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IN THE MATTER OF The Estate of Garner ROBINSON, Jr., Deceased

CA 91-86 816 S.W.2d 896

Court of Appeals of Arkansas
Division II
Opinion delivered October 16, 1991

Etoch Law Firm, by: *Mike J. Etoch*, for appellant.

Wilson & Associates, by: *Kathleen Bell*, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Garner Robinson, Sr., appeals from an order of the probate court of Phillips County, Arkansas, appointing Benzene Collier as personal representative of the Estate of Garner Robinson, Jr., deceased. We find no error and affirm.

Garner Robinson, Jr., was killed in an automobile accident. Appellant, the deceased's natural father, filed a petition praying that he be appointed personal representative of his son's estate. Willie Ann Anderson, the deceased's natural mother, filed a petition in which she nominated her brother, Benzene Collier, for appointment. The probate judge ruled that both nominees shared equal priority and that, on the evidence presented to him, Benzene Collier was the more suitable and competent person to serve as personal representative of the estate.

Arkansas Code Annotated § 28-48-101 (1987) sets out the priorities that the court must consider in appointing an administrator of a decedent's estate. It provides, in pertinent part, as follows:

> (a) Domiciliary letters testamentary or of general administration may be granted to one (1) or more of the natural or corporate persons mentioned in this section who are not disqualified, in the following order of priority:
>
> (1) To the executor or executors nominated in the will;
>
> (2) To the surviving spouse, or his or her nominee, upon petition filed during a period of thirty (30) days after the death of the decedent;
>
> (3) To one (1) or more of the persons entitled to a distributive share of the estate, or his or her nominee, as the court in its discretion may determine . . . .
>
> (4) To any other qualified person.

This section further provides that no person whom the court finds

to be unsuitable may be qualified to serve. It has been held that the choice of a personal representative is discretionary with the probate court, but that the statutory provisions set forth in the section quoted above are to be followed absent unusual circumstances. *See Standridge* v. *Standridge*, 304 Ark. 364, 803 S.W.2d 496 (1991); *McEntire* v. *McEntire*, 265 Ark. 260, 577 S.W.2d 607 (1979).

Appellant contends that since no unusual circumstances existed and he was not found to be unsuitable, Benzene Collier was not entitled to equal priority with him under § 28-48-101, and the court abused its discretion in not appointing appellant as administrator. He argues that, although he and Willie Ann Anderson enjoyed an equal priority under the provisions of subsection (a)(3), her nominee was not entitled to that same status. We disagree. Section 28-48-101 provides that, in the absence of a nominee in the will or a surviving spouse, any one or more persons entitled to a distributive share, *or* his or her nominee, may be appointed. We conclude that, because Collier was a nominee of a distributee of the estate, he shared equal priority with all other distributees under the clear wording of that section.

Furthermore, the evidence shows that appellant is fifty-eight years old and, due to several automobile accidents, had not worked for a number of years and was receiving social security disability benefits. Although appellant testified that he completed the eleventh grade, the record indicates that he has difficulty reading and some of his answers to questions put to him were not entirely responsive. On the other hand, Benzene Collier is thirty-eight years old and had maintained a close relationship with the deceased throughout his life. He graduated from high school, attended Arkansas Tech University, and was employed at the local chemical company. He was a nominee of the decedent's mother, who testified that, because of her lack of formal education, she would not be qualified to act as administratrix but had no reservation about Collier's ability to handle the estate.

From our *de novo* review of the record, we cannot conclude that the probate court abused its discretion in appointing Collier to serve as personal representative of the estate.

Affirmed.

COOPER and JENNINGS, JJ., agree.

SONIC DRIVE-IN, Ranger Insurance Company, and U.S. Fire Insurance Company *v.* Mary Ellen WADE

CA 91-9 816 S.W.2d 889

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

Walter A. Murray, for appellant Ranger Insurance Company.

Barber, McCaskill, Amsler, Jones & Hale, P.A., by: *Michael L. Alexander* for appellant U. S. Fire Insurance Company.

Guy Brinkley, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Ranger Insurance Company and U.S. Fire Insurance Company appeal from an order of the Arkansas Workers' Compensation Commission apportioning between them responsibility for paying temporary total disability benefits to appellee, Mary Ellen Wade. Although a number of issues are raised on appeal, we conclude that the case should be remanded to the Commission for more specific findings.

On October 17, 1985, appellee suffered an injury while employed at a Sonic Drive-In, resulting in a period of temporary total disability due to carpal tunnel syndrome. At the time of that injury, Ranger Insurance Company was Sonic's workers' compensation carrier. Appellee returned to work at Sonic on May 31, 1986, but on that day sustained a second injury, resulting in temporary total disability due to thoracic outlet syndrome. By the time of the second injury, U.S. Fire Insurance Company had replaced Ranger as Sonic's carrier.

On June 16, 1987, the administrative law judge entered an order holding Ranger responsible for all of appellee's temporary total disability, permanent disability, and medical expenses resulting from her carpal tunnel syndrome. The order held U.S. Fire Insurance Company responsible for appellee's temporary total disability, permanent disability, and medical expenses subsequent to May 31, 1986, which were related to her thoracic outlet syndrome. The opinion of the ALJ was adopted by the Commission, and no appeal was taken from that order.

Appellee thereafter left her employment at Sonic, continued her education, and then worked as a licensed practical nurse in a Missouri nursing home until September 1989. At that time, she ceased her employment and sought further treatment, including inpatient treatment at a local hospital for which medical expenses in an amount from $23,000.00 to $25,000.00 were incurred. Appellee then filed this claim for additional temporary total disability and payment of her medical expenses.

The ALJ found that appellee was again temporarily totally disabled and that her present disability and the medical treatment relative thereto were the result of "the cumulative effect of successive and repeated accidental injuries suffered in the same employment [*i.e.*, at Sonic], some of which occurred during the period of coverage of both carriers." In his order, the ALJ directed that each carrier pay one-half of appellee's temporary total disability benefits until she reaches the point of maximum healing, and one-half of her medical expenses that are causally related to her previous compensable injuries. Although specifically contested, the ALJ made no finding on the issue of whether appellee's medical treatment and expenses were reasonable and necessary. Again, the Commission merely adopted the ALJ's

opinion as its own.

On appeal, each carrier makes several arguments that it contends warrant reversal as to it. One argument is that it was error for the Commission not to make a finding on the issue of the "reasonableness and necessity" of the medical treatment and expenses mentioned in the evidence, including the inpatient treatment. We agree that the Commission should have made a finding on this issue.

While there may be evidence in the record to support a finding one way or the other, neither the ALJ nor the Commission resolved the issue by a specific finding of fact. This court does not review decisions of the Commission *de novo* on the record or make findings of fact that the Commission should have made but did not. Our function is to review the sufficiency of the evidence to support the findings that the Commission does make, and when it fails to make specific findings on an issue, it is appropriate that the case be reversed and remanded for the Commission to make such findings. *Wright* v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1987). In order that this case not be decided piecemeal on appeal, we conclude that it should be remanded to the Commission for a specific finding on the issue of whether appellee's medical treatment and expenses were reasonable and necessary.

We might also point out that the order that "Respondents 1 and 2 shall each pay one-half of claimant's statutory attorney's fees on this award" needs clarification. Arkansas Code Annotated § 11-9-715 (1987) does not provide any set figure as "statutory attorney's fees"; rather, the Commission is to determine and award a reasonable fee within specific limitations.

Reversed and remanded.

COOPER and ROGERS, JJ., agree.

Greg BUCKLEY *v.* STATE of Arkansas

CA CR 91-20 816 S.W.2d 894

Court of Appeals of Arkansas
Division II
Opinion delivered October 16, 1991

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

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with possession of cocaine. After a bench trial on September 4, 1990, the trial court found the appellant guilty of possession of a controlled substance and sentenced him to five years probation conditioned upon his paying court costs and a fine of $250.00. From that decision, comes this appeal.

For reversal, the appellant contends that the evidence was insufficient to support his conviction for possession of a controlled substance because the State failed to show that he possessed a "usable amount" of cocaine. We do not agree, and we affirm.

Where the sufficiency of the evidence is at issue in a criminal case, whether tried by judge or jury, we do not weigh the evidence favorable to the State against any conflicting evidence favorable to the accused, *Westbrook* v. *State*, 286 Ark. 192, 691 S.W.2d 123 (1985), but instead review the evidence in the light most

favorable to the State and affirm if the finding of guilt is supported by substantial evidence. *Turner* v. *State*, 24 Ark. App. 102, 749 S.W.2d 339 (1988). Substantial evidence is evidence which induces the mind to go beyond mere suspicion or conjecture, and is of sufficient force or character to compel a conclusion one way or the other with reasonable certainty. *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984).

The record shows that the appellant in the case at bar was arrested after a police officer saw him drop a small white rock-like substance from his right hand. Gene Bangs, a chemist with the Arkansas State Crime Laboratory, testified that he subjected the white rock-like substance to chemical analysis and determined that it was cocaine base, commonly called "crack." Mr. Bangs also testified that the quantity of the substance was twelve milligrams, and that, in his opinion, twelve milligrams was a usable amount. He based his opinion on his prior experience; he stated that he had seen pieces of crack broken up in numerous sizes, and that he had previously seen a pipe containing a piece of crack that weighed twelve milligrams. He also stated that he had formerly seen crack cocaine broken up into chips the same size as that obtained from the appellant or slightly larger. Finally, although Mr. Bangs testified that he was not a pharmacologist and did not know what amount of cocaine one would have to possess in order to have an effect on the human body, that he was able to readily detect the presence of the object he examined without the use of any scientific equipment, testing, or processing.

The appellant contends that the State failed to prove that he possessed a usable amount of cocaine because Mr. Bangs was unable to testify concerning the effect twelve milligrams would have on the human body. We do not agree. In *Terrell* v. *State*, 35 Ark. App. 185, 818 S.W.2d 579, we held that proof as to the effect of a given quantity of drugs on the human body was not required under *Harbison* v. *State*, 302 Ark. 315, 790 S.W.2d 146 (1990), and that the testimony of the state chemist in that case to the effect that the quantity was "enough to light and get a hit off of" constituted substantial evidence that Terrell possessed a "usable amount" of cocaine, defined in *Harbison* as an amount "sufficient to be useable in the manner in which such a substance is ordinarily used." 302 Ark. at 322. We think that Mr. Bangs' testimony in the case at bar to the effect that he had formerly seen

pieces of crack broken up into chips the size of the substance obtained from the appellant, and that he had seen pieces of crack of that size loaded into a pipe, was sufficient to permit the fact-finder to infer that the appellant possessed an amount of crack cocaine equivalent to a dosage sometimes employed by crack users, and therefore constituted substantial evidence that the appellant possessed a usable quantity of cocaine.

Affirmed.

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

Columbus ROWE *v.* STATE of Arkansas

CA CR 91-23 816 S.W.2d 897

Court of Appeals of Arkansas
Division II
Opinion delivered October 16, 1991

LaJeana Jones, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

JAMES R. COOPER, Judge. The appellant, Columbus Rowe, appeals from his conviction by a jury of delivery of a controlled substance. He contends the trial judge erred in denying his motion for directed verdict at the close of the State's case and his

motion for judgment notwithstanding the verdict at the sentencing phase, both motions being based on the lack of sufficient evidence to convict. We conclude that Rowe waived his right to question the sufficiency of the evidence on appeal by failing to move for a directed verdict at the conclusion of all the evidence, and therefore we affirm.

In June 1989, an undercover agent was approached by the appellant and three other persons. The agent gave the appellant $35.00, and the appellant left and returned twenty minutes later with "rock" cocaine. At trial, the agent testified that he kept the substance in his possession until it was sent to the State Crime Laboratory. A chemist testified that the rock substance contained cocaine. The jury found the appellant guilty of delivery of a controlled substance.

No motion for a directed verdict was made at the close of the case as required by Ark. R. Crim. P. 36.21(b), which states that the defendant must "move for a directed verdict at the conclusion of the evidence presented by the prosecution and at the close of the case" to preserve an argument based on sufficiency of the evidence. Failure to do so constitutes a waiver of any question pertaining to the sufficiency of the evidence to support the jury verdict. *See Sanders* v. *State*, 305 Ark. 112, 805 S.W.2d 953 (1991).

In *Weaver* v. *State*, 305 Ark. 180, 806 S.W.2d 615 (1991), the Court refused to address the sufficiency issue when the appellant failed to move for a directed verdict at the close of all the evidence but moved for a new trial on the basis that the verdict was contrary to the weight of the evidence. And, in *Easter* v. *State*, 306 Ark. 452, 815 S.W.2d 924 (1991) it is stated that "the court has strictly followed the requirements of Rule 36.21(b) and has refused to address sufficiency of the evidence questions unless both directed verdict motions were made." *See Andrews* v. *State*, 305 Ark. 262, 807 S.W.2d 917 (1991). In *Easter*, the appellant moved for a directed verdict at the close of the State's case but failed to do so at the close of all the evidence. After the jury verdict, he again moved for directed verdict. The court held this to be, in fact, a motion for a new trial which did not preserve his argument that there was insufficient evidence.

Accordingly, where the motion for directed verdict was

not renewed at the close of all the evidence, the motion for judgment notwithstanding the verdict made after the jury had rendered its verdict, and after the trial judge imposed sentence was not sufficient to comply with the requirements of Rule 36.21, and the issue was not preserved for appeal.

Affirmed.

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

Juanita J. MOSLEY, Widow of William C. Mosley, Deceased *v.* MCGEHEE SCHOOL DISTRICT and State of Arkansas, Public Employee Claims Division

CA 90-364 816 S.W.2d 891

Court of Appeals of Arkansas
En Banc
Opinion delivered October 16, 1991

Mitchell and Roachell, by: *Richard W. Roachell* for appellants.

Public Employee Claims Division, by: *Richard S. Smith* for appellees.

JOHN E. JENNINGS, Judge. This case is before the court a second time. We set out the relevant facts in *Mosley* v. *McGehee School Dist.*, 30 Ark. App. 131, 783 S.W.2d 871 (1990), and need not do so again. In that decision we remanded the case to the Commission because we could not determine from the Commission's opinion whether it had ruled, as a matter of law, that a stress-related heart attack was compensable only if there was a "close temporal relationship" between the stressful event and the subsequent heart attack.

On remand the Commission once again denied compensation and explained that the length of time between the stressful event and the heart attack is merely one factor to be considered in determining the issue of causation. Appellant again raises a number of issues on appeal to this court. We find no reversible error and affirm.

Appellant's primary contention is that the Commission's decision is not supported by substantial evidence. In determining whether the Commission's findings are so supported,

we must 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). 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). We are persuaded that the facts as set out in both the majority and dissenting opinions issued in the first appeal in this case constitute substantial evidence to support the Commission's decision.

Appellant argues that the Commission should have believed Dr. Rosenman rather than Dr. Kizziar. The Commission, however, is not bound by medical opinion, even if uncontroverted. *See Wade* v. *Mr. C. Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989). Appellant correctly notes some inconsistencies in Dr. Kizziar's testimony, while conceding that there are also inconsistencies in the testimony of Dr. Rosenman. In any event this is a matter of credibility — a question for the trier of fact to resolve. *Warwick Electronics, Inc.* v. *Devazier*, 253 Ark. 1100, 490 S.W.2d 792 (1973). Appellant argues that any fair-minded person would necessarily infer that Mr. Mosley's death was causally related to the stressful event but, again, the drawing of inferences is for the Commission as trier of fact. *Marrable* v. *Southern LP Gas, Inc.*, 25 Ark. App. 1, 751 S.W.2d 15 (1988). Appellant argues that Dr. Rosenman's qualifications are more outstanding than those of Dr. Kizziar. Assuming this to be so, it does not follow that the Commission is therefore obliged to accept the testimony of Rosenman and reject that of Kizziar. *See Wade, supra.* Our conclusion is that the Commission's opinion displays a substantial basis for the denial of the relief sought. *See Linthicum* v. *Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987).

At the original hearing before the administrative law judge, appellant called twenty-one teachers and other witnesses from Mr. Mosley's school to testify, in essence, that anticipating and taking the teacher test was stressful for Mr. Mosley. Appellant contends that the Commission ignored this testimony, but the Commission's opinion gives us no reason to agree. The Commission's decision was not based on a finding of an absence of stress; rather, the Commission found that the appellant had failed to

establish by a preponderance of the evidence a causal relationship between the work-related stress and Mr. Mosley's subsequent death.

Appellant also contends that despite Act 10 of 1986 the Commission should "decide . . . factual disputes in favor of the claimant where the evidence may be nearly or equally balanced." She also contends that Act 10 of 1986 violates the doctrine of separation of powers. Because both arguments are raised for the first time on appeal, we need not address them. *Johnson* v. *Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989). *See also Arkansas Cemetery Bd.* v. *Memorial Properties, Inc.*, 272 Ark. 172, 616 S.W.2d 713 (1981).

Finally, appellant contends that the Commission erred in denying her motion to remand the case to the administrative law judge for the purpose of adding to the record additional articles contained in various medical journals. The Commission's denial of the motion was based, in part, on its determination that the additional evidence would be cumulative. *See Mason* v. *Lauck*, 232 Ark. 891, 340 S.W.2d 575 (1960). We hold that determination is adequately supported by the record and therefore find no error in the Commission's denial of the motion to remand.

Affirmed.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. We have recently stated that the workers' compensation law was not intended to compel a finding of compensability merely because the claimant died at work. *Austin* v. *Highway 15 Water Users Ass'n*, 30 Ark. App. 60, 782 S.W.2d 585 (1990). I think it is equally clear that the workers' compensation law does not mandate a finding of noncompensability merely because the claimant died at home. However, a comparison of the facts of the case at bar to those presented in *C.J. Horner Co.* v. *Stringfellow*, 286 Ark. 342, 691 S.W.2d 861 (1985), leads me to the conclusion that the Commission has in fact rejected the painstaking analysis required in heart attack cases and adopted in its stead a bright-line rule based on timing and geography.

In *Stringfellow, supra*, the Workers' Compensation Com-

mission found a causal relationship between the employment and the death of the decedent employee, an office clerk. Mr. Stringfellow, who smoked approximately two packages of cigarettes a day and participated in a musical combo which played at night at clubs and private parties, was employed in a position that involved long hours but no heavy physical activity. Mr. Stringfellow, who had appeared to be excessively tired in the months preceding his death, was sitting at his desk performing his job when he bent forward, laid his head down on the desk, and died of an acute myocardial infarction. Virtually the only evidence connecting Mr. Stringfellow's death to his employment was his physician's statement that job stress could very well have been a contributing factor. On cross-examination, the physician admitted that he had no personal knowledge that Mr. Stringfellow was under any unusual job stress just prior to his death and that he did not believe that the job caused Mr. Stringfellow's death, only that it may have been a contributing factor.

