married on July 18, 1980. Both parties had been married previously and had children by those marriages. They had known each other for about five weeks before they were married. Prior to their marriage, the parties signed an antenuptial agreement, which had been prepared at the direction of appellee. The agreement indicated a desire by the parties that their individual estates descend to their respective children and heirs, and provided that the property owned by each party at the time of the marriage would remain his or her separate property and that neither party would acquire, as a result of the marriage, any interest in the property or estate of the other, or right to control any interest in income, rents, and profits derived therefrom. The agreement provided that all property acquired by the parties subsequent to the marriage would be owned jointly by them. It further provided that, in the event of divorce, appellant was entitled to receive $1,000.00 in full satisfaction of any interest in appellee's property that she might have acquired under the law.

The parties separated in January 1987 and were divorced by a decree entered July 23, 1990. The chancellor found that the antenuptial agreement was valid and that the fair market value of all property acquired subsequent to the marriage, which was not replacement property, was $62,800.00. Appellant was awarded $31,400.00 plus $1,000.00 as her share under the agreement.

Appellant first contends that the chancellor erred in finding that the antenuptial agreement was valid and enforceable. We disagree.

[redacted] Our law recognizes that parties contemplating mar-

riage may, by agreement, fix the rights of each in the property of the other differently than established by law. Such agreements must be made in contemplation of the marriage lasting until death, rather than in contemplation of divorce. *Oliphant* v. *Oliphant*, 177 Ark. 613, 7 S.W.2d 783 (1928); *Gooch* v. *Gooch*, 10 Ark. App. 432, 664 S.W.2d 900 (1984). However, an agreement that is not solely intended to be operative upon divorce is not void merely because it mentions or is operative upon divorce among other contingencies. *Dingledine* v. *Dingledine*, 258 Ark. 204, 523 S.W.2d 189 (1975); *Babb* v. *Babb*, 270 Ark. 289, 604 S.W.2d 574 (Ark. App. 1980). Marriage is sufficient consideration for such agreements. *Comstock* v. *Comstock*, 146 Ark. 266, 225 S.W.2d 621 (1920); *Babb* v. *Babb*, *supra*. An antenuptial agreement will be enforced by the court where the agreement was freely entered into by both parties, and is not unjust, inequitable, or tainted with fraud. *Faver* v. *Faver*, 266 Ark. 262, 583 S.W.2d 44 (1979); *Arnold* v. *Arnold*, 261 Ark. 734, 553 S.W.2d 251 (1977); *Davis* v. *Davis*, 196 Ark. 57, 116 S.W.2d 607 (1938); *Gooch* v. *Gooch*, supra.

At the hearing, appellant testified that appellee wanted her to sign an agreement before they were married but did not explain to her the effect of such an agreement or the rights that she would be relinquishing under it. She testified that, approximately one hour before the wedding, she received a call from appellee's attorney's office, advising her that she needed to sign the agreement before the wedding. Appellant stated that she went to the attorney's office in her wedding dress and signed the document, without having it explained to her and without reading it. She testified that she was not made aware of the extent of appellee's property before the marriage.

Appellee testified that he and appellant had discussed the antenuptial agreement before they were married and that he advised appellant that he would not get married without such an agreement. He stated that appellant told him that she "would be glad to sign it" and "didn't want me for anything I have." Appellant admitted on cross-examination that there was no pressure put on her to sign the agreement. There was evidence that the agreement had been prepared and was ready for signing several days prior to the wedding. Attached to the agreement was a detailed list of all of appellee's property and the value thereof.

The list showed that, at the time the agreement was executed, appellee had a net worth in excess of $600,000.00.

Relying on *Faver*, *Arnold*, and *Davis*, appellant argues that because appellee's wealth and means were so disproportionate to the provisions made for her, it must be presumed that there was a designed concealment by appellee of his assets. Those cases held that, where the provisions for the wife are disproportionate to the means of the husband, a presumption arises that there has been a designed concealment. Such presumption places a burden on the husband to show by a preponderance of the evidence that the wife had knowledge of the character and extent of his assets, or ought to have had such knowledge at the time the agreement was signed. *Faver* v. *Faver*, *supra*; *Arnold* v. *Arnold*, *supra*; *Davis* v. *Davis*, *supra*. Here, unlike in those cases, the presumption was overcome by proof. There was made available to appellant a complete list of appellee's assets, the value thereof, and appellee's estimated net worth. There was evidence that, before the marriage, appellant had been on appellee's farm, knew that he had chicken houses and cattle, and had seen appellee's company trucks on his property. She admitted that no pressure had been applied to force her to sign the agreement.

We agree with the chancellor that appellant's failure to read the proposed agreement before she signed it did not excuse her from its consequences. It is a rule of general application that one is bound to know the content of a document signed by her and if she has the opportunity to read it before she signs it, she cannot escape the obligations imposed by the document by merely stating that it was signed without reading it. *See Stone* v. *Prescott School Dist.*, 119 Ark. 553, 178 S.W. 399 (1915); *Lambert* v. *Quinn*, 32 Ark. App. 184, 798 S.W.2d 448 (1990). When all of the facts and circumstances are considered, we cannot conclude that the chancellor's findings that there had been full disclosure by the parties of their respective financial conditions, that appellant entered into the agreement freely and voluntarily, and that the provisions of the agreement were fair and equitable are clearly erroneous.

Appellant next contends that the trial court erred in its determination of the amount of property she was entitled to

receive under the agreement. We agree.

With regard to after-acquired property, the agreement provided:

> [A]ny property acquired by them subsequent to the contemplated marriage, not including the increase in presently owned property either by way of appreciation of [sic] payment of outstanding indebtednesses, shall be owned jointly by them and that in the event of divorce or death, each of them shall be entitled to the ownership of one-half of any such property acquired subsequent to the date of the contemplated marriage.

At the conclusion of the hearing, the chancellor stated:

> There was discussion, some, about the value of all of it. (I sort of lumped it all together at the very end and I said, "Lee, what in your judgment is the value of that property today, because it's the value today that I have to go by?" If the property is worn out and not in use, I can't go back and pick up what it costs then and try to divide it in that way. He talked about the tractor, about a new chicken house, about some barns, about some other stuff the court considers rather minor and he says "Judge in my judgment, all of that is worth the sum of $60,000.00." That's the figure I wrote down after I added what he had said. In addition to that, he said, "I don't know any other major items," and I went back looking to see if I could find any and I found $2800.00 from Tyson stock that had been purchased since that time. So, all in all I find there's been $62,800.00 that I think we could call a new acquisition.

This finding was carried forward in the judgment and appellant was awarded the sum of $31,400.00 as her share of the property.

From our review of the entire record, the figure of $60,000 given by appellee as the total present value of all property acquired subsequent to the marriage is not permissibly deducible from the evidence presented on that issue. Our *de novo* review discloses testimony concerning a number of other items of personal property acquired subsequent to the marriage that were not included in that $60,000 figure, and we are unable to conclude that they were "minor items" or presently valueless. As the

testimony is not clear as to the present value of some of those items, we are unable, on *de novo* review, to make an accurate determination of those values.

We conclude that the chancellor's finding that the total present value of all property acquired subsequent to the marriage was $62,800.00 is clearly against the preponderance of the evidence, and we reverse that portion of the decree. The cause is remanded for further proceedings to determine the present value of all "property acquired by them subsequent to the contemplated marriage, not including the increase in presently owned property either by way of appreciation [or] payment of outstanding indebtedness," and for entry of an order awarding appellant an amount equal to one-half of the total present value thereof.

On cross-appeal, appellee contends that the trial court erred in its determination that appellant was entitled to certain property under the agreement. He argues that although the paragraph to which the court referred in its conclusion does state that property acquired subsequent to the marriage was to be divided equally, the provisions of preceding sections provide that each will retain his or her separate property and that the other will have "no interest in the income, increased rents, or profits, or dividends arising therefrom." He argues that these preceding provisions eliminate from consideration any property purchased with monies produced by his separate property. We disagree. The agreement clearly states that property acquired subsequent to the marriage shall be owned jointly, with each party entitled to one-half ownership in any such property. If there is any ambiguity created in another portion of the agreement, it must be resolved in favor of appellant. Appellee prepared the agreement and any ambiguity must be resolved against him. *Williams* v. *Cotten*, 9 Ark. App. 304, 658 S.W.2d 421 (1983).

Reversed and remanded on appeal; affirmed on cross-appeal.

COOPER and ROGERS, JJ., agree.

Etta Lee GUINN *v.* Norris W. GUINN

CA 90-489 816 S.W.2d 629

Court of Appeals of Arkansas
Division II
Opinion delivered October 9, 1991

Oscar Hirby, for appellant.

Meredith Wineland, for appellee.

JOHN E. JENNINGS, Judge. Norris and Etta Lee Guinn were married in 1958 and were divorced by decree of the Saline County Chancery Court on September 25, 1989. On appeal to this court, Mrs. Guinn contends that the chancellor erred in holding that the "Timex Major Needs Fund" was not marital property and erred in his disposition of certain funds which had been withdrawn from a joint bank account. We agree with the first point raised and reverse and remand.

Mr. Guinn began working for the Timex Corporation at about the time the parties married. During the marriage Mr. Guinn had accumulated interest in a fund described as a "Major Needs Fund Account." The fund was non-contributory in the sense that all contributions to it were made by the employer. The employer's annual contribution was equal to ten percent of the appellee's base pay. At the time of the divorce appellee's interest in the fund was $14,546.91. This money was available for Mr. Guinn's use, at his option, for the following purposes only: (1) purchase of an automobile up to the sum of eighty percent of its price or the limits of the fund account; (2) investment in real estate up to eighty percent of the property's price or the limits of the fund account; (3) educational needs of Mr. Guinn or his dependents up to the limit of the fund account; and (4) home improvements up to five percent of the base of the employee's annual salary or the limits of the fund account.

The entire balance of the fund was payable in cash upon the employee's retirement, layoff, disability, or death. The appellee would become ineligible to withdraw the money in the fund only if he voluntarily quit or was discharged for cause.

In determining that the property was not marital the court said:

> [I]t does not appear that that is a vested account that is subject to his receiving it other than if he meets certain criteria.