Although the Workers' Compensation Commission, in *Stringfellow*, emerged from the evidentiary vacuum in that case to conclude that Stringfellow's heart attack was work-related, the Commission in the case at bar ignored the testimony of twenty-one teachers and other witnesses who testified that anticipating and taking the teacher test was stressful for the deceased, who suffered his fatal heart attack the morning following the test.

I submit that the Commission's opinion displays no substantial basis for disbelieving this testimony and denying relief, and that it should therefore be reversed. *See Williams* v. *Arkansas Oak Flooring*, 267 Ark. 810, 590 S.W.2d 328 (Ark. App. 1979). Any attempt to distinguish *Stringfellow* from the case at bar on the basis of cardiac risk factors is essentially meaningless: admittedly, the deceased in the case at bar was subject to several risk factors; however, Mr. Stringfellow was a fifty-two-year-old man who moonlighted by participating in a band which played nights, and who smoked two packs of cigarettes daily. As Justice Hickman noted in his dissent, there was no substantial evidence that Mr. Stringfellow's job caused his death. Instead, the Commission relied on Mr. Stringfellow's doctor's statement that Mr. Stringfellow may have been exposed to job pressure, which may have been a contributory factor to his heart attack. Because job stress need not be the sole cause of a heart attack, but need only

rise to the level of a contributing factor, *see Stringfellow, supra*; *see also Boyd* v. *General Industries*, 22 Ark. App. 103, 733 S.W.2d 750 (1987), I am at a loss to explain why the presence of cardiac risk factors in the case at bar negates the testimony of twenty-one witnesses to the effect that the teacher test was stressful to the deceased.

I submit that the discrepancy between the Commission's findings in *Stringfellow* and the Commission's findings in the case at bar can be explained only in terms of timing and geography: Mr. Stringfellow died at his desk during working hours; the deceased died in his recliner on his day off approximately eighteen hours after taking the teacher test. Mr. Stringfellow's death was compensable because the Arkansas Workers' Compensation Commission has improperly chosen to apply either the temporality rule as a rule of law, *see Mosley* v. *McGehee School District*, 30 Ark. App. 131, 783 S.W.2d 871 (1990), or a similar bright-line rule based on geography. For the same reason, the Commission here has held that Mr. Mosley's death was not compensable.

I dissent.

PIZZA HUT OF AMERICA, INC. and Edward Lee McDonald *v.* WEST GENERAL INSURANCE CO.

CA 91-194 816 S.W.2d 638

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

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

Michael R. Landers, for appellee.

MELVIN MAYFIELD, Judge. In this appeal, appellee, West General Insurance Company, an automobile liability insurer, sought declaratory judgment as to its liability, if any, under a personal automobile insurance policy it issued to appellant Edward Lee McDonald. The circuit judge determined that the language used in the policy was not ambiguous and excluded coverage for appellant's accident. We disagree with this finding and reverse and remand.

Appellant McDonald was employed by appellant Pizza Hut of America, Inc., to perform various duties, including delivering pizzas in his personal automobile. While McDonald was in the process of delivering a pizza for Pizza Hut, he was involved in a collision with an automobile being driven by Michael Hearnsberger. McDonald was insured by a policy issued by appellee, which contained the following exclusionary language: "We do not provide liability coverage for any person for that person's

liability arising out of the ownership or operation of a vehicle while it is being used to carry persons or property for a fee." Appellee contended the exclusionary language under the policy precluded coverage for McDonald's accident and filed a declaratory judgment action. After hearing testimony, the circuit judge issued a letter opinion in which he held the exclusionary language contained in the policy was not ambiguous and that it excluded coverage for McDonald's accident.

Under Arkansas law, the intent to exclude coverage in an insurance policy should be expressed in clear and unambiguous language, and an insurance policy, having been drafted by the insurer without consultation with the insured, is to be interpreted and construed liberally in favor of the insured and strictly against the insurer. *Baskette* v. *Union Life Ins. Co.*, 9 Ark. App. 34, 36, 652 S.W.2d 635, 637 (1983). *See also Gregg Burial Ass'n* v. *Emerson*, 289 Ark. 47, 49, 709 S.W.2d 401, 403 (1986). If the language in a policy is ambiguous, or there is doubt or uncertainty as to its meaning and it is fairly susceptible of two or more interpretations, one favorable to the insured and the other favorable to the insurer, the one favorable to the insured will be adopted. *Drummond Citizens Ins. Co.* v. *Sergeant*, 266 Ark. 611, 620, 588 S.W.2d 419, 423 (1979). *See also Farm Bureau Mutual Ins. Co.* v. *Milburn*, 269 Ark. 384, 387, 601 S.W.2d 841, 842 (1980).

In the case at bar, appellants argue the use of the word "fee" in the policy's exclusionary clause is ambiguous. Appellants contend there are numerous definitions for the word "fee" and that a salaried employee delivering a pizza as a part of his duties and receiving no additional compensation for making such deliveries, is not necessarily carrying property for a fee.

The *Random House Dictionary of the English Language* 706 (2nd ed. 1987) defines the word "fee" as: "1. a charge or payment for professional services: *a doctor's fee*. 2. a sum paid or charged for a privilege: *an admission fee*. 3. a charge allowed by law for the service of a public officer. . . . 5. a gratuity; tip . . ." Definitions for the word "fee" included in *The American Heritage Dictionary* 495 (2nd ed. 1985) are: a fixed charge, a charge for a professional service, and a tip or gratuity. *Black's Law Dictionary* 553 (5th ed. 1979) defines "fee" as follows:

> A charge fixed by law for services of public officers or for use of a privilege under control of government. *Fort Smith Gas Co.* v. *Wiseman*, 189 Ark. 675, 74 S.W.2d 789, 790. A recompense for an official or professional service or a charge or emolument or compensation for a particular act or service. A fixed charge or perquisite charged as recompense for labor; reward, compensation, or wage given to a person for performance of services or something done or to be done.

Although there is very little case law construing the word "fee," two courts' interpretations of similar exclusionary language support appellants' argument. In *First Georgia Insurance Co.* v. *Goodrum*, 187 Ga. App. 314, 370 S.E.2d 162 (1988), a vehicle being driven by the insured, Ms. Goodrum, was involved in a collision while she was driving kettle workers to their job site as part of her employment duties with the Salvation Army for which she was paid mileage in addition to her regular salary. The policy contained the following exclusion: " 'We do not provide Uninsured Motorists Coverage for property damage or bodily injury sustained by any person: . . . (3) When your covered auto is being used to carry persons or property for a fee.' " 370 S.E.2d at 163. The appellant insurer asserted this exclusion as a defense to the claim made under the policy. The court found this provision was ambiguous as to whether it applied to a situation where an employee was being paid by her employer to drive other employees and, therefore, construed the policy to provide coverage.

The Tennessee appellate court also found coverage existed in a situation similar to the case at bar. *See United Services Automobile Ass'n* v. *Couch*, 643 S.W.2d 668 (Tenn. Ct. App. 1982). In this case, the appellant liability insurer sought a declaratory judgment as to its liability, if any, under a policy it issued, which stated: " 'We do not provide Liability Coverage . . . for any person's liability arising out of the ownership or operation of a vehicle while it is being used to carry persons or property for a fee. This exclusion does not apply to a share-the-expense car pool.' " 643 S.W.2d at 669. At the time of the accident, appellee William Couch was delivering a pizza for his employer, B & L Pizza Palace. Couch was a "part-time" employee, and his duties included general help around the kitchen, cleaning, and delivering pizzas. In finding the policy

provision did not exclude coverage, the court stated:

> The evidence shows that, on some deliveries, a "delivery charge" was added to the price of the merchandise delivered. However, such delivery charge inured to the benefit of the employer and not to the additional insured. It is not considered that a delivery charge added to the price of the article delivered amounted to using the vehicle for transportation of property for a fee. Therefore, this Court would not sustain the exclusion claimed in the second issue.

643 S.W.2d at 672.

The initial determination of the existence of an ambiguity rests with the court, and if ambiguity exists, then parol evidence is admissible and the meaning of the ambiguous term becomes a question for the fact finder. *C & A Constr. Co.* v. *Benning Constr. Co.*, 256 Ark. 621, 622, 509 S.W.2d 302, 303 (1974); *Don Gilstrap Builders, Inc.* v. *Jackson*, 269 Ark. 876, 878, 601 S.W.2d 270, 271 (Ark. App. 1980). In the instant case, we find that the word "fee" used in the appellee's insurance policy is ambiguous, and the trial judge erred in holding to the contrary.

In *Fort Smith Appliance & Service Co.* v. *Smith*, 218 Ark. 411, 236 S.W.2d 583 (1951), the Arkansas Supreme Court said:

> In the above instruction the court told the jury that, as a matter of law, for the time stated, the merchandise was on consignment. In our opinion the contract is not so clear and free of ambiguity that the court could say what it meant as a matter of law. In a situation of this kind it must be left to a jury to determine what was the intention of the parties. Ordinarily it is the duty of the Court to construe a written contract and declare its meaning to a jury, but, where there is a latent ambiguity, parole [sic] evidence is admissible to explain the meaning of the parties, and then it is a question for the jury and should be submitted to a jury. Regardless of whether the ambiguity is patent or latent, if the intention of the parties is not clear it is a question for the jury.

218 Ark. at 414, 236 S.W.2d at 585 (citations omitted). The case was remanded for a new trial.

In *Tribble* v. *Lawrence*, 239 Ark. 1157, 396 S.W.2d 934 (1965), a washing machine was purchased under a conditional sale contract. The face of the contract provided that the buyer elected "to include in the time balance hereof, the cost of property protection insurance. . . ." But the back of the contract provided that the buyer agreed "to keep the property insured . . . with the proceeds from such insurance payable to and protecting Seller. . . ." The trial court instructed the jury that under the contract, if it was in force and effect at the time the washing machine was destroyed by fire, it was the buyer's duty to see that the machine was covered by insurance. The Arkansas Supreme Court said:

> The court properly instructed the jury under the facts here obtaining that they must determine whether the contract was in force and effect at the time the property was destroyed by fire. However, the court should also have submitted to the jury the interpretation of the conflicting insurance clauses in the light of the attending circumstances of this case, if they found that the contract was in fact in effect. For this error it is necessary that the case be reversed and the cause remanded for new trial. It is so ordered.

239 Ark. at 1160, 396 S.W.2d at 936.

In *State Farm Insurance Companies* v. *Gilbert*, 3 Ark. App. 52, 621 S.W.2d 880 (1981), the trial court directed a verdict against the insurance company on a finding that the term "earth movement" in the insurance policy was "patently ambiguous." On appeal, we held that when a term in a contract is ambiguous a factual question for the jury is presented. Therefore, we said: "Whether the loss in this case was occasioned by an 'earth movement' was a factual question for the jury." 3 Ark. App. at 56, 621 S.W.2d at 882. The case was reversed and remanded.

Thus, in the case at bar, the court erred in finding that the exclusionary language in the policy was not ambiguous. We do not, however, decide in this appeal the issue of whether the policy excluded coverage for appellant McDonald's accident. That is an issue for the fact finder to decide. This suit was brought by the insurance company, seeking a declaratory judgment. When a declaratory judgment proceeding involves the determi-

nation of an issue of fact, the issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. Ark. Code Ann. § 16-111-107 (1987).

Reversed and remanded for a new trial.

ROGERS and DANIELSON, JJ., agree.

Billy BIGHAM *v.* STATE of Arkansas

CA CR 91-7 820 S.W.2d 462

Court of Appeals of Arkansas
Opinion delivered October 23, 1991

John Kearney, for appellant.

Winston Bryant, Att'y Gen., by: *Jeff Vining*, Asst. Att'y Gen., for appellee.

PER CURIAM. Billy Bigham filed an appeal from an order revoking his probation and sentencing him to a term of six years in the Arkansas Department of Correction. His attorney, John L. Kearney, has moved to be relieved as counsel on grounds that the

appeal is without merit. Counsel's motion is accompanied by an "abstract and brief" that consists entirely of a statement of the case, a statement that the appeal is without merit, a four-page abstract, and a conclusion. The State has filed a brief in which it argues that the evidence was sufficient to support the revocation.

Motions to be relieved as counsel for criminal defendants are governed by Ark. Sup. Ct. R. 11(h), which was adopted by our supreme court in order to insure the constitutional guarantees of equal protection and due process set out in *Anders* v. *California*, 386 U.S. 738 (1967). Rule 11(h) provides in pertinent part:

> A request to withdraw on grounds that the appeal is wholly without merit shall be accompanied by a brief referring to anything in the record that might arguably support the appeal, together with a list of all objections made by the appellant and overruled by the court and of all motions and requests made by the appellant and denied by the court, accompanied by a statement as to the reason counsel considers that the points thus raised would not arguably support the appeal.

Counsel's "brief" in this case fails to meet any of the requirements of Rule 11(h) set out above. The mere assertion by counsel that the appeal is without merit is insufficient. These deficiencies cannot be cured by the State's brief. *See House* v. *State*, 20 Ark. App. 28, 722 S.W.2d 886 (1987).

Mr. Kearney's motion to be relieved as counsel is denied, and we direct that he comply with the requirements of Rule 11(h) and *Anders* v. *California*, *supra*, by filing a proper brief in support of his motion on or before November 25, 1991.

Marcia Nadine HARVELL *v.* Dwayne Hickman HARVELL

CA 90-535 820 S.W.2d 463

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

Janice Williams Wheeler, for appellant.

Mathis and Dejanes, by: *William Travis Mathis*, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Marcia Nadine Harvell appeals from that part of an order of the Clark County Chancery Court holding her in contempt and ordering a change of custody of the parties' minor children from appellant to appellee Dwayne Hickman Harvell. We find sufficient merit in appellant's arguments on appeal to warrant reversal and remand.

The parties were divorced in March 1989 by a decree that placed primary custody of their three minor children with

appellant and provided that appellee pay child support. The decree provided specific periods of visitation for appellee, but stipulated that the visitation be carried out in a "suitable home such as [appellee's] parents' home." The parties were required to keep the court and each other informed of their current addresses and, if either party removed the children from the state, a $1,000.00 bond was required.

In August 1989, the parties entered into a stipulation and agreement allowing appellant to remove the children to her home in North Carolina upon the posting of the requisite bond. The agreement further provided that, at appellant's expense, appellant would return the children to appellee's home for three-weeks' visitation in the summer and one week at Christmas. Appellant then filed the bond and moved the children to North Carolina.

Appellee continued to make support payments into the registry of the court. However, the clerk of the court was unable to effect delivery of the payments to appellant at the address that appellant had furnished the court. In July 1990, appellee filed a motion requesting that the court suspend his obligation to make child support payments, alleging that appellant's whereabouts were unknown and that appellant had interfered with his visitation. The court entered such an order *ex parte*. Shortly thereafter, appellee filed a motion asking the court to amend that order and direct the clerk to refund to him the $764.00 in support payments that had accumulated in the court's registry. Notice of a hearing on that motion was communicated to appellant, who appeared on October 14, 1990, to defend against it.

At the hearing, appellant testified that she had made efforts to communicate a change of address to the clerk of the court and that she and the children had been in contact by telephone with appellee's family during the past year. It was admitted that appellee had no telephone at his home by which appellant could communicate to him directly; however, there was evidence that appellant knew where appellee was employed and could have reached him there. Appellant testified that, because she received no support payments, she had applied for Aid for Dependent Children in North Carolina, and that her failure to return the children for summer visitation was due to her financial inability to do so. Appellant's testimony conflicted with that of appellee and

the clerk of the court.

At the conclusion of the hearing, the judge announced that he was holding appellant in contempt for violating his orders, stating that appellant could receive "jail time" and that now was the time to "make an example" of her conduct in ignoring his orders. The following then took place:

> [APPELLANT'S COUNSEL]: What about the child support? Not paying the child support would be hurting the children.
>
> BY THE COURT: I agree with that. I agree with that and I think it's an extreme way of trying to get her attention, but I think I've found another way to do it. I can and will hereby change custody of the children as a finding of part of the problems in this case and the failure of the [appellant] to abide by the court orders and I will change custody and give custody to the [appellee] if he has a suitable home. If not, the children will stay with the grandparents I hate to do it during the middle of a school term, but —
>
> [APPELLANT'S COUNSEL]: They did not request a change of custody.
>
> BY THE COURT: I understand that. I understand that and I'm looking at it from the standpoint of if the children are in a position of being the effected [sic] parties here, really.
>
> [APPELLANT'S COUNSEL]: Your Honor, had I been on notice that this might be a change of custody proceeding, I would have —
>
> BY THE COURT: This was not a change of custody proceeding.
>
> [APPELLANT'S COUNSEL]: I'm aware of that. I would like an opportunity to present evidence on that. I could have brought out a great deal more. I brought [sic] only on the issues that were before the Court.

In its order, the trial court summarily held appellant in contempt, forfeited the bond, ordered a change of custody of the

minor children to appellee, and directed appellee to bring his child support payments to a current status. The order directed the clerk to reimburse the State of North Carolina for monies paid by that state for child support from the proceeds of the forfeited bond and the child support funds held in the registry of the court. The clerk was further directed to deduct from those funds appellee's travel expense should he be required to go to North Carolina to return the children to Arkansas, and to pay any remaining support funds to appellant. It is from this order that appellant appeals. Appellee does not cross-appeal that part of the order directing him to make current his child support and denying his motion to obtain the child support funds held in the registry of the court.

On appeal, appellant contends only that the trial court erred in summarily holding her in contempt and ordering a change of custody. She argues that, as she was not given notice that these matters would be considered at the hearing on appellee's motion pending before the court, it was error for the court to do so. She further argues that the court's change of custody was arbitrary and clearly against the preponderance of the evidence. We agree.

Arkansas Code Annotated § 16-10-108(c) (1987) provides that only contempts committed in the immediate view and presence of the trial court may be summarily punished. In all other cases, the party charged with contempt shall be notified of the accusation and afforded a reasonable time to make a defense. *See Estes* v. *Masner*, 244 Ark. 797, 427 S.W.2d 161 (1968); *Ex Parte Coulter*, 160 Ark. 550, 255 S.W. 15 (1923).

In *Estes* v. *Masner, supra*, the facts were somewhat similar to those present here. There, the appellant obtained temporary custody of the children and then fled the country. The appellee filed a petition for citation of contempt in the trial court and mailed a copy of it and notice of the hearing thereon to the appellant. The appellant did not appear, and the court thereupon entered an order holding her in contempt of the court's temporary order and modified the decree to award the appellee custody of the children. Citing *Ex Parte Coulter, supra*, the court held that the filing of a petition by the attorney did not meet the requirements of the contempt statute as it was the province of the court and not that of an attorney to cite one to appear and answer a

charge of contempt. The court continued:

> With regard to the modification of the 1959 custody award, appellant contends that she was adequately notified that the custody issue would be heard by the court. With this we also agree. Appellees' attorney filed his "Petition for Citation" on May 2, 1967, and by mail requested the Chancery Court Clerk to forward a copy of the notice of citation, together with a copy of the petition, to appellant and her attorneys. Although this was done, it cannot be said that appellant was sufficiently apprised of the nature of the hearing, as neither the petition nor the notice mentions the custody issue. While the Independence Chancery Court retained jurisdiction of the custody issue (*Myers* v. *Myers*, 207 Ark. 169, 179 S.W.2d 865), before it could lawfully take any further action thereon, it was necessary that the interested parties be properly notified. The mode of notice, not being specified by statute, must be "reasonably calculated" to afford the opposite party an opportunity to be heard. *Seaton* v. *Seaton*, 221 Ark. 778, 255 S.W.2d 954. "Once a defendant is effectively brought into court, however, by whatever method, he is subject to all the processes of the court which may legitimately be applied in that case. This includes . . . new orders or modifications in alimony and custody awards . . . provided only that the new step in the proceeding be brought within the limits allowed by law for it . . . . Further, he is entitled to reasonable notice of the reopened proceedings. This does not require new service, but only some formal notice having a reasonable tendency to give actual notification." Leflar, The Law of Conflicts of Laws, § 32, pp. 52-53. Even if the notice was actually received by appellant, it was not reasonably calculated to make appellant aware of the custody issue. For this reason, the custody modification will be reversed.

244 Ark. at 801-02; 427 S.W.2d at 163.

Here, the court had entered an order *ex parte* suspending appellee's obligation to pay child support. The parties were before the court on appellee's motion to amend that order to allow appellee to obtain the child support monies held in the court's

registry. While it cannot be argued that the court lacked jurisdiction to hold appellant in contempt or to modify its prior custody order, it is clear from the record that appellant was given no notice or opportunity to defend against these issues.

Furthermore, custody is not to be changed merely to punish or reward a parent, *Johnson* v. *Arledge*, 258 Ark. 608, 527 S.W.2d 917 (1975); *Carter* v. *Carter*, 19 Ark. App. 242, 719 S.W.2d 704 (1986), which is just what the chancellor, in his own words, did in this case. The primary consideration in a change of custody action is the welfare and best interest of the children. This record is devoid of any of the requisite proof. *See Carter* v. *Carter, supra.*

We conclude that it was error for each of these issues to be considered by the court in this proceeding, and we reverse that part of the order holding appellant in contempt and ordering a change in custody and remand the case for further proceedings not inconsistent with this opinion.

Reversed and remanded.

COOPER and JENNINGS, JJ., agree.

QUALITY SERVICE RAILCAR *v.* Jadell WILLIAMS and Second Injury Fund

CA 90-509 820 S.W.2d 278

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

Lavender, Rochelle, Barnett and Dickenson, by: *Charles D. Barnett*, for appellant.

Dowd, Harrelson, Moore and Giles, by: *C. Wayne Dowd*, for appellee Jadell Williams.

E. Diane Graham, for appellee Second Injury Fund.

MELVIN MAYFIELD, Judge. This is the second appeal in this Workers' Compensation case. In the first appeal we issued an unpublished opinion by which this case was reversed and remanded to the Commission for a determination as to whether the employer was given timely and proper notice of the claimant's alleged occupational disease within the requisite 90-day period and, if not, whether claimant's failure to do so fell within one of the statutory exceptions. Upon remand the Commission again awarded the claimant permanent partial disability benefits in an amount equal to 70% to the body as a whole. It is from this decision that the employer has now appealed.

A brief review of the facts is in order. The claimant was, at the time of the first hearing, a 64-year-old man who suffered from chronic obstructive pulmonary disease. The claimant had been employed by appellant as a carman and crane operator cleaning, repairing and overhauling railroad tank cars for approximately 21 years. While performing his job, the claimant was required to go down into railroad tank cars which had been steam cleaned but which still contained strong odors from previous loads. There was testimony that the cars contained anything from grain to asphalt to chemicals. The claimant was required to scrape rust and other substances from the interior walls of the tank cars and install fiberglass insulation. The claimant testified that the air he was forced to breathe in the tank cars contained fiberglass particles, chemical fumes, welding smoke and fumes, rust dust and paint fumes. Furthermore, the claimant had been a one-pack-a-day smoker for almost 30 years but had quit smoking in 1969 (when he was 45 years old).

In 1975 the claimant was diagnosed as having chronic obstructive pulmonary disease and acute bronchitis. He was hospitalized and treated but eventually was able to return to work. He continued to work for appellant until July 1985 when he developed breathing problems so severe he was unable to work. He took sick leave and annual leave for the remainder of 1985, attempted to work a few days in January 1986 but could not, then retired.

Dr. C.T. Marrow, who examined appellant on November 19, 1985, reported that the claimant was not able to continue work at North American Tank Car (the predecessor of Quality Service Railcar) because of the necessity of using a cutting torch and exposure to excessive environmental pollutants. By deposition Dr. Marrow testified that the claimant has predisposition to lung disease when exposed to industrial irritants, paint and welding fumes or other pollutants; that he has hyperirritable, hyperresponsive bronchi, and sensitivities to allergens, to dust, pollen, and a host of other things. He said that when a man who has this predisposition to lung disease is exposed to industrial irritants, paint and welding fumes or other pollutants, "it is a disaster waiting to happen." In a letter written to the Social Security Administration on February 25, 1986, Dr. Marrow stated:

> Mr. Jadell Williams, date of birth 3/15/24, is unable to continue work at Quality Service Railcar Repair Corporation because of the high level of air pollution. On each occasion of his returning to work, Mr. Williams has had severe respiratory distress, and on occasions, loss of consciousness. Working there, he is exposed to paint fumes, welding fumes, dust, sanding fumes, as well as chemical fumes.
>
> . . . He has extensive pulmonary fibrosis, which has progressed rapidly since his last visit to this office because of inhalation of fumes.

On August 11, 1987, Dr. Joseph H. Bates, a pulmonary specialist at the University of Arkansas Medical Center at Little Rock, reported:

> I am writing to provide my report regarding the medical condition of Mr. Jadell Williams of Fouke, Arkansas. In coming to my opinions I reviewed depositions given by Dr. Marrow of Texarkana, Mr. Williams and his wife, and medical reports from Drs. Pappas, Haynie, Marrow, Patelle, and Stevens. In addition I had a telephone conversation with Dr. Stephen Parrish, the physician who cared for Mr. Williams when he was hospitalized in Texarkana during July, 1987. My conclusions are based on an analysis of all of these data, together with my own assessment following an interview and physical examination, and the

> review of blood tests, pulmonary function results, and chest x-rays made at the University of Arkansas Medical Center.
>
> . . . .
>
> The major question is-did his work cause him to have bronchospastic disease? He worked on cars that had hauled plastic pellets, dietomaceous earth, clay, starch and grain, according to Mr. Benny Sinyard of Quality Service Railcar Repair Corporation. Most patients who develop bronchospastic disease at this age have no identifiable cause, except for cigarette abuse. . . .
>
> It seems probable to me that Mr. Williams was born with a genetic predisposition to develop bronchospastic airways disease. He most probably would not have had this problem had he not abused tobacco. However, he stopped smoking in 1969 and the airways disease continued to worsen after this and has been especially severe in the 1980's. It would not be correct to state that the work environment caused the disease, but it is true that strong odors and perhaps antigens from material hauled in the cars could induce episodes of bronchospasms in a person already diseased.
>
> No reasonable physician would try to set out percentages regarding the weight of the various factors that caused him to develop bronchospastic lung disease. I have concluded that the two most important factors in his illness are a genetic predisposition and abuse of tobacco. The work environment made the process worse after it was established. Being away from the work environment will not prevent episodes in the future.

On this evidence the Commission found that the claimant was permanently and totally disabled, and although the work had not caused the claimant's condition, his condition had been aggravated by his employment with appellant. The Commission also held that under Ark. Code. Ann. § 11-9-601(c)(1) (1987), it was required to reduce claimant's compensation to the proportion attributable to his occupational disease. Dr. Marrow had found that the claimant suffered a 40% loss in pulmonary function,

which rendered the claimant permanently and totally disabled. He found 12% of the 40% attributable to cigarette smoking and 28% attributable to the employment. The Commission found that this converted to a permanent partial disability of 70% to the body as a whole and this percentage was attributable to claimant's employment.

In the previous appeal we remanded the case to the Commission to make a finding of fact regarding compliance with the requirement of a 90-day written notice of occupational disease and, if the requirement had not been met, to determine whether the failure was excusable under one of the statutory exceptions. Upon remand the Commission found that the claimant suffered from a preexisting pulmonary disease which was aggravated by his exposure to pollutants at work; that the time period runs from the first distinct manifestation of a disease cognizable under workers' compensation, not the first distinct manifestation of the disease; that the claimant was not aware his pulmonary condition was "a disease cognizable under workers' compensation" until he attempted to return to work in January 1986, and suffered "a clear relapse"; and that on March 3, 1986, Dr. Marrow notified the appellant of the claimant's work-related condition "by indicating on the insurance claim form the claimant's condition arose out of his employment due to the exposure to various inhalants." The Commission further found that even if the first distinct manifestation of an occupational disease occurred prior to January 1986, it would excuse the failure to give timely notice to the employer.

On appeal appellant first argues that the Commission erred in holding that the claimant had proven by clear and convincing evidence that his preexisting pulmonary disfunction was aggravated by his employment with appellant. When reviewing a decision of the Workers' Compensation Commission, we must view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision.

Bearden Lumber Company v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

Appellant argues that the various doctors disagree on whether or not the claimant's condition was related to his work; that there was medical testimony that various odors and fumes in environments other than the work place would bring on an attack; that many environmental and emotional problems could trigger an attack; and that the building in which the claimant worked was well ventilated. Nevertheless, there was ample medical and lay evidence on which the Commission could rely in reaching its conclusion. Thus, we cannot say that reasonable minds with the same evidence before them could not reach the conclusion reached by the Commission.

Next appellant argues that the Commission erred in holding that the claimant-appellee is entitled to permanent partial disability benefits in an amount equal to 70% of the body as a whole. Appellant argues that Dr. Marrow was the only physician who even attempted to place an estimate on the claimant's loss of use of the lungs and that the Commission strains to extrapolate a 40% loss of the use of the lungs into a permanent and total disability. We disagree. The Commission has found that the claimant is permanently and totally disabled as a result of his lung disease and its consequences. That finding is supported by substantial evidence. Dr. Marrow attributed 12% of the 40% to cigarette smoking and 28% to the exposure to irritants at work. Ark. Code Ann. § 11-9-601(c)(1) (1987) provides:

> Where an occuptional disease is aggravated by any other disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease, the compensation payable shall be reduced and limited to the proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as the occupational disease, as a causative factor, bears to all the causes of the disability or death.

Thus, under the situation in this case, the above statute requires that "the compensation payable shall be reduced . . . to the proportion . . . of the compensation that would be payable if

the occupational disease were the sole cause of the disability . . . as the occupational disease, as a causative factor, bears to all the causes of the disability." Under the evidence, the claimant is 100% disabled. However, that 100% must be reduced to the proportion that the occupational disease bears to all other causes of disability. Since the 100% disability results from the 40% loss of the lungs, and 28% of the lung-loss was caused by occupational disease, then 40% is to 100% as 28% is to x. Mathematically, this relationship can be written as $40:100 = 28:x$, and to determine the unknown term of this proportion, we multiply the means by the extremes. *See* 15 The World Book *Proportion* 831-32 (1990). This multiplication produces $40x = 2800$, and the division of those numbers makes x equal to 70%. Thus, the Commission's finding that the appellant is liable for 70% of the claimant's disability is not erroneous. Appellant's suggestion that its liability is only 28% of 40%, or 11.20% of the total disability, is obviously flawed. That calculation would make appellant liable for only the loss of the use of the lungs which was caused by claimant's occupational disease. Appellant's obligation, however, is for the disability of the *man* which was caused by the occupational disease.

Appellant also argues that the Commission erred in holding there was no basis for Second Injury Fund liability. It contends that the Commission "in essence" found that Section 13 (Ark. Code. Ann. § 11-9-525) and Section 14 (Ark. Code Ann. § 11-9-601) of the Workers' Compensation Act are mutually exclusive, and appellant argues that the Commission was wrong in that regard. However, both the claimant and the Second Injury Fund think the Commission was right. The Fund points out that Section 14, which is now codified as Ark. Code Ann. § 11-9-601 (1987), provides in § 11-9-601(a) that "where an employee suffers from an occupational disease . . . and is disabled or dies as a result of the disease . . . the employee, or, in case of death, his dependents, shall be entitled to compensation as if the disablement or death were caused by injury, *except as otherwise provided in this subchapter.*" (Emphasis added). An exception "otherwise provided" is found in Ark. Code Ann. § 11-9-601(c)(1) (1987), which we have already quoted in this opinion, and as we have pointed out, that section contains provisions which clearly state that where an occupational disease is aggravated by

a non-compensable disease the compensation payable is limited to the proportion of compensation that would be payable if the occupational disease were the *only* cause of disability. That is the formula that the Commission applied in this case, and it found that the claimant's work caused 70% of the claimant's disability. Both of the appellees in this case rely upon *Jenkins* v. *Halstead Industries*, 17 Ark. App. 197, 706 S.W.2d 191 (1986), in which we affirmed the Commission's finding that the appellant's emphysema was 92% attributable to cigarette smoking and 8% attributable to his work. We stated:

> We agree with the Commission's conclusion that the legislature did not intend for our occupational disease apportionment statute to be interpreted and applied in the same manner as our accidental injury apportionment statute . . . .

17 Ark. App. at 201. Both of the appellees recognize that "this is simply not a Second Injury Fund case."

In its opinion of September 28, 1990, the Commission pointed out that Ark. Code Ann. § 11-9-601(f)(1) places liability for occupational disease on "the employer in whose employment the employee was last injuriously exposed to the hazards of the disease," and that the employer's liability is limited by Ark. Code Ann. § 11-9-601(c)(1) to the proportion that the occupational disease bears to all causes of the disability. In contrast, the Commission also pointed out that the Second Injury Fund statute, Ark. Code Ann. § 11-9-525, is designed "to limit the employer's liability to the amount of disability or impairment suffered by the employee during his employment with that employer." The Commission reached this conclusion:

> Here a noncompensable pulmonary dysfunction was aggravated by an occupational disease. Therefore, the Administrative Law Judge was correct in apportioning liability for the degree of claimant's permanent disability pursuant to § 601(c)(1) and in dismissing the Second Injury Fund from this case.

We believe the Commission's decision on this point is clearly supported by both the evidence and the law.

Next, appellant argues that the Commission erred in finding

that the claim was not barred by the claimant's failure to give appellant notice of the occupational disease "within ninety (90) days after the first distinct manifestation thereof." *See* Ark. Code Ann. § 11-9-603(a)(2) (1987). Appellant contends that the claimant became aware of his occupational disease in July 1985, and did not notify the employer until March 3, 1986. Furthermore, appellant argues that the claimant first became aware that his condition was related to his work in 1975 when he was told by Dr. Haynes in Shreveport that he needed to get away from his work environment.

The Commission found that the claimant was not aware, until he attempted to return to work in January 1986 and was not able to do so, that he suffered from a disease cognizable under workers' compensation. The Commission relied on *Desoto, Inc.* v. *Parsons*, 267 Ark. 665, 590 S.W.2d 51 (Ark. App. 1979), for the rule that the time period for notice to the employer begins to run from "the first distinct manifestation of a disease cognizable under workers' compensation, not the first distinct manifestation of the disease." Although the *Parsons* case involved an injury rather than an occupational disease, the court in *Parsons* quoted with approval the following statement by the Commission: "Claimant was not in a position to give notice of injury because she wasn't aware, until notified by her union, that she had a claim cognizable under workers' compensation." We think the rule stated by the Commission in the present case is correct. Another way to express the same rule is found in *Woodard* v. *ITT Higbie Mfg. Co.*, 271 Ark. 498, 609 S.W.2d 115 (Ark. App. 1980), where the court said, "the statute does not begin to run until the employee knows or should reasonably be expected to be aware of the extent or nature of his injury." We also agree the evidence in this case supports the finding that it was not until January 1986, when the claimant was unable to continue working, that he realized he was suffering from an occupational disease, and it is not disputed that the employer learned on March 3, 1986, that the claimant was contending his condition was work related. Moreover, the Commission found that any failure to give timely notice of claimant's occupational disease was excusable. The Commission said the evidence shows that the employer had as much knowledge of the causal connection between the claimant's work and his disease as the claimant did. Under the case of *Peerless*

Coal Co. v. *Gordon*, 237 Ark. 152, 372 S.W.2d 240 (1963), the authority of the Commission to excuse the failure to give notice under the statute relating to an injury (now Ark. Code Ann. § 11-9-701) would also apply to the failure to give notice of occupational disease as required under Ark. Code Ann. § 11-9-603. We affirm the Commission's finding that any failure to give notice was excusable.

Finally, the appellant argues the Commission erred in finding that the claimant is due a period of temporary total disability for 18 months from the cessation of his employment on or about July 4, 1985. Appellant again relies on selected portions of the medical testimony to support its theory that the claimant's condition could be aggravated by a plethora of allergens, whether at work or at home, and argues that the medical evidence taken as a whole dictates that appellee's employment was not such that the hazards of such disease actually existed or that the characteristics thereof were peculiar to the trade, occupation, process or employment.