> The testimony is that they have not used it in the past. It is based on the likelihood, only contemporaneously that something may or may not occur.
>
> It is not a vested marital asset with acceptable division. To grant her half interest in the amount would require him to go borrow or to trump up a need to borrow something so he could get money out of the plan. I don't feel like it is the court's province to require people to utilize things if they don't feel it is profitable to do so. I do not find it to be marital.

We cannot agree. In *Day* v. *Day*, 281 Ark. 261, 663 S.W.2d 719 (1984), the court held:

> [E]arnings or other property acquired by each spouse must be treated as marital property, unless falling within one of the statutory exceptions, and neither one can deprive the other of any interest in such property by putting it temporarily beyond his or her own control, as by the purchase of annuities, participation in a retirement plan, or other device for postponing full enjoyment of the property."

In *Gentry* v. *Gentry*, 282 Ark. 413, 668 S.W.2d 947 (1984), the supreme court said that "marital property means *all* property *acquired* by either spouse subsequent to the marriage" (citing Ark Stat. Ann. § 34-1214 (Repl. 1962)) (emphasis in *Gentry*).

As to the question whether Mr. Guinn's interest in the major needs fund account was "vested," his right to the account meets the test approved in *Day*, i.e., it is "one that cannot be unilaterally terminated by the employer without also terminating the employment relationship." *Day* v. *Day*, 281 Ark. at 267. Finally, the fact that the fund is non-contributory is not controlling. *Goode* v. *Goode*, 286 Ark. 463, 692 S.W.2d 757 (1985); *Dunn* v. *Dunn*, 35 Ark. App. 89, 811 S.W.2d 336 (1991). We conclude that the appellee's interest in the major needs fund account was marital property.

Under the circumstances of the case at bar we think it appropriate to remand the case to the trial judge, as the supreme court did in *Gentry*, *supra*. The chancellor has at least three options available for the disposition of vested but non-matured

retirement interests. *Addis* v. *Addis*, 288 Ark. 205, 703 S.W.2d 850 (1986).

Appellant's second contention concerns a joint bank account. When the parties separated in 1989, Mr. Guinn moved from the marital home and withdrew approximately $5,600.00 from a joint bank account. As of the date of divorce $2,400.00 of these funds remained unspent and the chancellor divided this amount equally between the parties. Mr. Guinn testified that he used the balance of the funds to pay dental bills, rent, security deposits, and start-up expenses for housekeeping. Appellant does not contend that the money was spent otherwise, but insists that the chancellor was required to divide the account balance as of the date it was withdrawn.

Before the money was withdrawn from the account it was held as tenancy by the entirety property and was subject to division under Ark. Code Ann. § 9-12-317 (1987). *See Lofton* v. *Lofton*, 23 Ark. App. 203, 745 S.W.2d 635 (1988). When appellee withdrew the funds they ceased to be a part of the estate by the entireties. *See Jackson* v. *Jackson*, 298 Ark. 60, 765 S.W.2d 561 (1989). It is clear, however, that the appellee could not, merely by the act of withdrawing the funds from the joint account, acquire title to the funds as against the appellant. It is true, as appellant contends, that one remedy available in an appropriate case is the imposition of a constructive trust. *See e.g.*, *Savage* v. *McCain*, 21 Ark. App. 50, 728 S.W.2d 203 (1987). The chancellor also has authority in equity to order an accounting (*See* D. Dobbs, *Handbook on the Law of Remedies* § 4.3 at 252 (1973), and in an appropriate case to offset funds. *See Dillard* v. *Dillard*, 28 Ark. App. 217, 772 S.W.2d 355 (1989) (Rogers, J., dissenting). The equitable remedy of a constructive trust, however, is not imposed absent a legal wrong, such as fraud, as suggested in *Jackson* v. *Jackson*, 298 Ark. 60, 765 S.W.2d 561 (1989), or overreaching, as in *Savage*, *supra*. In the case at bar the chancellor made no finding of fraud or overreaching on the part of the appellee, and we are not persuaded that we should make such a finding on *de novo* review. Not infrequently parties to a divorce must use marital funds to live from day to day during the pendency of the divorce. Equity must act only when unfair advantage is taken. In the case at bar we cannot say that the chancellor's decision not to impose a constructive trust or to order

an offset was clearly erroneous.

Affirmed in part; reversed and remanded in part.

DANIELSON and MAYFIELD, JJ., agree.

Harvey SUMNER *v.* STATE of Arkansas

CA CR 90-202 816 S.W.2d 623

Court of Appeals of Arkansas
Division II
Opinion delivered October 9, 1991

Harkness and Friedman, by: *Al Williams, Jr.*, for appellant.

Ron Fields, Att'y Gen., by: *Sandy Moll*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Harvey Sumner was found guilty by a Hempstead County jury of possession of marijuana with intent to deliver and possession of cocaine with intent to deliver. Sumner was sentenced to a total of nineteen years imprisonment.

On appeal four arguments are made: (1) that the trial court improperly refused to instruct the jury on entrapment; (2) that the court improperly commented on the evidence; (3) that the court erred in denying appellant's motion for directed verdict; and (4) that the court improperly failed to consider probation as an alternative. We must reverse and remand on the last point; otherwise we affirm.