The record shows that the claimant became unable to breathe around July 4, 1985, and was hospitalized for several days. In the next year and a half he required hospitalization or treatment 36 times. He attempted to return to work in January 1986 but was unable to do so. Dr. Marrow testified:

> There was permanent damage to the tune of roughly 40%, permanent damage which was maintained even nine months after leaving North American. But the airways themselves have shown a tremendous ability to rebound and improve. He has had a 34% improvement, a 23% lung function when he left North American to a little better than 50% nine months later. So these small airways are up to 51.7% from 23% over a period of nine months. So his small airways and large airways continue to improve. The time of improvement until he reaches what is called a steady stage, there is no further healing, is probably in the range of a year and a half. No doctor has a crystal ball and can give an exact time but if I had to make a guess that at 18 months he would continue to show some improvement in lung function barring a pneumonia or doing some welding or some crazy thing like going duck hunting and falling out

> of the boat and getting pneumonia or something like that. If he doesn't do something crazy to damage his lungs further he should show continued but lessening improvement in his lung function up to about 18 months after leaving work.

In light of this testimony we cannot say the decision of the Commission to award the claimant 18 months of temporary total disability is not supported by substantial evidence.

Affirmed.

JENNINGS and DANIELSON, JJ., agree.

Harold BROOKS *v.* STATE of Arkansas

CA CR 91-21 819 S.W.2d 288

Court of Appeals of Arkansas
Division II
Opinion delivered November 6, 1991

Bill E. Ross, for appellant.

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

GEORGE CRACRAFT, Chief Judge. Harold Brooks appeals from an order revoking his probation and sentencing him to a term in the Arkansas Department of Correction. He contends that he was denied his constitutional right to counsel. We agree, and reverse and remand.

In 1987, appellant pled guilty to two counts of battery in the first degree and was placed on probation for five years. In March 1990, the State filed a petition to revoke appellant's probation, alleging that appellant had violated the terms and conditions of

his probation in that he had violated the laws of this state.

The record reflects that on September 24, 1990, a hearing on the petition was held by the trial court. Before the hearing began, the following took place:

> THE COURT: Mr. Brooks, when we were here the first day of the term of court, you had just said you didn't want the public defender to represent you, and this petition for revocation was set to be heard, and I continued it until today and told you to get a lawyer if you didn't want the public defender's office to represent you; and you indicated you didn't. Have you gotten a lawyer?
>
> [APPELLANT]: No, sir.
>
> THE COURT: Are you planning on representing yourself?
>
> [APPELLANT]: *I ain't qualified to represent myself. I need an attorney.* As you seen when I first come up here, she stood up there and lied. She wasn't my lawyer, and she stood up there and stated she gave me papers —
>
> . . . .
>
> [APPELLANT]: I'm telling you about the lawyer's case. I don't feel she represents me in my best behalf, so this is why I dismissed her from the case. . . .

Thereafter, there was some discussion as to the events leading up to appellant's decision not to be represented by the public defender, and whether appellant had been notified that the petition would be heard on that date, September 24, 1990. The court then stated:

> THE COURT: All right. If he was advised of that, [that the petition to revoke would be heard on September 24, 1990] and I have given him two months to get a lawyer — It is in the record that I continued the thing until today to get counsel —
>
> [APPELLANT]: (Interposing) I ain't got none.
>
> THE COURT: That's your fault. I told you you would either have to represent yourself or get your own lawyer

> because you had fired Ms. Bracy, and that was the end of that. We are not going to appoint every lawyer in the United States for you.
>
> [APPELLANT]: I don't want her.

Appellant then protested the holding of the hearing without having his witnesses present. He explained to the court that witnesses who he had subpoenaed to appear at the hearing when it was first scheduled were not present. He indicated that the testimony of one particular witness who was not present was critical to his case. The court advised appellant that this was also his fault, and that the hearing would proceed as scheduled. The court indicated that the public defender would sit at appellant's table if appellant so requested, but appellant reiterated that he did not want the assigned public defender to assist him.

The court proceeded to hear testimony and appellant appeared *pro se*. At the conclusion of the hearing, the trial court revoked appellant's probation and sentenced him to a term in the Arkansas Department of Correction. The sole issue raised on appeal is whether appellant knowingly and intelligently waived his right to counsel. We conclude that, from the record before us, he did not.

The Constitutions of both the United States and the State of Arkansas guarantee an accused the right to have the assistance of counsel for his defense, and it is generally recognized that no sentence involving loss of liberty can be imposed where there has been a denial of counsel. *Philyaw* v. *State*, 288 Ark. 237, 704 S.W.2d 608 (1986). This right extends to revocation hearings if sentencing is to follow revocation. *Furr* v. *State*, 285 Ark. 45, 685 S.W.2d 149 (1985); *see* Ark. Code Ann. § 5-4-310(b)(4) (1987). Although the right to counsel is a personal right and an accused may knowingly and intelligently waive counsel at various stages of the proceedings, every reasonable presumption must be indulged against the waiver of this fundamental right. *Philyaw* v. *State*, *supra*.

There are certain requirements that must be met before a trial court can find that an accused has knowingly and intelligently waived counsel and allow the accused to proceed *pro se*:

> A defendant in a criminal case may invoke the right to defend *pro se* provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly disposition of the issues.

Philyaw, 288 at 244-45, 704 S.W.2d at 611. The accused must have full knowledge and adequate warning concerning his rights and a clear intent to relinquish them before waiver can be found. *Barnes* v. *State*, 258 Ark. 565, 528 S.W.2d 370 (1975). Waiver of the right to counsel presupposes that the court has discharged its duty of advising appellant of his right to counsel, questioning him as to his ability to hire independent counsel, and explaining the desirability of having assistance of counsel during the trial and the problems attending one representing himself. This last requirement has been held especially important since a party appearing *pro se* is responsible for any mistakes he makes in the conduct of his trial and he receives no special consideration on appeal. *Philyaw* v. *State*, *supra*. The burden is on the State to show that an accused voluntarily and intelligently waived his right to counsel. *Scott* v. *State*, 298 Ark. 214, 766 S.W.2d 428 (1989). Presuming waiver from a silent record is impermissible. *Id.*

Here, there is no indication in the record presented to us of any request by appellant that he be allowed to represent himself. To the contrary, appellant requested that he have counsel and averred that he was not qualified to defend himself. Nor does the record show that appellant was informed of his right to counsel, the consequences of failure to obtain counsel, or the alternatives to *pro se* representation if he was unable to retain independent counsel, or that any inquiry was made as to his financial ability to employ counsel. We do not have a transcript of the proceedings at the pretrial hearing at which appellant's first request to obtain different counsel was made. What reasons appellant gave for wanting substitute counsel, what the trial judge told him concerning his right to counsel, or whether the judge advised him of the pitfalls of appearing *pro se* was not preserved for us. We do not know whether the court made an inquiry as to appellant's financial ability to have counsel or whether appellant was informed that the court would appoint

counsel without expense to him. The record we do have is completely silent as to waiver of counsel. Therefore, we cannot conclude that appellant knowingly and intelligently waived his right to counsel. *See Scott* v. *State*, *supra.*

The State contends, alternatively, that appellant "forfeited" his right to counsel because his conduct at trial was intended to manipulate and obstruct the fair and orderly disposition of justice. While we agree that the constitutional right to counsel is a shield, not a sword, and that a defendant may not manipulate this right for the purpose of delaying the trial or playing "cat-and-mouse" with the court, *see Burns* v. *State*, 300 Ark. 469, 780 S.W.2d 23 (1989); *Tyler* v. *State*, 265 Ark. 228, 581 S.W.2d 328 (1979), we cannot agree, from the record before us, that that is what occurred in this case.

The State argues that the case at bar is controlled by *Tyler* v. *State, supra*; however, we find the two cases to be clearly distinguishable. In *Tyler*, counsel for the appellant announced to the court on the morning of trial that the defense was not ready and that appellant had discharged him. The attorney stated, however, that it was his duty to disclose that "the sole and only reason he was discharged was 'because the [appellant] wants a continuance.' " *Tyler*, 265 Ark. at 825, 581 S.W.2d at 329. The appellant did not deny his counsel's statement, and stated his reasoning as follows:

> This is a legitimate thing, really because I didn't get my witnesses together. I had full intentions of waiting until after the first of the year to try my case on account of the election and everything. I felt if I waited until after the first of the year, things would be better organized and I would all round get a better trial and everything. I would say that finances and everything to do with lawyers would be reasonable cause for postponement.

Tyler, 265 Ark. at 86, 581 S.W.2d at 330.

The supreme court, in determining that the appellant had waived his right to counsel, considered the following: (1) that the appellant had ample time to employ, and did employ, counsel but discharged him on the eve of the trial; (2) that the principal reason for the discharge was to postpone the trial; (3) that the

appellant had taken no steps to secure another attorney; and (4) that there was no showing that appellant had been unable to obtain counsel or that he had requested that appointment of counsel. Here, appellant had not discharged his counsel on the eve of trial, but several weeks in advance of trial. There was no indication that he did so for the sole purpose of obtaining a subsequent continuance. At the hearing, appellant requested the appointment of counsel and made a motion for a continuance in order to obtain the presence of witnesses. Therefore, on the facts of this case, we cannot conclude that the record is sufficient to support a finding of intentional manipulation of the judicial process amounting to a "forfeiture" of the right to counsel.

Reversed and remanded.

DANIELSON and MAYFIELD, JJ., agree.

Adrian McKEAG *v.* HUNT TRANSPORTATION, INC.

CA 91-46 818 S.W.2d 581

Court of Appeals of Arkansas
Division II
Opinion delivered November 6, 1991

Jay N. Tolley, for appellant.

Davis, Cox, & Wright, by: *Constance G. Clark*, for appellee.

ELIZABETH W. DANIELSON, Judge. Appellant Adrian McKeag was employed as a truck driver for Hunt Transportation, Inc., a Nebraska based company, when he suffered a heart attack while preparing to load his trailer. The Arkansas Workers' Compensation Commission found that it did not have jurisdiction over McKeag's claim for compensation benefits. We affirm.

McKeag was employed with appellee from October 1985 until January 1987 when he quit his job in order to accept a job with Wal-Mart where he worked for approximately two weeks. In April 1987, McKeag sought to be rehired by appellee and called the Hunt offices in Omaha, Nebraska, from his home in Bentonville, Arkansas.

McKeag traveled to Omaha, filled out employment papers, took his physical and driving exams, and was again employed by appellee. Within a week of reestablishing employment with appellee, he moved his family to Mattawan, Michigan, where he has remained a resident since that time. McKeag continued to drive a truck for appellee until he suffered a heart attack while working in Ohio in August of 1987. McKeag contends his heart attack is causally related to his employment.

The only question before us is whether the Arkansas Workers' Compensation Commission has jurisdiction over this matter. Relying on *Midwest Dredging Company* v. *Etzberger*, 270 Ark. 936, 606 S.W.2d 619 (Ark. App. 1980), McKeag contends the commission has jurisdiction over this case because the contract for his employment with appellee was made in Arkansas when he telephone David White in Omaha, Nebraska, and was told to "come on back." In *Etzberger*, this court applied Professor Larson's six grounds dealing with the constitutional limits on which the application of a particular compensation act may be asserted, now found in 4 Arthur Larson, *The Law of Workmen's Compensation* § 86.10 (1990). This court in *Etzberger* held that the commission had jurisdiction over the claim on the basis that a contract for hire occurred in Arkansas. In that case the claimant, an Arkansas resident, accepted a job with an Arkansas company over the telephone from his brother, who had called from

Louisiana. Claimant then went to Louisiana where he was interviewed and began work. At no time did claimant perform work for Midwest in Arkansas.

In the case at bar, there is nothing in the record to establish who David White, the person McKeag claimed he talked with is, what exactly was said in his telephone conversation with McKeag, what authority, if any, David White had been given by appellee to hire McKeag, and what was intended by the words "come on back." Thus, there is not enough evidence that a contract for hire was made in Arkansas. Further, since McKeag traveled to Nebraska to fill out the necessary employment papers and take the required exams, it would appear that the contract was accepted, and thus completed, in Nebraska.

The court in *Etzberger* and also in *International Paper Co.* v. *Tidwell*, 250 Ark. 623, 466 S.W.2d 488 (1971), held that the commission had jurisdiction in those cases not only because the employment contract was made in Arkansas but also because the employer was localized or maintained an office exercising general supervision and control over its employees in Arkansas. In the case at bar, appellee did not have terminals in Arkansas and did not have a place of business in Arkansas where it exercised any type of control over its employees. McKeag testified that he had made some deliveries in Arkansas while employed with appellee, but as the full commission properly concluded, this is not a strong enough link with Arkansas to allow the Arkansas Workers' Compensation Act to be applied to this case.

The *Etzberger* and *Tidwell* cases applied the act liberally and connected the employment, and not merely the employee, to Arkansas. *Patton* v. *Brown & Root, Inc.*, 31 Ark. App. 141, 789 S.W.2d 745 (1990). As the full commission pointed out in its opinion, unlike the employer in *Etzberger* and *Tidwell*, the employer in this case did not have an office in Arkansas, did not issue paychecks from an office in Arkansas, and did not initiate contact with the claimant in Arkansas regarding employment. McKeag is not even a resident of Arkansas. Thus, since the facts connecting McKeag's employment with appellee to Arkansas are lacking, the statutory basis required for the commission's jurisdiction is absent. *See id.*

Affirmed.

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

CAGLE FABRICATING AND STEEL, INC. *v.* Roger D. PATTERSON

CA 90-481 819 S.W.2d 14

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

Warner & Smith, by: *Wayne Harris*, for appellant.

Daily, West, Core, Coffman & Canfield, by: *Eldon F.*

Coffman and *Douglas M. Carson*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Workers' Compensation Commission which awarded compensation benefits to the claimant, Roger D. Patterson, upon a finding that he had sustained a work-related hernia. Appellant argues the decision is not supported by substantial evidence and is contrary to law.

The record contains evidence that on December 28, 1988, Patterson, a 29-year-old welder, was pulling a sixty-pound part from a jig when he felt a pulling sensation on his right testicle. He testified that he had a sudden flash of severe pain; that he stopped work and reported the incident to his supervisor; and that the lunch bell rang about that time. The pain subsided during the lunch hour and he went back to work. He said he worked for the next two weeks with a nagging pain which was not really severe but which got worse, and by January 16 the pain became so severe that he went to see his doctor.

In a letter dated March 1, 1989, Dr. W. F. Dudding stated that he saw the claimant on January 16, 1989, and his examination, "revealed tenderness in the right testicle with no marked epididymal swelling, a mild fingertip inguinal hernia on the right with tenderness in this area." His letter then states that "a diagnosis of inguinal strain versus small hernia versus epididymitis was entertained and patient was treated with anti-inflammatory medication for about a week." The letter also stated that the claimant suffered increasing discomfort and that Dr. Dudding sent the claimant to see a surgeon, Dr. John J. Weisse, who found an inguinal hernia and repaired it on January 20, 1989. Dr. Dudding's letter of March 1, 1989, also stated that the "facts are consistent with an on-the-job injury on December 28, 1988, as per Mr. Patterson's story," and "it is not unusual that a very small hernia be very painful, yet still be very difficult to detect even by a professional let alone a layman who could not be expected to determine what the problem was."

The history and physical report made by Dr. Weisse for the claimant's admission to the hospital states that the doctor's examination had "confirmed a right inguinal hernia." As his "impression at the time of admission," Dr. Weisse recorded a "job related right inguinal hernia." The "operative report" lists

the postoperative diagnosis as a "right direct inguinal hernia," and describes in detail the "hernia repair procedure" which occurred on January 20, 1989.

Arkansas Code Annotated Section 11-9-523(a) (1987) provides:

(a) In all cases of claims for hernia, it shall be shown to the satisfaction of the commission:

> (1) That the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or the application of force directly to the abdominal wall;
>
> (2) That there was severe pain in the hernial region;
>
> (3) That the pain caused the employee to cease work immediately;
>
> (4) That notice of the occurrence was given to the employer within forty-eight (48) hours thereafter;
>
> (5) That the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two (72) hours after the occurrence.

The Commission held that these criteria had been met and found the claimant's hernia to be compensable. It stated:

> We find that Patterson's effort of pulling on the jig and feeling sudden pain in his testicle constitute the sudden effort and severe pain satisfying the first two criteria. The Administrative Law Judge erred in ruling that the occurrence of a hernia did not "immediately" follow the pulling incident, since "immediately" does not mean "instantly"; rather, it is only necessary for the hernia to occur in a time and manner making clear the causal connection between it and the strain that occurred. *Osceola Foods, Inc. v. Andrew*, 14 Ark. App. 95, 685 S.W.2d 813 (1985). We find such to be the case, because Patterson gave credible testimony that he was in distress throughout the two weeks before the cause of pain was diagnosed. The employer

> appears not to deny that Patterson ceased working and complained to his supervisor contemporaneously with the incident. Thus, it can be seen that all requirements of the statute are met if Patterson's physical distress was such that the attendance of a licensed physician was required within seventy-two (72) hours after the occurrence. The law on this point has been set out in *Ayres* v. *Historic Preservation Associates*, 24 Ark. App. 40, 747 S.W.2d 587 (1988).

The Commission then quoted from our opinion in *Ayers*, which quoted from other cases, including the final sentence of the opinion in *Osceola Foods, Inc.* v. *Andrew*, 14 Ark. App. 95, 685 S.W.2d 813 (1985), which states, "The diagnosis of a hernia would confirm the need of the services of a physician . . . ." *See Osceola*, 14 Ark. App. at 103. The Commission stated:

> We understand the requirements of the fifth subsection to have been effectively negated by the *Ayres* holding. If the diagnosis of a hernia confirms the fact that the claimant needs a physician, it logically follows that any claimant who can prove a work-related hernia has satisfied the fifth requirement. Since we find that Patterson did comply with subsections 1 through 4 and that the injury did occur within the scope and course of his employment, he has met his burden of proof under Section 523(a) and is entitled to appropriate benefits.

Appellant cites a number of Arkansas appellate decisions and argues that the claimant in this case is not entitled to compensation because the Commission's decision is not supported by substantial evidence and because the Arkansas appellate courts have construed too liberally the statutory provisions regarding hernia. As to the five factual requirements set out in Ark. Code Ann. § 11-9-523(a), the appellant contends that the appellee did not "experience that type of severe pain as contemplated by the statute, did not experience continued severe pain after the December 28, 1988, incident, was able to perform his regular employment duties involving strenuous manual labor, and had absolutely no reason to believe medical attention was required until a few days prior to January 16, 1989."

When reviewing a decision of the Workers' Compen-

sation Commission, we must view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Bearden Lumber Company* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). We believe that there is substantial evidence to support the Commission's findings of fact in this case.

We next examine the appellate decisions which the appellant contends "have construed too liberally the statutory provisions regarding hernia." Those decisions were concerned with the fifth requirement of the statute which requires that "the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two hours after the occurrence." The appellant argues that the Commission's decision in the present case "erroneously found the fifth statutory requirement had been negated by Court decisions."

In the discussion of this issue, we first note that the fifth requirement does not provide that a claimant must prove that he was *actually attended* by a physician within seventy-two hours after the injury, but the statute provides only that the physical distress following the occurrence of the hernia was such as to *require* the attendance of a physician within seventy-two hours after the occurrence. The purpose of this requirement was explained in *Harkleford* v. *Cotter*, 248 Ark. 811, 454 S.W.2d 76 (1970), where the court said:

> It is a matter of common knowledge that witnesses do not *see* hernias sustained by fellow workmen as they would see a broken leg or broken arm. Consequently the people have seen fit to make, and the legislature has seen fit to leave, a compensable hernia a rather dramatic occurrence under the statute, with little or no room left for question or doubt that it did occur within the course of employment . . . .

248 Ark. at 820. The court in *Harkleford* reversed a Commission decision awarding compensation for a hernia claim, but it did not

hold that the claimant must *actually see* a physician within the required period (48 hours at that time). That issue was settled in *Prince Poultry Co.* v. *Stevens*, 235 Ark. 1034, 363 S.W.2d 929 (1963), where the court adopted the interpretation given in Mississippi to a similar statutory provision in that state. Also, *Prince* noted that one of the meanings of "require" is "to need." In *Miller Milling Co.* v. *Amyett*, 240 Ark. 756, 402 S.W.2d 659 (1966), Justice George Rose Smith said of the *Prince* case:

> We followed a very similiar Mississippi case, where the court reasoned that for an injury "to require" a physician's attendance within a certain number of days does not invariably mean that the physician must actually be consulted within that time. A substantial compliance may be sufficient."

240 Ark. at 758.

The *Prince* decision was again referred to in *Ammons* v. *Meuwly Machine Works*, 266 Ark. 851, 587 S.W.2d 590 (Ark. App. 1979), where the Arkansas Court of Appeals said, "As pointed out in the *Prince* case, the statute does not require claimant to prove he was actually attended by a physician within 72 hours after the injury." 266 Ark. at 854. In *Ammons* the claimant tried, but was unable, to see a doctor within 72 hours after injury, and we said the statutory requirement is met "if the evidence shows that within 72 hours after the injury the claimant's condition was such that he sought and needed the services of a physician." The word "sought" was applicable in light of the evidence in that case, but our reference to *Prince* made it clear that we did not think it was necessary that the services of a physician be *sought* within 72 hours; that it was only necessary to show that such services were *required* or *needed* within that period.

The Arkansas Court of Appeals again relied upon *Prince* in *Brim* v. *Mid-Ark Truck Stop*, 6 Ark. App. 119, 639 S.W.2d 75 (1982), where the Commission's failure to award compensation was reversed. Although the claimant in that case did not see a doctor until 36 days after her injury, we held that the claimant "adequately met her burden of proof that she needed the services of a physician within 72 hours." *See* 6 Ark. App. at 122.

In the *Osceola Foods, Inc.* v. *Andrew*, case, *supra*, one of the contentions made by the appellant was that the claimant's distress following the hernia did not require the services of a physician within the prescribed time because the claimant went to the doctor for treatment of an allergic reaction to a pain pill, not because of the hernia that caused the pain. We relied upon *Brim* for the holding that the claimant was not required to prove that he was "actually attended by a physician within 72 hours but only that he needed the services of a physician within that period." Therefore, in *Osceola*, in the context of the appellant's contention that the claimant's physical distress from the hernia did not require the attention of the doctor who diagnosed the hernia at the time he was seen for the allergic reaction, we stated, "The diagnosis of a hernia would confirm the need of the services of a physician which is all that section requires." *See* 14 Ark. App. at 103.

Returning now to the Commission's decision in the present case, we think the Commission was clearly in error when it held that the fifth subsection of Ark. Code Ann. § 11-9-523(a) (1987), was "effectively negated by the *Ayres* holding." Thus, the Commission was also in error in its next statement that "if the diagnosis of a hernia confirms the fact that the claimant needs a physician, it logically follows that any claimant who can prove a work-related hernia has satisfied that fifth requirement." The statement that "the diagnosis of a hernia would confirm the need of the services of a physician" was first made in *Osceola* and was correct in that case because, as we have explained, it applied to the employer's contention in that case.

In *Ayres* we cited *Osceola*, and relied upon its language, when we held there was no substantial evidence to support the Commission's decision that the claimant in that case had not needed the services of a physician within 72 hours of the occurrence of the hernia. We did not, however, hold that "any claimant who can prove a work-related hernia has satisfied the fifth requirement" of the statute, and the statutory requirement was not "effectively negated" by our decision in *Ayres*. In fact, we specifically referred to the statement from *Osceola* only in the context of our discussion of the *sufficiency* of the evidence.

However, the Commission's statement in the present

case as to its "understanding" of our decision in *Ayres* is not a finding of fact but amounts only to a conclusion of law. It has been the rule in Arkansas for many years that the Commission must make findings of fact in sufficient detail that the reviewing court may perform its function to determine whether the Commission's findings as to the existence or nonexistence of the essential facts are supported by the evidence. *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 507-08, 579 S.W.2d 360 (1979); *Mosley* v. *McGhee School District*, 30 Ark. App. 131, 133, 783 S.W.2d 871 (1990). The Commission has done this in the instant case.

In its opinion the Commission held that the first two requirements of Ark. Code Ann. § 11-9-523(a) (1987) were met because under the law "it is only necessary for the hernia to occur in a time and manner making clear the causal connection between it and the strain that occurred."

As to statutory requirements three and four, the Commission's opinion states, "The employer appears not to deny that Patterson ceased working and complained to his supervisor contemporaneously with the incident." This is, of course, a finding of fact. Moreover, no one testified in this case except the claimant. We have already detailed his testimony as to the "sudden flash of severe pain" and that he stopped work and reported the incident to his supervisor. In fact, he testified that he "stepped back and put my hands on the table, waited a second" and "hollered to the shop foreman." Certainly there is substantial evidence to support the Commission's finding that the third and fourth statutory requirements were met.

■ And, as to the fifth requirement, the Commission said, "Since we find that Patterson did comply with subsections 1 through 4 and that the injury did occur within the scope and course of his employment, he has met his burden of proof under Section 523(a) and is entitled to appropriate benefits." While the Commission was wrong in thinking that *Ayres* "effectively negated" the fifth requirement of the statute, the Commission specifically found that the claimant "met his burden of proof under Section 523(a)." That is definitely a finding of fact. Moreover, it is a summary of other factual findings which are in sufficient detail for us to determine whether they are supported by substantial evidence. The findings here are not like those in

Wright v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986), where the Commission simply found that "claimant has failed to prove her claim by a preponderance of the evidence." There, we said "the record contains no finding as to whether a compensable injury actually occurred on the job, or whether claimant became disabled, or whether she required further medical services, or whether a job-related injury aggravated a preexisting latent spinal disease." So we concluded, "Absent any findings of essential additional facts, this court is not in a position to make a meaningful review of the decision of the Commission." *See also Jones* v. *Tyson Foods, Inc.*, 26 Ark. App. 51, 759 S.W.2d 578 (1988), which we said was "surprisingly similar" to *Wright*. In the instant case, however, the Commission has found:

(1) That "Patterson's effort of pulling on the jig and feeling sudden pain in his testicle constitute the sudden effort and severe pain satisfying the first two criteria."

(2) That "the employer appears not to deny that Patterson ceased working and complained to his supervisor contemporaneously with the incident."

(3) That "Patterson gave credible testimony that he was in distress throughout the two weeks before the cause of pain was diagnosed."

Thus, the Commission found in (1) that the first two requirements of Ark. Code Ann. § 11-9-523(a) had been satisfied. In (2), the Commission found that it did not appear that the employer even contended that the third and fourth requirements of the statute had not been met. And in (3) the Commission found from the claimant's credible testimony that he was in distress throughout the two weeks before the cause of pain was diagnosed. The Commission then summed up these findings by stating that the claimant "met his burden of proof under Section 523(a)." Had the Commission made only this last statement we would be faced with the situation in *Wright* and *Jones* v. *Tyson*, but that is not our situation in this case. Here, the requirements of *Wright* and *Jones* v. *Tyson*, which were based upon *Clark* v. *Peabody Testing Service, supra*, were fully met. In appeals from the Commission, it is our duty to

> view and interpret the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the commission and give the testimony its strongest probative force in favor of the action of the commission, whether it favored the claimant or the employer.

Clark v. *Peabody Testing Service, supra*, at 265 Ark. 496-97. *See also Fowler* v. *McHenry*, 22 Ark. App. 196, 203, 737 S.W.2d 663 (1987).

Obviously, it can be argued that the Commission's understanding of the law in *Ayres* caused it to make the factual findings that it made in regard to the requirements of Ark. Code Ann. § 11-9-523(a); but it nevertheless made those findings, and they are in sufficient detail for us to review. Therefore, although we do not agree with the Commissions's conclusion of law that our decision in *Ayres* "effectively negated" the fifth requirement of Ark. Code Ann. § 11-9-523(a) (1987), when we consider that the only evidence in the record comes from the claimant and the medical reports, and that the Commission's opinion states the claimant gave "credible testimony," and "met his burden of proof under Section 523(a)" (which includes the fifth subsection), we think the Commission's findings of fact are so clearly supported by substantial evidence that we do not believe those findings were affected by the Commission's misunderstanding of our decision in *Ayres*.

Affirmed.

CRACRAFT, C.J., COOPER, and JENNINGS, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. The majority opinion turns on the conclusion that the Workers' Compensation Commission found that the appellee's distress was such that the attendance of a physician was required within seventy-two hours after the occurrence. I think it clear that the Commission made no such finding, and that its decision was instead based on an erroneous interpretation of the applicable law. Arkansas Code Annotated § 11-9-523(a) provides that:

> (a) In all cases of claim for hernia, it shall be shown to the satisfaction of the commission:

> (1) That the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or the application of force directly to the abdominal wall;
>
> (2) That there was severe pain in the hernial region;
>
> (3) That the pain caused the employee to cease work immediately;
>
> (4) That notice of the occurrence was given to the employer within forty-eight (48) hours thereafter;
>
> (5) That the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two (72) hours after the occurrence.

In its opinion, the Commission tracked the statutory language and found that the first four requirements of Ark. Code Ann. § 11-9-523 (a) had been satisfied. However, as the following excerpt from the Commission's opinion plainly shows, the Commission made no finding with the respect to the fifth requirement because it concluded that the fifth requirement had been eliminated by our holding in *Ayres* v. *Historic Preservation Associates*, 24 Ark. App. 40, 747 S.W.2d 587 (1988). The Commission stated in its opinion that:

> We find that Patterson's effort of pulling on the jig and feeling sudden pain in his testicle constitute the sudden effort and severe pain satisfying the first two criteria. The Administrative Law Judge erred in ruling that the occurrence of the hernia did not "immediately" follow the pulling incident, since "immediately" does not mean "instantly"; rather, it is only necessary for the hernia to occur in a time and manner making clear the causal connection between it and the strain that occurred. *Osceola Foods, Inc.* v. *Andrew*, 14 Ark. App. 95, 685 S.W.2d 813 (1985). We find such to be the case, because Patterson gave credible testimony that he was in distress throughout the two weeks before the cause of pain was diagnosed. The employer appears not to deny that Patterson ceased working and complained to his supervisor contemporane-

ously with the incident. *Thus, it can be seen that all requirements of the statute are met if Patterson's physical distress was such that the attendance of a licensed physician was required within seventy-two (72) hours after the occurrence.* The law on this point has been set out in *Ayres* v. *Historic Preservation Associates*, 24 Ark. App. 40, 747 S.W.2d 587 (1988):

> In *Brim* v. *Mid-Ark. Truck Stop*, 6 Ark. App. 119, 630 S.W.2d 75 (1982), this court reversed a Commission decision denying benefits to a claimant who sustained a hernia on July 28, 1980, and did not see a physician until September 2, 1980 — thirty-six days later. Explaining subsection (5), we said:
>
> > The statute does not require a claimant to prove that he was actually attended by a physician within 72 hours after the injury. The statutory requirement is met if the evidence shows that within 72 hours after the injury the claimant's condition was such that he sought and needed the services of a physician. *Prince Poultry Co.* v. *Stevens*, 235 Ark. 1034, 363 S.W.2d 929 (1963); *Ammons* v. *Meuwly Machine Works*, 266 Ark. 851, 587 S.W.2d 590 (Ark. App. 1979).
>
> ***
>
> In *Prince Poultry Co.* v. *Stevens*, *supra*, the Arkansas Supreme Court cited with the interpretation given the word "required" by the Supreme Court of Mississippi in *Lindsey* v. *Ingalls Shipbuilding Corporation*, 68 So. 2d 872, which was as follows:
>
> > To demand or exact as necessary or appropriate; hence to warrant; to need; call for.
>
> 6 Ark. App. at 121-122, 693 S.W.2d at 76. The only condition for satisfaction of the statutory requirement under *Brim*, then, was that a claimant "required" the services of a physician within seventy-two hours of the occurrence of the injury.
>
> Subsequently, this court in *Osceola Foods, Inc.* v.

> *Andrew*, 14 Ark. App. 95, 685 S.W.2d 813 (1985), affirmed the award of benefits to a claimant seeking compensation for a hernia. We cited *Brim* and held specifically that 'The diagnosis of a hernia would confirm the need of the services of a physician which is all that section requires.' 14 Ark. App. at 103, 685 S.W.2d at 818.

> *We understand the requirements of the fifth subsection to have been effectively negated by the Ayres holding. If the diagnosis of a hernia confirms the fact that the claimant needs a physician, it logically follows that any claimant who can prove a work-related hernia has satisfied the fifth requirement. Since we find that Patterson did comply with subsections 1 through 4 and that the injury did occur within the scope and course of his employment, he has met his burden of proof under Section 523(a) and is entitled to appropriate benefits.* [Emphasis supplied.]

I submit that a fair reading of the Commission's opinion shows that the Commission merely found that the first four requirements of the statute had been met, and that all that was required was to determine whether the fifth requirement had been satisfied. However, based on its interpretation of our holding in *Ayres, supra*, the Commission concluded that it was unnecessary for the claimant to go further and prove compliance with the fifth requirement because he had been ultimately diagnosed with a hernia.

I disagree with the majority's holding that the Commission made a finding of fact regarding the fifth statutory requirement when it stated that the claimant "met his burden of proof under Section 523(a)." We rejected a similar "finding" of the Commission in *Jones* v. *Tyson Foods, Inc.*, 26 Ark. App. 51, 759 S.W.2d 578 (1988), where the Commission "found" that the claimant failed to meet her burden of proof by a preponderance of the credible evidence. Noting that a claimant is entitled to know the factual basis upon which his claim is denied and that we were unable to determine what the Commission found the facts to be, we reversed and remanded that case for a new decision based upon findings of fact set out in sufficient detail to permit our meaningful review. It would seem that an employer is likewise

entitled to know the factual basis upon which a claim is granted; in any event, the Commission's statement in the case at bar that the claimant met this burden of proof is not a finding of fact, but is instead a conclusion of law. In contrast, a finding of fact is:

> [A] simple, straightforward statement of what happened. A statement of what the Board finds has happened; not a statement that a witness, or witnesses, testified thus and so. It is stated in sufficient relevant detail to make it mentally graphic, i.e., it enables the reader to picture in his mind's eye what happened. And when the reader is a reviewing court the statement must contain all the specific facts relevant to the contested issue or issues so that the court may determine whether the Board has resolved those issues in conformity with the law.

Wright v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986).

The Commission's decision in the case at bar does not enable us to picture whether the claimant needed a physician within the 72-hour statutory period. Nor does the Commission's conclusion that the claimant met his burden of proof under the statute allow us to determine whether the Commission decided this issue in conformity with the law.

The majority opinion recites the oft-repeated rule that we are duty-bound to view the evidence and all inferences deducible therefrom in the light most favorable to the Commission. While this is unquestionably the law, it is important to note that this rule applies to the Commission's findings of fact, not to its opinions or conclusions of law. *See* 3 Larson, *The Law of Workmen's Compensation* § 80:13 (1983). It is apparent that in cases such as this one the presumption in favor of the Commission's findings is of no help in resolving the more basic question of what those findings are.

The Commission was required to find as facts the basic component elements on which its conclusion was based. *Id.* Whether or not the attendance of a physician was required within 72 hours is a necessary component element of the conclusion that the claimant met his burden of proof under the statute. Because the Commission's opinion does not give us a "simple, straightfor-

ward statement" concerning the claimant's need for a physician, we are left to speculate regarding the manner in which the Commission arrived at its decision: Was the Commission convinced that the attendance of a physician was in fact required within the statutory period, or did the Commission instead omit this requirement from its analysis because of its erroneous belief that the requirement had been "effectively negated by the *Ayres* holding"?

I believe that the Commission followed the latter course of reasoning because that is precisely what it said it was doing in its opinion. The majority believes that the Commission was convinced that a physician's attendance was in fact required. I am at a loss to understand how the majority arrived at this understanding of the Commission's opinion which, in a single paragraph, states in unbroken sequence that the fifth statutory requirement was negated by *Ayres*, and that, since the first four statutory requirements had been met, the claimant met his burden of proof under the statute. Nevertheless, the very existence of this disagreement among the judges of this Court concerning what the Commission found exemplifies the inadequacy of the Commission's findings. We are, at best, left to guess what course the Commission took in arriving at its conclusion, and no meaningful review is possible when we are reduced to guessing whether the Commission resolved an issue in conformity with the law.

The Commission's opinion should be reversed and the case remanded because it contains no finding of fact regarding the fifth statutory requirement and because all member of this Court, both in the dissent in the majority, are in agreement that the Commission's interpretation of our holding in *Ayres* was erroneous. I respectfully dissent.

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

FIRST NATIONAL BANK OF LAWRENCE COUNTY *v.* HIGGINBOTHAM FUNERAL SERVICE, INC.

CA 90-487 818 S.W.2d 583

Court of Appeals of Arkansas
En Banc
Opinion delivered November 6, 1991
[Rehearing denied December 4, 1991.*]

*Cracraft, C.J., and Cooper, J., would grant rehearing.

Ponder & Jarboe, by: *Dick Ponder*, for appellant.

Davidson, Horne & Hollingsworth by: *Allan W. Horne*, for appellee.