At trial, Wesley Sossamon, the enforcement director for the Ninth East District Drug Task Force, testified that he was operating as an undercover officer in February 1989. Sossamon was introduced to the appellant and asked him if he had any marijuana for sale. Sumner told Sossamon that he thought he could locate some in Hope, Arkansas. Sossamon testified that he, Mr. Sumner, and several others got into the officer's car and went to Hope. They went to several houses and when Mr. Sumner could not find any marijuana, Sumner asked Sossamon if he would be interested in buying some crack cocaine. Sossamon said that he would.

The group then went to another house in Hope. Sossamon gave Sumner $100.00 and asked him to buy two twenty-five dollar "rocks" of cocaine. Sumner went into the house and returned with the cocaine and the officer's change.

Approximately two weeks later Sossamon asked Sumner to buy him two "quarter bags" of marijuana and gave him $60.00. Sumner obtained the marijuana and delivered it to Sossamon.

During his opening statement, appellant's counsel began to discuss the defense of entrapment with the jury. The trial court, on its own motion, then ruled the defense should not refer to the word entrapment during the trial because entrapment had not been pled. This ruling was made despite the state's acknowledgement that it had been put on notice that the defense would be raised. We agree that this ruling was error. Ark. Code Ann. § 5-1-111 (1987) provides that a defendant must prove an affirmative defense by a preponderance of the evidence. Rule 18.3 of the Arkansas Rules of Criminal Procedure provides that the prosecuting attorney shall, upon request, be informed as soon as practicable before trial of the nature of any defense. In a civil case, affirmative defenses must be pled. Ark. R. Civ. P. 8(c); *Mercer* v. *Nelson*, 293 Ark. 430, 738 S.W.2d 417 (1987). We can find no corresponding requirement in the criminal law requiring the pleading of affirmative defenses.

Nevertheless, we hold that the ruling was harmless error. It is clear from the record that appellant was permitted to put on his evidence relating to the claimed defense. His theory of the case was that because the officer simulated smoking marijuana with him, the appellant did not believe Mr. Sossamon was a police officer, so the appellant was not afraid to obtain drugs for him. According to Ark. Code Ann. § 5-2-209 (1987), "Entrapment occurs when a law enforcement officer or any person acting in cooperation with him induces the commission of an offense by using persuasion or other means likely to cause normal law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment." Here, as in *Hill* v. *State*, 13 Ark. App. 307, 683 S.W.2d 628 (1985), there was no evidence that the officer promised anything to the appellant, nor that he used "persuasion or other means likely to cause [a] normally law-abiding" person to commit the offense. Where there is no evidence to support the giving of an instruction it is not error to refuse it. *Hill*, *supra*; *see also Parks* v. *State*, 11 Ark. App. 238, 669 S.W.2d 496 (1984). Because appellant was permitted to put on his evidence relating to his theory of entrapment and because the trial court was correct in declining to instruct the jury on the defense, the court's error in its initial ruling was harmless. *See Berna* v. *State*, 282 Ark. 563, 670 S.W.2d 434 (1984).

After the jury had retired to deliberate, the court was informed that they had a question to ask. When they were returned to the courtroom, the foreman stated:

> [T]he simulation practice given in the testimony, is that we notice the word he used was practice. Is that a legal practice? I mean, is it covered? Is it a law that covers that or states that? Is that done under the law?

The court advised the jurors that it would need to confer with counsel before it could answer the question. After that conference, which apparently was not recorded, the court advised the jury, without objection, "Ladies and gentlemen of the jury, as to the first question, the simulation of the use of drugs by law enforcement is an accepted law enforcement practice." Appellant now claims that this amounts to a comment on the evidence. We agree with the state that this situation is governed by the principal that appellant cannot agree with the ruling made by the trial court and then attack that ruling on appeal. *See Gilbert* v. *State*, 277 Ark. 61, 639 S.W.2d 346 (1982).

Appellant contends that the evidence is insufficient to support the verdict. His specific argument is that there was insufficient evidence to establish his intent to deliver. Intent, being a subjective matter, is ordinarily not susceptible to proof by direct evidence but usually must be established by circumstantial evidence. *Taylor* v. *State*, 28 Ark. App. 146, 771 S.W.2d 318 (1989). We hold that under the facts in this case the jury could permissibly infer that the appellant intended to deliver the controlled substances.

At the time of sentencing, appellant asked the court to consider probation as an alternative. The court responded that probation was not an option available under the law. Sumner contends on appeal that the court abused its discretion in failing to consider probation. This issue was decided in appellant's favor in *Pennington* v. *State*, 305 Ark. 507, 808 S.W.2d 780 (1991). On virtually identical facts, the court in *Pennington* held that it was error for the circuit court to fail to consider a request for probation following a conviction of possession of cocaine with intent to deliver. We therefore reverse and remand this case to permit the trial court to consider appellant's request.

Affirmed in part; reversed and remanded in part.

DANIELSON and MAYFIELD, JJ., agree.

Ben UNDERNEHR *v.* Shirley SANDLIN, Benton County Assessor, and Charlie Daniels, Commissioner of State Lands.

CA 90-469 816 S.W.2d 635

Court of Appeals of Arkansas
Division I
Opinion delivered October 9, 1991
[Supplemental Opinion on Denial of Rehearing
January 15, 1992.]

Mashburn & Taylor, by: *Timothy L. Brooks*, for appellant.