JUDITH ROGERS, Judge. On May 26, 1989, appellant, First National Bank of Lawrence County, filed suit in the Lawrence County Circuit Court against appellee, Higginbotham Funeral Service, Inc., and William Carter Higginbotham, individually, to collect on a note executed in 1987 that was past due. On August 28, 1989, a consent judgment was signed by the trial judge and entered of record as presented by appellant's attorney, and David Mullen, who purportedly represented as counsel both Carter Higginbotham and the appellee-corporation.

On September 9, 1989, appellee filed a motion to set aside the consent judgment pursuant to Ark. R. Civ. P. 60 on grounds of preventing a miscarriage of justice and fraud in the procurement of the judgment, based on the claim that the employment of David Mullen to represent the corporation was unauthorized and that Mullen was without authority to consent to judgment on its behalf. As a meritorious defense, appellee asserted that the note upon which the appellant's claim was based was executed without its authority, and was thus null and void. In its response to the motion, appellant pled laches, waiver, estoppel and ratification. The hearing of this matter was not held until September of 1990.

Based on a finding of fraudulent conduct on the part of appellant in obtaining the judgment, the trial court set aside the consent judgment as to appellee and granted a new trial, but the court left intact the judgment against Carter Higginbotham, who took no part in the hearing.

Appellant appeals from the trial court's order granting appellee's motion to set aside the consent judgment. Appellant raises two issues for reversal, arguing that appellee was estopped from setting the judgment aside; and that appellee ratified the action of Carter Higginbotham in hiring David Mullen and that the trial court erred in finding that there was clear evidence of fraud. We affirm on all issues.

It will be necessary to recite in some detail the factual background of this case in order to fully understand the questions raised on appeal. The record discloses that appellee, Higginbotham Funeral Services, Inc., is a close corporation which was formed in 1968 by W.C. Higginbotham and his family, and has branches located in Walnut Ridge and Hardy, Arkansas. In 1981, W.C. and his wife, Mary Jo, were divorced, and in the divorce settlement, W.C. was given control over the Walnut Ridge branch, while Mary Jo was given control of the Hardy operation. W.C. died sometime in 1987.

Roughly six weeks before the appellant filed the instant lawsuit in circuit court, David Mullen, at the behest of Carter Higginbotham [hereinafter "Carter"], who is W.C. and Mary Jo's son, filed an action in the Lawrence County Chancery Court for declaratory judgment on behalf of the corporation against Mary Jo. In the complaint for declaratory judgment, it was alleged that the board of directors had unanimously agreed to sell all real and personal property comprising the Hardy assets of the corporation; that Mary Jo had by letter objected to this action, considering unlawful any decision by the board, as she deemed herself the only lawful director of the corporation; and that the prospective purchaser was unwilling to go forward with the purchase until the matter was settled. Therefore, it was asked of the chancellor to declare that the board was lawfully constituted, and that the decision of the board to sell the assets of the Hardy branch was valid.

Thereafter, on June 1, 1989, Mary Jo filed a third-party

complaint in the declaratory judgment action against Carter, both individually and as executor of W.C.'s estate. The third-party complaint contained the allegations that certain shares of the corporation had been transferred to Carter and Hazel Best in violation of the Articles of Incorporation; that Carter had taken control of the Walnut Ridge operation; that Carter and Hazel Best had purported to act as elected officers and directors of the corporation and had purported to take action in the name of the corporation, such as by obtaining loans and expending corporate funds and assets; that such acts were in violation of the Articles of Incorporation and were without authority, or in excess of authority, and were null and void; and, that Carter had undertaken to employ David Mullen as the attorney for the corporation, an undertaking for which he was without authority.

On June 20, 1989, David Mullen filed an answer to appellant's complaint in circuit court on behalf of appellee and Carter, admitting the indebtedness owed to appellant.

Trial of the declaratory judgment and third-party complaint was had on August 4, 1989, and on August 17th, the chancellor ruled that Mary Joe was the only duly elected member of the board of directors, and that Carter and Hazel Best were not validly elected officers or directors of the corporation. The chancellor enjoined the two from conducting any further activities on behalf of the corporation.

The consent judgment at issue here was entered on August 28, 1989, which was after the chancellor's ruling in the other lawsuit; however, it is undisputed that neither appellant, nor Mullen knew of that decision when the consent judgment was entered, on the day the case was set for trial. By virtue of this settlement, appellant was awarded judgment jointly and severally against appellee and Carter in the amount of $108,087.62 with interest accruing at the rate of $30.33 per day, together with costs and an attorney's fee of $3,000.

Since the issue of fraud was the primary subject of our discussion in conference, we will address that issue first. Rule 60 (c)(4) of the Arkansas Rules of Civil Procedure authorizes the trial court to modify or vacate an order, at any time, for fraud practiced by the successful party in obtaining the judgment. The Rule thus permits vacation or modification of an order after

ninety days only in cases of fraud practiced upon the court in obtaining the judgment. *See Smart* v. *Biggs*, 26 Ark. App. 141, 760 S.W.2d 882 (1988). The fraud for which a decree will be canceled must consist in its procurement and not merely in the original cause of action. *Alexander* v. *Alexander*, 217 Ark. 230, 229 S.W.2d 234 (1950). It is not sufficient to show that the court reached its conclusion upon false or incompetent evidence, or without any evidence at all, but it must be shown that some fraud or imposition was practiced upon the court in the procurement of the decree, and this must be something more than false or fraudulent acts or testimony the truth of which was, or might have been, an issue in the proceeding before the court which resulted in the decree assailed. *Id.* Even though the fraud that vitiates a judgment may be constructive rather than actual, constructive fraud is nonetheless a species of wrongdoing. *Ark. State Hwy. Comm'n.* v. *Clemmons*, 244 Ark. 1124, 428 S.W.2d 280 (1968). Constructive fraud is defined as a breach of a legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others. Neither actual dishonesty nor intent to deceive is an essential element. *See RLI Ins. Co.* v. *Coe*, 306 Ark. 337, 813 S.W.2d 783 (1991). The party seeking to set aside the judgment has the burden of showing that the judgment was obtained by fraud, *see Karam* v. *Halk*, 260 Ark. 36, 537 S.W.2d 797 (1976), and the charge of fraud must be sustained by clear, strong, and satisfactory proof. *Ark. State Hwy. Comm'n.* v. *Clemmons*, *supra.*

From the testimony and exhibits introduced at the hearing, it was revealed that appellant, through its representatives, had knowledge of the controversy surrounding the control of the corporation. Specifically, it was shown that appellant was aware of the declaratory judgment action as early as May 17, 1989, which was before its own complaint was filed, and it was shown that appellant had received a copy of Mary Jo's third-party complaint within days of its filing, in which the question of both Carter and Mullen's authority to act was specifically challenged. There was also evidence that appellant itself was concerned about the problems within the corporation, as on May 19, 1989, the appellant advised Carter that no further loans would be extended due to the uncertainty as to who were the proper directors of the

corporation.

The trial court made its ruling from the bench, stating:

> In that motion to set aside the judgment, we have to determine if in fact there was fraud practiced by the successful party, which is the bank, not necessarily Carter Higginbotham, but the bank.
>
> . . .
>
> In looking at the issues and reading the rule about five, six, seven times and listening to your argument and reading your briefs, the Court is going to rule that the motion to set aside the judgment is going to be granted in that there is some evidence of fraud on the part of the bank. It does not mean fraud like we think of fraud, it means that there was a judgment submitted to me through David Mullen of which the bank or there's evidence that the bank had some knowledge that this was not properly done.

As indicated by these comments, the trial judge found that appellant had practiced a constructive fraud on the court in obtaining the judgment. The appellant possessed the knowledge of the other proceedings and the challenge to Carter's authority, from which Mullen's representation was derived. Nevertheless, a consent judgment was entered into with these parties and presented to the court for signature without revealing to the court that there were questions over control of the corporation. We believe that under these circumstances the trial court had the right to set aside the consent judgment as to appellee, and we affirm the finding of the trial court on the issue of fraud.

In all due respect to the dissenting judges, it was not incumbent on the trial court to set out with specificity its finding of fraud, particularly in the absence of a request to do so by the parties. *See Miles* v. *Southern*, 297 Ark. 274, 763 S.W.2d 656 (1987) (supplemental opinion denying rehearing). Even so, we cannot accept the view that no such finding was made by the trial court in this instance. First, it is clear from the discussions between court and counsel before the hearing began, that the trial court was well-aware, and the court expressly stated, that the burden of proof on the issue of fraud was by clear and convincing evidence in order to set aside the judgment. Secondly, in making

this finding, the trial judge accurately described the type of fraud evidenced in the record, that of constructive fraud, which should dispel any doubt that such a finding was made. To seize upon the words "some" and "evidence" of fraud to reach a conclusion that no finding of fraud was made is merely placing form over substance. We are unwilling to say that the trial court ignored its earlier pronouncement with respect to the burden of proof, and this, coupled with the trial court's descriptive remarks, constitutes a sufficient finding for purposes of review.

Furthermore, the appellant does not argue that the trial court's finding of fraud was in any way deficient, and more importantly, appellant does not seriously argue that the trial court's finding of fraud was not supported by the evidence. It appears then that the dissent has created an issue for reversal out of whole cloth, an argument which is neither advanced nor addressed by the parties on appeal, or at the hearing. Since neither of the parties contend otherwise, the question on appeal is whether or not the trial court's finding was clearly against the preponderance of the evidence. *See e.g. Riggs* v. *Sheridan*, 22 Ark. App. 175, 737 S.W.2d 175 (1987). There was ample evidence presented that the consent judgment was procured by constructive fraud, such that we cannot say that the trial court's finding was clearly erroneous.

As stated above, appellant in its argument before this court does not seriously contest the findings of fraud made by the trial court. Instead, appellant asserts that, notwithstanding a finding of fraud, appellee is precluded from contesting the entry of the consent judgment based on principles of ratification and estoppel. It is the appellant's contention that the appellee ratified the actions of Carter and Mullen, and is estopped from attacking the judgment because it was shown that Mary Jo had notice of this lawsuit as of July 6, 1989. We do not find that these principles apply to the facts in this proceeding involving the narrow issue of vacating the judgment. In the first place, appellant was at all relevant times aware of the dispute over the control of the corporation. Absent in its argument is any claim of detrimental reliance, which might prevent appellee from contesting the judgment. It simply cannot be said that appellant was misled. In addition, we believe that the filing of the motion to set aside the judgment within nine days after its entry negates a finding of

ratification. We do note that appellant has expanded his arguments on these issues to include matters that will likely arise at trial. Therefore, we express no opinion on these questions at this time. For these reasons, we find no merit in the arguments advanced based on the doctrines of ratification and estoppel.

Affirmed.

CRACRAFT, C.J., and COOPER, J., dissent.

GEORGE K. CRACRAFT, Chief Judge, dissenting. I dissent. My departure from the majority is brought about by a firm conviction that its conclusions are based on an entirely false premise, i.e., that the trial court vacated the judgment "[b]ased on a finding of fraudulent conduct on the part of appellant." There was simply no such finding.

On appeal, appellant argues, *inter alia*, that the court erred in finding clear evidence of fraud, and appellee contends that it offered sufficient proof. The evidence on the issue of fraud was conflicting. Although there was evidence that the bank did have some knowledge of the declaratory judgment action and challenge to the authority of Carter Higginbotham and David Mullen to control the corporation, whether that evidence was sufficient to justify a finding of fraud was an issue for the trial court to determine from the evidence. The majority perceives such a finding in the following statement of the court:

> In looking at the issues and reading the rule about five, six, seven times and listening to your arguments and reading your briefs, the Court is going to rule that the motion to set aside the judgment is going to be granted in that *there is some evidence of fraud* on the part of the bank. It does not mean fraud like we think of fraud, it means that there was a judgment submitted to me through David Mullen of which the bank *or there's evidence that the bank had some knowledge* that this was not properly done. [Emphasis added.]

The majority opinion is based on the premise that "[a]s indicated by these comments, the trial judge found that appellant had practiced a constructive fraud on the court. . . ." To me, the trial court's remark has an entirely different meaning. It clearly indicates that the trial court had determined to set the judgment

aside, not on finding fraud, but on finding *some evidence* of it. If any doubt remained, the following colloquy should have dispelled it:

> [APPELLANT'S COUNSEL]: . . . I don't think that you can make a finding of whether there is fraud without considering whether or not—
>
> THE COURT: Oh, I'm making a ruling that there is *evidence* of fraud. [Emphasis added.]

Rule 60 (c)(4) of the Arkansas Rules of Civil Procedure contemplates that a final judgment will not be set aside except on a finding of fraud practiced on the court in procurement of the judgment. It does not authorize the setting aside of solemn judgments merely because a party presents "evidence of fraud" or "some evidence" of it. The rule contemplates that the trial judge will weigh the evidence of fraud on the court against that of fair and open dealing, determine from the whole record whether such fraud has been proved, and enter his order accordingly. Fraud is never presumed; it must be proved by clear, strong, and satisfactory evidence. *See Arkansas State Highway Commission* v. *Clemmons*, 244 Ark. 1124, 428 S.W.2d 280 (1968). Here, the trial judge made no such finding, and the order appealed from sets the judgment aside without reciting any grounds.

Contrary to what the majority seems to think, I agree that a trial judge is not required to set out specific findings of fact in the absence of a request that he do so. In the ordinary case, we presume that a court acted properly and made the findings of fact necessary to support its judgment. However, this presumption will be indulged only *in the absence of a showing to the contrary. See Kindrick* v. *Capps*, 196 Ark. 1169, 121 S.W.2d 515 (1938); *Hollingsworth* v. *McAndrews*, 79 Ark. 185, 95 S.W. 485 (1906). The recognized limitations on the use of this presumption are set out in 5 C.J.S. *Appeal and Error* § 1564(8) (1958):

> A finding will not be implied where it would be clearly wrong to do so, as where it would be in contradiction of the record, or where the likelihood exists that to do so would thwart the intention of the trial court, or where the counsel have agreed that there shall be no findings, or *where the*

> *court has expressly refused to find the particular fact.* Further, the doctrine of implied findings will not be applied as to matters on *which the court has made a direct finding, or a finding which precludes the inference*, or where the fact is not fairly inferable from the facts found; and it has been said that the appellate court will not search the record to supply a finding which the trial court should have made in the first instance.
>
> It will not be presumed that the trial court found a particular fact where to do so would result in a reversal of the judgment, or where the record shows that the judgment was expressly based on the findings made, *where the finding presumed would be inconsistent with the findings made*, where a special statute applicable to the case required certain facts to be set forth in the judgment, where the case is one in which no findings are required, or where the findings made are not within the pleadings. It is not presumed that the judge found facts sufficient to support the judgment entered where it is apparent that he acted under an erroneous conception of the applicable law. [Emphasis added. Footnotes omitted.]

To me, one cannot escape the conclusion that there was in this case such a "showing to the contrary" as to completely negate the applicability of any presumption that the trial court found fraud. To presume that the trial court found that fraud on the court had been proved (as distinguished from having found that there was "some evidence" of it) would be in direct contradiction to, and wholly inconsistent with, the finding actually announced and concisely restated at the close of the hearing.

The majority also accuses me of "creat[ing] an issue for reversal out of whole cloth, an argument which is neither advanced nor addressed by the parties on appeal, or at the hearing." It is true that appellant does not in its brief attack the trial court's "finding" of fraud as being "deficient." However, as the majority concedes, appellant does argue that the evidence is insufficient to support the trial court's "finding" of fraud.[1] That

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[1] The majority opinion twice states that appellant does not "seriously" contest the sufficiency of the evidence as to fraud. Nevertheless, after stating the procedural history of

argument alone *requires* us to consider the issue raised in this dissent. As there was no finding of fraud on the court in the procurement of the judgment, and as it would be improper on the facts of this case for us to presume that such a finding was made, there is no finding for us to review. *See Charleston School District No. 9* v. *Sebastian County Board of Education*, 300 Ark. 242, 778 S.W.2d 614 (1989); *Des Arc Bayou Watershed Improvement District* v. *Finch*, 271 Ark. 603, 609 S.W.2d 70 (1980). As there is no finding for us to review, I am at a loss as to how we can decide the sufficiency issue presented to us. *See Des Arc Bayou Watershed Improvement District* v. *Finch, supra.* As we do not review circuit court cases *de novo* on the record, we cannot make the missing finding ourselves on appeal; our function in this regard is simply to review the findings of the factfinder. *See Charleston School District No. 9* v. *Sebastian County Board of Education, supra.*

I am of the firm and abiding conviction that the majority opinion is dead wrong, and that the order appealed from should be reversed and the case remanded for the circuit court to make a finding, based on the record as it already exists, on the factual issue that was presented to it. I express no opinion as to the sufficiency of the evidence in this record to support a finding of fraud, if and when one is ever made.

COOPER, J., joins in this dissent.

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the case, it takes the majoirty six typewritten pages to discuss that evidence and dispose of that very issue. Only one paragraph is devoted to the issues of ratification and estoppel.

Vience SHAW *v.* COMMERCIAL REFRIGERATION

CA 91-16 818 S.W.2d 589

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

Whetstone and Whetstone, by: *Gary Davis*, for appellant.

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

GEORGE K. CRACRAFT, Chief Judge. Vience Shaw appeals from an order of the Arkansas Workers' Compensation Commission denying his claim for benefits upon a conclusion that he had failed in his burden of proving his entitlement to benefits by a preponderance of the evidence. Appellant contends that the decision is not supported by substantial evidence and that the Commission failed to conduct a *de novo* review in violation of his right to due process of law. We affirm.

On appellate review of decisions of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and will affirm if those findings are supported by substantial evidence. Where, as here, the Commission has denied a claim because of failure to show entitlement to benefits, the substantial evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief. *Linthicum* v. *Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987); *Williams* v. *Arkansas Oak Flooring Co.*, 267Ark. 810, 590 S.W.2d 328 (Ark. App. 1979). Questions concerning the credibility of witnesses and the weight to be given their testimony are exclusively within the province of the Commission. *Wade* v. *Mr. C. Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Austin* v. *Highway 15 Water Users Association*, 30 Ark. App. 60, 782 S.W.2d 585 (1990).

Appellant filed this claim contending that he was entitled to temporary total disability benefits as a result of an injury allegedly suffered in the course and scope of his employment with appellee. He testified that he suffered a work-related injury to his back on March 14, 1988, while lifting refrigeration tanks with co-worker Aubrey Burton. Appellant stated that he informed the co-workers with whom he carpooled of the injury that afternoon and the he had also informed the company nurse, his foreman, and several other friends the he had sustained an injury and that it was job related.