MELVIN MAYFIELD, Judge. Appellant Ben Undernehr appeals from a decision of the Benton County Chancery Court dismissing his "Petition to Reform Deed" against Shirley Sandlin, Benton County Assessor and Charlie Daniels, Commissioner of State Lands. We find no error and affirm.

The evidence shows that on May 17, 1988, appellant purchased a parcel of land in the City of Bentonville, Benton County, Arkansas, at a tax forfeiture sale conducted by the State Land Commissioner, Charlie Daniels. The Limited Warranty Deed issued to him contained the following description:

> Pt. Lot 2 Beg 50' W NE/C E60' S247½' W30' N110' S247½' W30' N110' Etc. Dickson

A close examination of this description reveals that it is incomplete and does not "close." A search of the records in the county assessor's office revealed an error, which was made in 1978, when the assessor's office was converting to computers. This resulted in certain property being double taxed. The taxes on that property, which was owned by Dynamic Enterprises, were not delinquent. This was a larger parcel that included the smaller parcel Underhehr thought he had purchased.

This suit was brought by Dynamic Enterprises against Undernehr to have his tax deed declared void and title to the property quieted in Dynamic. The trial court found for Dynamic Enterprises and ordered Undernehr to quitclaim his interest in the property to Dynamic. The court's order also granted Undernehr twenty days to file a third-party complaint against the State of Arkansas or any of its political subdivisions. Undernehr then filed a third-party complaint against the appellees asking for reformation of his tax deed. Both appellees filed answers admitting that an error had been made and that Undernehr had received a tax deed with an incomplete description, and they asked that his petition for reformation be dismissed. Extensive evidence was taken from Ms. Sandlin regarding the tracing of the parcels of property from 1978 forward. At the close of the case the judge dismissed the petition for reformation and this appeal followed.

The record clearly shows that the description of the property which appellant purchased at the tax sale was defective: the description goes north then south along the same line; it does not return to the point of beginning and, therefore, does not "close"; it ends with "*Etc.*"; and it does not say that "Dickson" is a subdivision.

It has long been held that a tax sale which contains an

incomplete or defective description is void. In *Sutton* v. *Lee*, 181 Ark. 914, 28 S.W.2d 697 (1930), the appellant had ascertained that certain real estate was unoccupied and had been forfeited to the state for nonpayment of taxes for 1917 and 1921 under the indefinite description: "Parts of lots 3 and 4 in block 36 in the city of Hot Springs, Arkansas." The appellant had the land surveyed, purchased it at a sheriff's sale, and received a certificate which contained a definite description in keeping with the survey. Appellant then paid the purchase price, presented her certificate to the State Land Commissioner, and applied for a deed. The Land Commissioner refused to issue a deed containing the survey description, but he did issue a deed containing the description by which the land had been forfeited and conveyed to the state for nonpayment of taxes. Appellant took possession of the land and made valuable improvements on it. Appellee then filed an ejection action against appellant contending she held title to the property by inheritance. The suit was transferred to chancery by consent and a decree was rendered for the appellee for possession. On appeal the court stated:

> In the instant case the sale was unauthorized because the description of the land in the assessment and all proceedings involved was insufficient to identify it. It amounted to no description at all.
>
> Appellant also contends for a reversal of the decree because the certificate of purchase acquired under a compliance with the requirements of act 365 of the Acts of 1923, contained a definite and certain description of the real estate in controversy. This act only applies to purchasers of lots from the State to which it has acquired title. The State acquired no title to the real estate in controversy in the instant case as the assessment and forfeiture were void from the want of a description by which same might be located. The certificate was issued without authority, and could not and did not confer color of title to said real estate although definitely describing it.

181 Ark. at 918-19.

In *Gardner* v. *Johnson*, 220 Ark. 168, 246 S.W.2d 568 (1952), the court said:

The tax sale was invalid by reason of the defective description. The law is firmly established in this State that in order to make a valid sale of land for taxes, the land must be described with certainty upon the assessment rolls, and all subsequent proceedings for the enforcement of payment of taxes, *Wilkerson* v. *Johnston*, 211 Ark. 170, 200 S.W.2d 87. In that case the court said:

> "It is well settled, not only by the decisions of this court, but by the adjudged cases in the courts of other states, as far as we can discover, that, in order to make a valid assessment and sale of land for taxes, the land must be described with certainty upon the assessment rolls and in all subsequent proceedings for the enforcement of payment of the tax. The chief reason for this requirement is that the owner may have information of the charge upon his property. It has sometimes been said that a description that would be sufficient in a conveyance between individuals would generally be sufficient in assessment for taxation. We do not, however, consider that a safe test. The description in tax proceedings must be such as will fully apprise the owner, without recourse to the superior knowledge peculiar to him as owner, that the particular tract of his land is sought to be charged with a tax lien. It must be such as will notify the public what lands are to be offered for sale in case the tax be not paid. In *Cooper* v. *Lee*, 59 Ark. 460, 27 S.W. 970, this court said: 'A description which is intelligible only to persons possessing more than the average intelligence, or the use and understanding of which is confined to the locality in which the land lies, is not sufficient.' These statements have been cited with approval in many subsequent cases."

220 Ark. at 171-72.

The law as set out in the above cases has recently been applied in the case of *Liggett* v. *Church of Nazarene*, 291 Ark. 298, 724 S.W.2d 170 (1987). Thus, it is clear that the appellant in the instant case acquired no title by the tax sale as it was void because of the incomplete description under which the land was

assessed and sold. It is also clear that appellant's tax deed, based upon the void tax sale, could not be reformed.

Appellant argues, however, that "Where separate defendant, Charlie Daniels, State Land Commissioner, admitted that legal description on limited warranty deed was inaccurate and further admitted that the deed should be reformed, it was error for the chancellor to dismiss the amended petition to reform deed." Appellant contends that there was a mutual mistake, and the tax deed should be reformed. He says there is no such thing as a legal description being bought or sold; rather, it is the underlying land that is bought or sold. He then quotes from several cases which hold that reformation of a deed can be had in cases of mutual mistake.

Appellant's argument ignores the law cited above which holds that the State acquires no title to real estate forfeited under an incomplete and defective description as the assessment and forfeiture in that situation are void. Therefore, reformation simply does not apply where land has been forfeited to and sold by the State under an incomplete and defective description.

Appellant is, however, entitled to have his money refunded. Ark. Code Ann. § 26-37-204(a) (1987) provides that "in the event the sale is set aside by legal action or if the land is proven to be nonexistent or double assessed, the purchaser shall be entitled to reimbursement of moneys paid." And Ark. Code Ann. § 26-37-206 (1987) states:

> If the taxes charged on any land or lot, or part thereof, are regularly paid, and the land or lot [is] erroneously returned delinquent and sold for taxes, the sale of the land or lot shall be void and the money paid by the purchaser at such a void sale shall be returned to him by the officer having the money in charge, on the order of the county court that the land was erroneously returned delinquent and sold for taxes.

The decision of the trial court is affirmed, but this case is remanded for the entry of an order for refund of the amount paid for the tax deed.

DANIELSON and ROGERS, JJ., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
JANUARY 15, 1992

___ S.W.2d ___

Petition for rehearing; denied.

Mashburn & Taylor, by: Timothy L. Brooks, *for appellant.*

No response.

MELVIN MAYFIELD, Judge. Appellant, Ben Undernehr, has filed a petition for rehearing contending that the opinion issued by this court on October 9, 1991, which affirmed the trial court decision and remanded the case for further proceedings, contains error of fact. Specifically, appellant alleges our opinion indicates that an error in the assessor's office "resulted in certain property being doubled taxed" and that "taxes on that property . . . were not delinquent." Appellant contends that according to the record it is "uncontroverted and unequivocal" that the property under question was not double taxed and that it was tax delinquent for the year 1980. The property involved was shown on the tax books as parcel 1594. Shirley Sandlin, Benton County Assessor, testified in part as follows:

> Q. Now, if we can kind of cut to the chase on this case, I think we'll go through this. What is your position as it relates to the parcel number fifteen ninety-four and its availability or whether it was subject to being sold at a tax delinquent sale?
>
> . . . .
>
> A. Okay. My position, I guess, would be the fact I felt like it was double assessed. I was not aware of the problem until it had sold. And in checking, I found out that that had been redrawn and was double assessed. The legal description was drawn out on other people's property entirely. (Tr. 59).
>
> . . . .

Q. When was it that the property became double assessed?

A. Nineteen Eighty. . . . (Tr. 60).

. . . .

Q. Okay. In Nineteen Eighty-one is where we have the second double assessment, if you will; is that correct?

A. Yes. Correct.

Q. The second double assessment is generated from the fact that the legal description was combined on a Warranty Deed into a single legal description instead of two separate legal descriptions?

A. Correct. (Tr. 63).

. . . .

Q. Would it be safe to say that if that faulty legal description has been superimposed on top of the correct legal description? (Tr. 81).

(At this point there was an objection and after discussion between the court and counsel, the witness answered the question.)

A. It does fall entirely on someone else's property.

Q. All right. And are there any delinquencies on that other piece of property?

A. No.

Q. No tax delinquencies on that piece of property? Okay. This incorrect legal description, was it ever given some type of parcel number?

A. It carried parcel number fifteen ninety-four. (Tr. 83).

While it is true that the trial judge stated, "I don't find a lot of evidence of double assessment here and because I don't, you know, I can't find that any piece of property has been assessed twice," the trial judge did not have the benefit of the written transcript before him as we do. The trial judge did say: "That piece of property ain't there. You didn't prove it's there. . . . If it's not there and it's not been delinquent, the state can't have it." We affirmed the trial judge because we thought his decision was right. After reading the transcript again, we are satisfied the record supports the statements in our original opinion that the property the appellant wants deeded to him was "double taxed" and that the taxes on that property "were not delinquent."

Appellant's petition for rehearing also contends that our opinion cited to "earlier" decisions which hold that a tax deed containing an incomplete or defective legal description is void, and appellant says that other case law is more closely on point and indicates that the description only needs to provide a "key" to the land in question. Appellant cites *Moseley* v. *Moon*, 201 Ark. 164, 144 S.W.2d 1089 (1940), as "more closely on point" and refers to language in that case which states that a description is sufficient if it "furnishes a key through which the land may be definitely located by proof *aliunde*." The paragraph which contains that language also states:

> Of course, the converse of this proposition is true; that is to say, extrinsic evidence is not admissible to cure or perfect a description which in itself is void and offers no key or suggestion by which the land may be located.