In its opinion, the Commission pointed out that none of the witnesses to whom appellant stated he had reported his injury corroborated his testimony, including the person with whom appellant said he was working at the time of the injury. The Commission also noted that appellant had failed to call as witnesses a number of other persons who he stated could corroborate his testimony. The Commission commented that, perhaps more importantly, appellant's own testimony "is contradictory, thereby indicating that his testimony is not credible." It then discussed several instances in which appellant's testimony had been contradictory, both as to his actions following the alleged work-related injury and as to his medical history regarding prior injuries to his back. Finally, the Commission noted that the April 6, 1988, report of Dr. James Grissom reflected that appellant had sought treatment for back pain that had been present for "quite some time" and indicated that appellant made no mention to him of an on-the-job injury. The Commission concluded as follows:

> Given all the facts in this case, we find that the claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury. Here, claimant's testimony is not corroborated by anyone working for the respondent or even claimant's friends. Further, the evidence reveals that the claimant mistakenly remembered an entire conversation which never occurred. Given those facts, *we find that claimant's testimony is not credible*. . . . Here, the evidence of record indicates the claimant's testimony is not corroborated and that he has made numerous inconsistent statements.

> Accordingly, we find that the claimant has failed to meet his burden of proof and affirm the Administrative Law Judge's decision. Therefore, this claim is respectfully denied and dismissed. [Emphasis added.]

It is clear that the burden was upon appellant to prove by a preponderance of the evidence that he had suffered a compensable injury. It is also clear, on the facts of this case, that appellant's credibility was of vital importance to his carrying of that burden. From our review of the record, we conclude that the Commission's finding that appellant was not credible was a permissible one and that the Commission's opinion displays a substantial basis for the denial of relief. *See Linthicum* v. *Mar-Bax Shirt Co., supra.*

Appellant also argues that this court should follow the rule applied in federal courts and some sister states that a decision of an administrative agency must be supported by "substantial evidence on the record as a whole." This argument was expressly rejected by the supreme court in *Scarbrough* v. *Cherokee Enterprises*, 306 Ark. 641, 816 S.W.2d 876 (1991).

Appellant next contends that, because the Commission reached the same result as the administrative law judge, the Commission failed to conduct the required *de novo* review of the record and thus deprived him of his right to due process of law. We find no merit in this contention for a number of reasons. In the first place, the Commission's opinion recites that it made a *de novo* review of the record, and we will not presume otherwise. Furthermore, the Commission wrote a lengthy and detailed opinion, demonstrating that it did, in fact, review the record *de novo.*

We also note that the due process issue was not raised before the Commission. In *Johnson* v. *Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989), and *Hamilton* v. *Jeffery Stone Co.*, 6 Ark. App. 333, 641 S.W.2d 723 (1982), we held that the rule that prohibits presentation of constitutional issues for the first time on appeal applies with equal force to appeals from the Commission. In *Hamilton*, we pointed out that such issues should be raised at the administrative law judge or Commission level because constitutional questions often require an exhaustive analysis and the preparation of a record that we can review. This case demon-

strates the wisdom of such a rule. In support of appellant's contention that there is "a staggering ratio of affirmations of the opinions of the Administrative Law Judges as opposed to reversals," he argues from what he asserts is a compilation of statistics showing numbers of cases affirmed and reversed by the Commission in 1988, 1989, and 1990. These statistics are not in the record and opposing counsel had no opportunity to develop the issue, present rebutting evidence, or contradict the conclusions arrived at by appellant. The Commission had no opportunity to determine their correctness or applicability. The issue, therefore, should not be addressed for the additional reason that we do not address arguments that are based on facts not properly contained in the record. *See General Electric Credit Auto Lease, Inc.* v. *Paty*, 29 Ark. App. 30, 776 S.W.2d 829 (1989).

Affirmed.

DANIELSON and MAYFIELD, JJ., agree.

Frank DALEY *v.* CITY OF LITTLE ROCK,
Little Rock Fire Department

CA 90-498 818 S.W.2d 259

Court of Appeals of Arkansas
Division I
Opinion delivered November 13, 1991
[Rehearing denied December 18, 1991.]

Karen K. Johnson, for appellant.

Thomas M. Carpenter, City Att'y, by: *Edward Gadcock*,

Asst. City Att'y, for appellee.

JAMES R. COOPER, Judge. The appellant, an employee of the Little Rock Fire Department, was subjected to disciplinary action by the fire department in January 1985 which ultimately resulted in a six-day suspension. He was again subjected to disciplinary measures in July 1987, and was suspended for thirty days, and on September 1, 1987, the fire department terminated his employment. In two separate decisions rendered in 1986 and 1988, the Little Rock Civil Service Commission upheld the actions taken against the appellant. The appellant appealed both of the civil service commission decisions to the Pulaski County Circuit Court, but before either of the appeals had been heard, the appellant filed and completely litigated a federal lawsuit based on 42 U.S.C. § 1983 which arose from the same incidents heard by the Little Rock Civil Service Commission. After the federal decision, which was adverse to the appellant, was upheld by the Eight Circuit Court of Appeals, the appellant resumed his efforts to appeal the Little Rock Civil Service Commission's decisions. The appellee moved for summary judgment on the theory of *res judicata*, and the Pulaski County Circuit Court granted this motion on July 24, 1990. From that decision, comes this appeal.

For reversal, the appellant contends that the circuit court erred in granting the appellee's motion for summary judgment because, the appellant asserts, an appeal of a civil service commission decision to circuit court does not constitute subsequent litigation for *res judicata* purposes. The appellant also contends that the circuit court erred by failing to find that the appellee waived the defense of *res judicata* by not asserting it to the federal trial court. We find no error, and we affirm.

Under the claim preclusion aspect of the doctrine of *res judicata*, a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff or his privies against the defendant or his privies on the same claim or cause of action. *Toran* v. *Provident Life*, 297 Ark. 415, 764 S.W.2d 40 (1989). *Res judicata* bars not only the relitigation of claims which were actually litigated in the first suit, but also those which could have been litigated. *Id. Res judicata* bars relitigation when (1) the first suit resulted in a judgment on

the merits; (2) the first suit was based upon proper jurisdiction; (3) the first suit was fully contested in good faith; (4) both suits involve the same claim or cause of action which was litigated or could have been litigated but was not; and (5) both suits involve the same parties or their privies. *Swofford* v. *Stafford*, 295 Ark. 433, 748 S.W.2d 660 (1988).

Appellant concedes that his federal suit arose from the same incidents heard by the civil service commission, and that his federal lawsuit was completely litigated. Citing the Missouri case of *Shaffer* v. *Terry Dale Management Corp.*, 648 S.W.2d 595 (Mo. App. 1983), the appellant argues that appeals are not subsequent litigation for purposes of *res judicata*. Therefore, he contends, his appeal of the civil service commission decisions to the Pulaski County Circuit Court should not be barred by that doctrine. We do not agree. First, we note that the Missouri Court of Appeals in *Shaffer*, *supra*, was not considering the application of *res judicata*, but instead dealt with the related, but distinct, principle of collateral estoppel.

Next, we note that the circuit court does not merely review the decision of the civil service commission for error, but instead conducts a *de novo* hearing on the record before the civil service commission and any additional competent testimony that either party might desire to introduce. *Campbell* v. *City of Hot Springs*, 232 Ark. 878, 341 S.W.2d 225 (1961); Ark. Code Ann. § 14-51-308(e)(1)(C) (1987). The effect of this statutory provision for a *de novo* appeal to circuit court is to reopen the entire matter "for consideration by the circuit court, as if a proceeding had been originally brought in that forum." *Civil Service Commission of Van Buren* v. *Matlock*, 206 Ark. 1145, 178 S.W.2d 662 (1944). The *Matlock* court, in describing the nature of an appeal to circuit court from a civil service commission decision, quoted with approval from *United States* v. *Ritchie*, 58 U.S. 528 (1854), for the proposition that, although the transfer is called an appeal,

> we must not, however, be misled by a name, but look to the substance and intent of the proceeding. The district court is not confined to a mere re-examination of the case as heard and decided by the board of commissioners, but hears the case de novo, upon the papers and testimony which had

> been used before the board, they being made evidence in the district court; and also upon such further evidence as either party may see fit to produce.

Matlock, 206 Ark. at 1150.

Therefore, although the transfer from the civil service commission is called an appeal in Ark. Code Ann. § 14-51-308(e)(1), the circuit court proceeding is in the nature of an original action. We think that the substance and intent of the circuit court proceeding is to provide a judicial forum for relitigation of the case. Therefore, we hold that the decision in the federal case is *res judicata* as to the matters involved in the appeal to circuit court from the civil service commission decisions in the case at bar because the circuit court case is, in substance, an original action. *See Matlock, supra.*

The appellant next asserts that, "[s]ince Appellee has argued that [the circuit court] cases are appeals, they [sic] should be judicially estopped from now arguing differently." We do not agree. Judicial estoppel is a doctrine whereby a party may be prevented from taking inconsistent positions in successive cases with the same adversary. *Muncrief* v. *Green*, 251 Ark. 580, 473 S.W.2d 907 (1971). The doctrine has been said to be one of vague application, but it is commonly required that the parties be the same, and that the same questions be involved. *Rinke* v. *Weeman*, 232 Ark. 900, 341 S.W.2d 44 (1960). Although the appellee did refer to the circuit court actions as "appeals" in its motion for summary judgment (and did so correctly, since that is the terminology employed by the statute), the appellee has taken no position contrary to its contention that the federal court decision is *res judicata* to the matters before the circuit court. The doctrine of judicial estoppel is therefore not applicable.

Finally, the appellant argues that the circuit court erred in finding that the appellee "had not waived the defense of *res judicata* by not pleading it at the trial court level." The appellant asserts that the *res judicata* defense should have been raised in federal court, apparently on the premise that the Pulaski County Circuit Court was an appellate court in this proceeding. We do not agree.

The appellant cites *Taggart* v. *Moore*, 292 Ark. 168,

729 S.W.2d 7 (1987) for the proposition that the appellee was required to present the defense of *res judicata* in the federal action because the civil service commission decisions were rendered before the federal case concluded. *Taggart* does state that "specific defenses and prayers for relief must be raised in the proper forum or be barred by *res judicata*." 292 Ark. at 172. Apparently, the appellant is arguing that the appellee's defense of *res judicata* is barred by *res judicata* because the appellee failed to present it to the federal court. Such an argument ignores the purpose of the *res judicata* doctrine, which is to put an end to litigation by precluding a party who had the opportunity for one fair trial from drawing the same controversy into issue a second time before a different court. *Taggart*, 292 Ark. at 171. The appellant in the case at bar has had the opportunity for at least one fair trial of this controversy and, without deciding whether the issue of *res judicata* could have been successfully raised in the federal proceeding, we hold that the Pulaski County Circuit Court was a proper forum in which to raise that defense, and that the circuit court did not err in granting the appellees' motion for summary judgment. There must be an end to litigation at some point, and we have reached it in this case.

Affirmed.

JENNINGS and ROGERS, JJ., agree.

Larry LOWE *v.* STATE of Arkansas

CA CR 91-46 819 S.W.2d 23

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

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

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with aggravated robbery and theft of property. After a non-jury trial on September 12, 1990, he was convicted of aggravated robbery and misdemeanor theft of property, and was sentenced to ten years in the Arkansas Department of Correction on the aggravated robbery conviction. From that decision, comes this appeal.

For reversal, the appellant contends that the evidence was insufficient to support his conviction on the charge of aggravated robbery. We find no error, and we affirm.

Where the sufficiency of the evidence is at issue in a criminal case, whether tried by judge or jury, we do not weigh the

evidence favorable to the State against any conflicting evidence favorable to the accused, *Westbrook* v. *State*, 286 Ark. 192, 691 S.W.2d 123 (1985), but instead we review the evidence in the light most favorable to the State and affirm if the finding of guilt is supported by substantial evidence. *Turner* v. *State*, 24 Ark. App. 102, 749 S.W.2d 339 (1988). Substantial evidence is evidence which induces the mind to go beyond mere suspicion or conjecture, and is of sufficient force or character to compel a conclusion one way or the other with reasonable certainty. *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984).

Viewed in the light most favorable to the State, the record shows that the appellant approached a woman in a grocery store, put his arm around her throat, and attempted to steal her purse. She resisted and began to scream after the appellant slammed her against the counter and struck her eye. After beating the woman to the floor, the appellant managed to pull her purse away from her and ran down the aisle with the purse in his hand. The appellant was observed by Ricky Thomas, who worked as a checker at the grocery store, and was pursued by Thomas, another store employee named Sammy, and a security guard. When the appellant reached the door, he turned around and said, "Stop or I will shoot." Mr. Thomas stated that he saw no weapon, so he continued to pursue the appellant outside. Behind a house, the appellant paused and again said, "Stop or I will shoot." This time, the appellant had something shiny in his hand; Mr. Thomas testified that, for a second, he thought that the appellant had a weapon and stopped pursuing him. However, when he saw that the shiny object in the appellant's hand was merely a set of keys, he tackled the appellant and, in company with the security guard and Sammy, subdued him.

The appellant contends that the evidence is insufficient to sustain a conviction for aggravated robbery because the State failed to show that he represented to the victim that he was armed with a deadly weapon; the appellant asserts that his conduct against Mr. Thomas was an independent episode separate from the robbery of the victim, and as such is not evidence to support his conviction for aggravated robbery. We do not agree.

■ A person commits robbery if, with the purpose of committing a theft or resisting apprehension immediately there-

after, he employs or threatens to immediately employ physical force upon another. Ark. Code Ann. § 5-12-102 (Supp. 1991). A person commits aggravated robbery if he commits robbery as defined in § 5-12-102, and he is armed with a deadly weapon or represents by word or conduct that he is so armed. Ark. Code Ann. § 5-12-103 (1987). Nothing in the statutes requires that the representation that the offender is armed must be made to the victim of the theft, and the appellant has cited no authority which so holds. Moreover, it has been stated that the clear legislative intent was to define robbery so as to cover situations where persons who have committed the theft choose to employ force to avoid arrest. *Williams* v. *State*, 11 Ark. App. 11, 665 S.W.2d 299 (1984). In the case at bar, there is clearly evidence to show that the appellant committed a robbery and chose to represent that he was armed with a deadly weapon to avoid arrest. Although the appellant did not tell Mr. Thomas that he had a gun, his statement to Mr. Thomas that he would shoot him if Mr. Thomas did not stop constituted a verbal representation that the appellant was armed with a deadly weapon. *Coley* v. *State*, 304 Ark. 304, 801 S.W.2d 647 (1991). Such a verbal representation is sufficient to convict for aggravated robbery regardless of whether the defendant did in fact have such a weapon. *Clemmons* v. *State*, 303 Ark. 354, 796 S.W.2d 583 (1990).

Nor do we agree that the threats employed by the appellant against Ricky Thomas constitute an independent episode separate from the robbery. Although Ark. Code Ann. § 5-12-102 requires that the employment or threat of force must be made with the purposes of committing theft or resisting apprehension immediately thereafter, "immediate" has been defined as "a reasonable time in view of particular facts and circumstances of the case under consideration." *Becker* v. *State*, 298 Ark. 438, 768 S.W.2d 527 (1989). As in *Becker*, *supra*, and *Williams, supra*, the facts of the case at bar show that the theft, flight, struggle, and apprehension were accomplished in a matter of minutes without any significant intervening event. Under these circumstances, we hold that the evidence was sufficient to establish that the threat of a deadly weapon was made immediately after the theft to resist apprehension or arrest.

Finally, we note that the appellant has cited several cases for the proposition that aggravated robbery is not a continuing

offense. *See, e.g., Rhodes* v. *State*, 293 Ark. 211, 736 S.W.2d 284 (1987). These cases, which deal with lesser-included offenses and double jeopardy considerations, are not germane to the question presented in the case at bar, i.e., the sufficiency of the evidence to support a single count of aggravated robbery.

Affirmed.

JENNINGS, and ROGERS, JJ., agree.

Brian FINN *v.* STATE of Arkansas

CA CR 90-327 819 S.W.2d 25

Court of Appeals of Arkansas
En Banc
Opinion delivered November 13, 1991

James R. Marschewski, for appellant.

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

JOHN E. JENNINGS, Judge. On March 8, 1989, Brian Finn pled guilty to forgery in the second degree and criminal mischief and received a suspended sentence. Appellant was ordered to pay restitution of $1,195.00 and $50.00 per month toward extradition costs and court costs.

In May, 1989, the state filed a petition to revoke appellant's suspended sentence and in June of 1989, Finn paid $135.00. He had paid nothing more by the time of the revocation hearing on August 15, 1990.

The trial court found Finn in contempt and sentenced him to thirty days in jail with twenty suspended. Appellant's sole argument on appeal is that the evidence was insufficient to support the court's judgment. Mr. Finn contends that the state did not establish that his failure to pay was inexcusable under Ark. Code Ann. § 5-4-309 (1987).

We hold that the evidence was amply sufficient to support the court's judgment. Even if Mr. Finn's testimony is fully credited, which the trial court was not obliged to do, it does not establish an excuse for nonpayment as a matter of law. Appellant paid nothing at all toward the restitution from June of 1990 through the date of the hearing in August, 1990. The picture that emerges from appellant's testimony is that, although he was employed and able to support his fiancee, he was waiting on an anticipated inheritance to pay off the ordered restitution. We hold that the evidence was sufficient to support the judgment of the trial court.

A search of the record discloses several possible errors, which the dissent believes warrant reversal. None of these issues were brought to the attention of the trial court and both the supreme court and this court have frequently said that we do not address issues raised for the first time on appeal. *See e.g., Harbour* v. *State*, 305 Ark. 316, 807 S.W.2d 663 (1991); *L&S*

Concrete Co. v. *Bibler Brothers*, 34 Ark. App. 181, 807 S.W.2d 50 (1991). Even issues of constitutional dimension are waived unless raised in the trial court. *See Smith* v. *City of Little Rock*, 305 Ark. 168, 806 S.W.2d 371 (1991). We do not have a "plain error" rule in Arkansas. *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

Not only was there a failure to raise these issues in the trial court, they are not raised here on appeal. "No citation of authority is necessary in saying that, aside from jurisdiction, we do not reverse cases on theories not presented by appellant to either the trial court or this court." *Arkansas Kraft Corp.* v. *Johnson*, 257 Ark. 629, 519 S.W.2d 74 (1975).