201 Ark. at 167.

In the instant case, we carefully considered the description in the deed appellant obtained from his purchase at the tax forfeiture sale. We cited cases which hold that the State acquires no title to real property "forfeited under an incomplete and defective description" because the assessment and forfeiture in

that situation are void. Therefore, we said that reformation simply does not apply where land has been forfeited to the State under an incomplete and defective description. This is as true when the State is the only defendant as when the owner of the land at the time of forfeiture is a party. The State simply cannot sell land it does not own, and a deed to such property cannot be reformed.

Moreover, we do not agree that the description in this case "furnishes a key through which the land may be definitely located by proof *aliunde*." The problem with this description is greater than an error as to the beginning point (which is the error suggested by appellant). The description goes east from the point of beginning and then goes south and then west and, after going south and west again, it goes north but never returns to the point of beginning. It simply stops and states "Etc.," which leaves the rest of the description to the imagination of the reader. This description is equally as defective as the one held void in the case of *Gardner* v. *Johnson*, 200 Ark. 168, 246 S.W.2d 568 (1952), cited in our original opinion and that is a later case than the case of *Moseley* v. *Moon, supra*, relied upon by appellant.

The petition for rehearing is denied.

Billy LEWIS *v.* CAMELOT HOTEL and Royal Insurance Co.

CA 91-47 816 S.W.2d 632

Court of Appeals of Arkansas
Division I
Opinion delivered October 9, 1991
[Rehearing denied November 6, 1991.]

Kaplan, Brewer, Maxey, P.A., by: *Silas H. Brewer, Jr.*, for appellant.

Barber, McCaskill, Amsler, Jones & Hale, P.A., by: *Robert C. Henry III* and *Gary R. Sammons*, for appellee.

JUDITH ROGERS, Judge. Appellant, Billy Lewis, appeals from a two to one decision of the Workers' Compensation Commission denying his claim for permanent total disability benefits. On appeal to this court, appellant urges that he is permanently and totally disabled under the "odd-lot" doctrine, and that the commission's decision to the contrary is not supported by substantial evidence. We agree with appellant's argument; therefore, we reverse and remand.

On March 25, 1988, appellant sustained an admittedly compensable injury when a stack of eight-foot banquet tables collapsed, severely crushing the upper portion of his right leg. Appellant underwent emergency surgery performed by Dr. W. Scott Bowen, who described the injury in his admitting diagnosis as having crushed the upper portion of the tibia, shattering the proximal ⅓ of the shaft, producing a compound fracture, and also involving the knee joint with severe comminution and depression. Dr. Bowen related that the injury was extremely difficult to repair, requiring four and a half hours of surgery with the placement of multiple screws and plate fixation devices. In his early reports, Dr. Bowen warned that appellant's prognosis was fair at best, and the injury would require a long period of rehabilitation of nine months to a year. He also stated that, due to the severity of the injury, he fully anticipated that appellant would develop post-traumatic arthritis, which would in time necessitate a total knee replacement.

By letter of January 16, 1989, Dr. Bowen reported that he had explained to appellant that he would never be able to return to a normal level of function, but that he felt that appellant was doing well considering the nature of his injury. After a year, Dr. Bowen assessed a thirty percent impairment rating. Thereafter, on July 6, 1989, Dr. Bowen again performed surgery on appellant, involving the removal of the hardware and bone grafting, as well as an arthroscopic debridement of the knee. Twenty-one months after the accident, Dr. Bowen released appellant to pursue sedentary employment with the restrictions that he avoid prolonged standing, and that he not be required to do any stooping, squatting, climbing or lifting more than five pounds.

Specifically, it was Dr. Bowen's opinion that appellant could pursue some type of office job or one at a computer terminal. He also believed that a job involving fine manipulation in a factory situation would be appropriate.

At the time of the injury, appellant was fifty-five years of age, and was employed as a banquet manager by appellee, the Camelot Hotel. In this position, which he had held for eight to ten years, appellant was responsible for preparing the facilities of the hotel for guests and parties, which involved physical duties, such as arranging tables and chairs, and moving platforms and risers. To this end, appellant testified that he was required to be on his feet a majority of the time. Appellant also testified that as banquet manager he supervised twenty-two to thirty employees, scheduled their shifts, and did the hiring and firing of employees. The record reflects that, since his graduation from high school, appellant has been employed in related occupations. Appellant testified that he worked as a waiter to the Marion Hotel from 1955 to 1970, and for the last five years there he held the position of assistant head waiter. After the Marion Hotel closed, appellant worked for a year at the Lafayette Hotel as a waiter, and was subsequently employed for several years as a bartender at the Little Rock Club, before being hired by the appellee when it opened in 1973.

Since the injury, appellant testified that he had worked only once as a bartender for his cousin, a caterer, at a Christmas party in 1989. He said that he had more trouble doing the work than he expected, and that after the first hour or two he experienced discomfort, which was eased when the hostess provided a stool for him to sit. The services of Rehabilitation Management, Inc., which provides vocational and rehabilitation consulting, were retained to help appellant locate employment. The rehabilitation specialist met with the appellant at his home and accompanied him on visits to the doctor. There was evidence that the specialist met with appellee's personnel director regarding the possible return of appellant to work within the guidelines established by Dr. Bowen. Appellant said that it had been some time since he had heard from the specialists he had seen regarding a job. Appellant testified that on his own he had applied for positions as a bartender at the Capitol Hotel, and a funeral home driver. He said that he was waiting, but had not again been contacted by his

cousin about work. Appellant further testified that he preferred to go back to his old job, which he felt he could do if he were not required to climb stairs. Appellant also related that he had difficulty in doing chores around the house, and that he could no longer mow the yard or wash the car. He said that he has had to forego taking walks for exercise, as he tires easily.

As a result of the injury, appellee, Royal Insurance Company, provided temporary total disability benefits from the date of the injury until March 25, 1989. Thereafter, permanent partial benefits were provided based on Dr. Bowen's impairment rating of thirty percent to the knee. Temporary total benefits were reinstated on July 6, 1989, after the second operation, and continued until September 1, 1989. Appellant then filed this claim for permanent total disability benefits pursuant to the odd-lot doctrine.

The "odd-lot doctrine" refers to employees who are able to work only a small amount. The fact that they can work some does not preclude them from being considered totally disabled if their overall job prospects are negligible. *M.M. Cohn Co.* v. *Haile*, 267 Ark. 734, 589 S.W.2d 600 (1979). In reference to the odd-lot doctrine, we have recognized that "total disability" does not require a finding that the employee is utterly helpless, and an employee who is injured to the extent that he can perform services that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist may be classified as totally disabled. *Hyman* v. *Farmland Feed Mill*, 24 Ark. App. 63, 748 S.W.2d 151 (1988). We have also observed:

> If the evidence of degree of obvious physical impairment, coupled with other facts such as the claimant's mental capacity, education, training, or age, places claimant *prima facie* in the odd-lot category, the burden should be on the employer to show that some kind of suitable work is regularly and continuously available to the claimant.

Johnson v. *Research-Cottrell*, 15 Ark. App. 48, 50, 689 S.W.2d 8, 9 (1985) (*quoting* A. Larson, *Workmen's Compensation Law* § 57.61 (1983)).

In rejecting appellant's claim, the commission quoted excerpts from appellant's testimony in which he expressed a marked

willingness to work, and eagerness to "try" any job that might be offered. The commission noted that appellant's physician stated that he was capable of performing sedentary work, and concluded that appellant's inability to find a job was not due to his disability, but was attributable to the unavailability of employment. The commission also noted appellant's experience in office work and his past role as a supervisor.

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. *Hardin* v. *Southern Compress Co.*, 34 Ark. App. 208, 810 S.W.2d 501 (1991). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *College Club Dairy* v. *Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988). 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. *ITT/Higbie Manufacturing* v. *Gilliam*, 34 Ark. App. 154, 807 S.W.2d 44 (1991). We are so persuaded in this case.

According to the reports generated by the rehabilitation specialist, appellant's optimism was noted, particularly with regard to his desire to return to his former job. However, the specialist did not believe that appellant had accepted the limitations resulting from his injury, and considered that his attitude was unrealistic. As evidenced by these reports, the specialist's efforts were initially focused on identifying a position with the appellee hotel, within the guidelines and restrictions given by Dr. Bowen. In speaking with appellant's supervisor, the specialist learned that as a banquet manager, appellant would spend no more than an hour and a half a day in the office, and that although he was considered a good employee, the supervisor informed her that appellant was less than an adequate administrator and "number cruncher." The specialist spoke with appellee's personnel director and discussed alternative clerical or bookkeeping positions, but the personnel director did not think appellant had the education or training to fill any of these positions. Ultimately, appellee refused to rehire appellant without a 100% release for all work. The specialist's final report indicates a decision to assist appellant in locating other employment. The specialist reported,

however, that appellant's age, his physical limitations and experience only in banquet service, were factors which would limit the availability of jobs for appellant. It does not appear that suitable jobs were located.

As indicated by the lengthy quotation from appellant's testimony in the opinion, we think the commission placed undue emphasis on appellant's eagerness to work. From his testimony, it is clear that appellant said he would try most any job offered to him, even those that did not fall within the restrictions recommended by Dr. Bowen. More importantly, the record reflects that appellant's willingness to work has not translated into opportunity. Indeed, the commission appears to have accepted the fact that there were no jobs available to appellant, but found that, since it was the opinion of Dr. Bowen that appellant could pursue sedentary work, appellant was not totally disabled. We believe this finding was in error. As indicated in the case law, the fact that a claimant is not utterly helpless or can perform some work does not preclude a finding of total disability under the odd-lot doctrine when it is shown that the claimant's future job prospects are negligible. We think the record amply demonstrates that suitable work was not available to appellant due to a combination of his advancing age, his level of education, his limited experience in one area of the job market, and his disability.

Based on the record before us, we hold that there is no substantial evidence to support the commission's decision, and that appellant does fall within the odd-lot category of workers. *See e.g. Sunbeam Corp.* v. *Bates*, 271 Ark. 385, 609 S.W.2d 102 (Ark. App. 1980). Accordingly, we reverse and remand for an award of benefits not inconsistent with this opinion.

Reversed and remanded.

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

[redacted]