It is contended that appellant's sentence of ten days[1] in jail for contempt is an "illegal sentence". As the dissent correctly states, an "illegal sentence" in this context means one that is "illegal on its face". *Abdullah* v. *State*, 290 Ark. 537, 720 S.W.2d 902 (1986). Whether or not it was error for the trial court to hold Finn in contempt of court, a sentence to ten days for criminal contempt is manifestly not illegal on its face; i.e., the sentence is well within the range of punishment the trial court was authorized to impose for criminal contempt. *See Blanks* v. *State*, 300 Ark. 398, 779 S.W.2d 168 (1989); *Delph* v. *State*, 300 Ark. 492, 780 S.W.2d 527 (1989).

Because the issues raised by the dissent were not raised by the defendant, we decline to address them.

Affirmed.

COOPER and MAYFIELD, dissent.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree to affirm the judgment entered by the trial court in this case because the state filed a petition to revoke the appellant's suspended sentence, but instead of acting upon the petition to revoke, the court held the appellant in contempt and sentenced him to thirty days in the county jail. I think this was an illegal sentence. In

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[1] The trial court sentenced Finn to thirty days in jail with twenty suspended. This amounted to a remission as to the suspended term. *Smith* v. *Smith*, 28 Ark. App. 56, 770 S.W.2d 205 (1989).

Jones v. *State*, 27 Ark. App. 24, 765 S.W.2d 15 (1989), we said:

> Recently the Arkansas Supreme Court has reviewed cases involving illegal sentences despite the absence of an objection below. In those cases, the Court has compared the illegal sentence issue to one involving subject matter jurisdiction, which may be raised at any time. *Howard* v. *State*, 289 Ark. 587, 715 S.W.2d 440 (1986). *Lambert* v. *State*, 286 Ark. 408, 692 S.W.2d 238 (1985). We wish to emphasize that a circuit court acting in excess of its authority in sentencing is not a matter of subject matter jurisdiction. *Banning* v. *State*, 22 Ark. App. 144, 737 S.W.2d 167 (1987). However, when a court has imposed an illegal sentence on a defendant, then we will review it regardless of whether an objection was raised below. An illegal sentence is one which is illegal "on its face." *Abdullah* v. *State*, 290 Ark. 537, 720 S.W.2d 902 (1986).

27 Ark. App. at 27.

The judgment appealed from in this case recites that the matter "comes on for hearing the Petition to Revoke the suspended sentence(s) imposed upon the Defendant," and after stating that the court has heard the evidence, the judgment states that "the Defendant is found in contempt of court." Thus, the judgment, in my view, is illegal "on its face." Moreover, in the statement of the case on the first page of appellant's brief it is stated that a petition was filed to revoke appellant's suspended sentence and the court found him in contempt. Although the appellant's brief only argues the sufficiency of the evidence, under the authority of the cases cited above it is proper to review the legality of the trial court's judgment.

I start with the obvious. Act 280 of 1975 enacted into law the "Arkansas Criminal Code." *See* Ark. Code Ann. § 5-1-101 (1987). It provided that the provisions of the Code "shall govern the prosecution for any offense defined by the Code and committed after January 1, 1976." *See* Ark. Code Ann. § 5-1-103. The Code also provides a method for the revocation of a suspended sentence rendered by a court under the Code. *See* Ark. Code Ann. § 5-4-309. On March 8, 1989, the appellant in this case pleaded guilty to forgery in the second degree and to criminal mischief. The trial court withheld imposition of sentence for a period of one

year conditioned upon good behavior and the payment of restitution and costs. This was an order authorized under the Arkansas Criminal Code. Subsequently, a petition to revoke the suspended imposition of sentence was filed; however, instead of acting on that petition, the court held the appellant in contempt. Provisions of the Arkansas Criminal Code regulate the filing, hearing, and action that can be taken on petitions to revoke suspended imposition of sentences. *See, e.g., Palmer* v. *State*, 31 Ark. App. 97, 788 S.W.2d 248 (1990). Holding a defendant in contempt of court on a petition to revoke is not an action that a court is authorized to take under the Code. Therefore, very simply, the court's action in this case was illegal.

This matter has been considered by other courts, although not extensively. In *Alfred* v. *State* 758 P.2d 130 (Alaska App. 1988), the court relied upon a decision by the supreme court of that state and held:

> We therefore conclude that the court may not invoke its contempt power to punish a defendant for a probation violation, at least when the defendant has not been warned of this possibility.

The court recognized that *People* v. *Patrick*, 83 Ill. App. 3d 951, 404 N.E.2d 1042 (1980), had upheld the use of a court's contempt power to punish probation violations but said:

> We decline to adopt the procedure upheld by the Illinois court. The actions by the Illinois court were based, in part, on the language of the commentary and the fact that, at one time, the Illinois statutes authorized the use of the contempt proceeding as a sanction for a probation violation. There appears to be no such analogous commentary or legislative history in Alaska. Moreover, Illinois appears to be the only jurisdiction to have adopted such an unusual procedure.
>
> We have a fairness concern here as well. We recognize that the sentencing judge generally informs each defendant who received a suspended sentence that the suspended term, or a portion thereof, may be imposed at a probation revocation hearing. When a defendant violates a condition of probation, we believe that fairness requires that the

> court adhere to the terms of its agreement, and conduct a probation revocation hearing, not a contempt hearing. Accordingly, we conclude that the court erred when it initiated the contempt proceeding.

758 P.2d at 132.

This matter was also considered in *State* v. *Williams*, 560 A.2d 100 (N.J. Super. Ct. App. Div. 1989), where the opinion states that "the defendant argues that conditions of probation are not considered court orders, and therefore violations of such conditions are not subject to contempt of court charges. " *Id.* at 102. In agreeing with that argument, the court pointed out that a statute of that state provided that where a defendant inexcusably failed to comply with a substantial requirement imposed as a condition of probation the court could revoke the probation and resentence the defendant as provided in the statute. *Id.* at 103. However, the court said it did not believe the legislature intended that the sanction for a violation of probation (other than for the inherent criminality of the act) could be contempt of court in addition to punishment for the original offense. *Id.* at 104-05.

In the case of *Jones* v. *United States*, 560 A.2d 513 (D.C. 1989), the court said:

> Probation is a conditional exemption from more severe punishment. It is an act of grace. . . . When a probationer violates a condition of his probation, the only appropriate sanction is a withdrawal of previously afforded favorable treatment rather than the imposition of an additional penalty. Punishment for contempt is an additional and separate penalty.

Id. at 516. The court concluded that "the use of the contempt power is inappropriate in such a circumstance." *Id.* at 517.

A court in Maryland considered this matter in the case of *Williams* v. *State*, 528 A.2d 507 (Md. Ct. Spec. App. 1987), and discussed the difference between "an act ordered as part of the penalty for a crime and an act ordered as a condition of probation." Citing another Maryland case, it was pointed out that an order made "as a sentence" could be, under proper circumstances, enforced through contempt proceedings, but an order stated as a condition of probation could be enforced only

through the power to revoke the probation. The difference, the court said, was that the use of contempt power to enforce a condition, which has been imposed as part of a sentence, is used to implement the sentence, not to enhance it; whereas contempt power employed because there has been a failure to comply with condition of probation "is equivalent to increasing, not merely implementing the suspended sentence." *Id.* at 509. This same distinction was made in the New Jersey case of *State of Williams, supra.*

In the instant case, the trial court entered two judgments withholding imposition of sentence for a period of one year. One judgment was entered on appellant's plea of guilty to the "reduced" charge of criminal mischief. That judgment recites that it was made on March 15, 1989, and contains the following language:

> IT IS THEREFORE, BY THE COURT, CONSIDERED, ORDERED AND ADJUDGED that the Court withholds imposition of sentence for a period of one year conditioned on the Defendant's good behavior and other written terms and conditions as set out by the Court including the following:
>
> That the Defendant is to pay restitution in the amount of $1195.00 to The Sebastian County Prosecuting Attorney's Office, payable by May 8, 1989.
>
> That the Defendant is to pay court costs in the amount of $95.75 to The Sebastian County Sheriff's Office, payable at the rate of $50 per month beginning May 8, 1989, and on the same day each month thereafter until paid in full.
>
> That the Defendant is to pay extradition cost in the amount of $341.25, to the Sebastian County Prosecuting Attorney's Office, payable at the rate of $50 per month beginning May 8, 1989, and on the same day each month thereafter until paid in full.
>
> That the Defendant is hereby placed under the supervision of the Sebastian County Adult Probation officers for a period of one year and to follow the rules and regulations as set out by their office, this includes paying

> the monthly probation supervision fee of $15.00 per month to the Sebastian County Sheriff's office.
>
> This sentence is to run concurrent with the sentence imposed in CR 89-173.

The sentence in the CR 89-173 case, is a judgment which recites that it was made March 15, 1989, on the defendant's plea of guilty to forgery in the second degree, and it states:

> [T]hat the court withholds imposition of sentence for a period of one year on condition of good behavior and other written terms and conditions as set out by the Court including the following:
>
> That the Defendant is to pay the restitution, court cost and extradition cost as ordered in CR 85-504.
>
> That the Defendant is placed on supervised court probation and to pay the monthly probation supervision fee as ordered in CR 88-504.

Thus, it seems clear that the trial court's order holding the appellant in contempt was based upon the violation of conditions imposed when the court withheld imposition of sentence for a period of one year. The Arkansas Criminal Code provides in Ark. Code Ann. § 5-4-104(a) that "No defendant convicted of an offense shall be sentenced otherwise than in accordance with this chapter." Section 5-4-104 also contains specific provisions which allow the court to suspend imposition of sentence or place a defendant on probation in accordance with Ark. Code Ann. § 5-4-301—5-4-311. Section 5-4-303(a) provides that "if the court suspends imposition of sentence on a defendant or places him on probation, it shall attach such conditions as are reasonably necessary to assist the defendant in leading a law-abiding life." And, as already pointed out, Ark. Code Ann. § 5-4-309 sets out the procedure for revocation of a suspended imposition of a sentence.

It is therefore my view that contempt of court is not an authorized sanction for the violation of a condition of a suspended imposition of sentence in a criminal case in Arkansas. So, I think the trial court's action in this case was illegal and should be reversed.

I would also point out that the judgment finding appellant in contempt of court and sentencing him to 30 days in the county jail was a definite and unconditional penalty and was criminal in nature. The distinction between criminal and civil contempt was explained in *Dennision* v. *Mobley*, 257 Ark. 216, 221, 515 S.W.2d 215 (1974), where the court said that civil contempt is used to enforce the rights of private parties who are in litigation, but the primary reason for the use of criminal contempt is the necessity for maintaining the dignity, integrity, and authority of, and respect toward, the courts. Criminal contempt is used as punishment for willful disobedience, *Jones* v. *Jones*, 287 Ark. 72, 75, 696 S.W.2d 727 (1985), and has been described as "an unconditional penalty" used to punish rather than to compel the doing of some act, *see Fitzhugh* v. *State*, 296 Ark. 137, 752 S.W.2d 275 (1988). The trial court in the present case made its finding "from a preponderance of the evidence." This is the standard in proceedings for civil contempt, but in criminal proceedings the proof must be "beyond a reasonable doubt." *Dennison, supra*, 257 Ark. at 221-22. *See also Ward* v. *Ward*, 273 Ark. 198, 202, 617 S.W.2d 364 (1981). Therefore, even if it were proper to use the trial court's contempt power in this case, the court erred in the standard of proof it required of the appellee.

Furthermore, in addition to sentencing appellant to 30 days in the county jail, the court also placed the appellant on "supervised court probation" for one year and provided that if appellant "fails to make the previously ordered restitution payments, he is to perform a total of 200 hours of community service work to be performed at the rate of 40 hours per month for each missed payment." This provision regarding restitution was clearly not authorized. Whether judged by the law governing revocation or the law governing contempt, appellant's failure to make restitution payments in the future would require some degree of willful or inexcusable conduct in order to merit sanction. But here, the appellant was not given a choice between restitution or community service; failure to make restitution, regardless of the reason, requires sanction.

In summary, I think the trial court's judgment was illegal because statutory law does not authorize the use of contempt for imposing sanctions for the violation of the conditions of a suspended sentence. Even if this were not prohibited by the

statutory law, the court's judgment suspending sentence would have to order or direct that the conditions be followed before the sanction of contempt could be used. Here, the conditions simply were not made orders of the court. They were made only conditions upon which the imposition of sentence was suspended. Moreover, I think the reasons for not using the sanction of contempt in revocation cases in this state are strong and sound. In the first place it is not needed. The case of *Palmer* v. *State, supra*, demonstrates the flexibility that our statutory system allows in the suspended imposition of sentences and the revocation of those suspensions. And the cases from other jurisdictions, cited above, reveal additional reasons that I need not reiterate. I would point out, however, that even in Illinois, where legislative acts have apparently authorized the use of contempt as a sanction for probation violations, the courts are greatly concerned that its use conform to the requirements of due process and fundamental fairness. *See People* v. *Boucher*, 179 Ill. App. 3d 832, 535 N.E.2d 56 (1989) (reversing judgment of contempt because the petition to revoke probation did not inform appellant that he might also be found in contempt); *People* v. *Mowery*, 116 Ill. App. 3d 695, 452 N.W.2d 363 (1983) (judgment of contempt reversed upon holding that "the record falls short of the due process and fundamental fairness to which [defendant] was entitled). I think it significant that the reasons given for reversing both of those cases are present in the instant case.

I dissent from the affirmance of this case, and am authorized to state that Judge Cooper joins in this dissent.

FEDERATED MUTUAL INSURANCE COMPANY and Federated Life Insurance Company *v.* Billy Eugene "Gene" BENNETT, Jr.

CA 91-236 818 S.W.2d 596

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

Davis, Cox & Wright, by: *Wm. Jackson Butt II*, and *Tim E. Howell*, for appellants.

Estes, Estes, & Gramling, by: *Peter G. Estes, Jr.*, for appellee.

ELIZABETH W. DANIELSON, Judge. Federated Mutual Insurance Company and Federated Life Insurance Company appeal from the Washington County Chancery Court's refusal to enforce a covenant not to compete against appellee, Billy Eugene Bennett, Jr., appellants' former employee. Appellants contend that the covenant should have been enforced; that the chancellor erred in refusing to admit certain evidence; and that the chancellor erred in refusing to apply the employment contract's severability clause. We disagree and affirm.

Appellee went to work as a marketing representative, or agent, for appellants in December of 1980, with an assigned territory which included several counties in northwestern Arkansas. Appellee was appellants' only marketing representative assigned to this territory and could not sell insurance for any other company. In 1983, the parties signed an employment contract, which included the following provision:

> 5. Marketing Representative agrees that he will not, within a period of two years following the date of the voluntary or involuntary termination of his employment with Employer, or his retirement therefrom, either directly or indirectly, by and for himself, or as the agent of another, or through others as his agent:
>
> (a) Divulge the names of Employer's policyholders and accounts to any other person, firm or corporation if these accounts are located within the territory assigned from time to time:
>
> (b) In any way seek to induce, bring about, promote, facilitate or encourage the discontinuance of or in any way solicit for and in behalf of himself or others, or in

> any way quote rates, accept, receive, write, bind, broker or transfer any renewal or replacement of any of the insurance business, policies, risks or accounts written, issued, covered, obtained (whether through the efforts of Marketing Representative or not) or carried by Employer in the territory assigned to Marketing Representative under this Employment Contract; nor will the Marketing Representative accept, receive, obtain, write, place, bind or broker insurance business or insurance policies of any type for any of Employer's policyholders and customers in said territory assigned within the said two year period.

In May 1990, appellee notified appellants that he had decided to resign at the end of that month. After terminating his employment with appellants, appellee began selling insurance for the Fulmer Insurance Agency. In October 1990, appellants filed suit against appellee, seeking specific performance of the covenant not to compete. In his answer, appellee asserted that the covenant not to compete was unreasonable and against public policy and, therefore, unenforceable.

Covenants not to compete are not looked upon with favor by the law. *Duffner* v. *Alberty*, 19 Ark. App. 137, 139, 718 S.W.2d 111, 112 (1986). In order for such a covenant to be enforceable, three requirements must be met: (1) the covenantee must have a valid interest to protect; (2) the geographical restriction must not be overly broad; and (3) a reasonable time limit must be imposed. *Id.*; *Rebsamen Ins.* v. *Milton*, 269 Ark. 737, 743, 600 S.W.2d 441, 443-44 (Ark. App. 1980). Here, it is not argued that the geographic restriction was overbroad or that the time limitation was unreasonable. Appellee successfully asserted at trial that appellants had no valid interest in preventing him from selling lines of insurance not offered by appellants. Covenants not to compete will not be enforced unless a covenantee had a legitimate interest to be protected by such an agreement, and the law will not enforce a contract merely to prohibit ordinary competition. *Duffner* v. *Alberty*, 19 Ark. App. at 139, 718 S.W.2d at 112; *Import Motors, Inc.* v. *Luker*, 268 Ark. 1045, 1051, 599 S.W.2d 398, 401 (Ark. App. 1980). The test of reasonableness of contracts in restraint of trade is that the restraint imposed upon one party must not be greater than is

reasonably necessary for the protection of the other and not so great as to injure a public interest. *Duffner* v. *Alberty*, 19 Ark. App. at 139, 718 S.W.2d at 112. *Accord Evans Labs., Inc.* v. *Melder*, 262 Ark. 868, 871, 562 S.W.2d 62, 64 (1978); *Girard* v. *Rebsamen Ins. Co.*, 14 Ark. App. 154, 159, 685 S.W.2d 526, 528 (1985). As we stated in *Duffner* v. *Alberty*, 19 Ark. App. at 141, 718 S.W.2d at 113, "[a]lthough contracts between individuals ought not to be entered into lightly, all other considerations must give way where matters of public policy are involved." The validity of these covenants depends upon the facts and circumstances of each particular case. *Duffner* v. *Alberty*, 19 Ark. App. at 140, 718 S.W.2d at 113. *Accord Miller* v. *Fairfield Bay, Inc.*, 247 Ark. 565, 569, 446 S.W.2d 660, 663 (1969); *Rebsamen Ins.* v. *Milton*, 269 Ark. at 742, 600 S.W.2d at 443.

Where a covenant not to compete grows out of an employment relationship, the courts have found an interest sufficient to warrant enforcement of the covenant only in those cases where the covenantee provided special training, or made available trade secrets, confidential business information or customer lists, and then only if it is found that the associate was able to use information so obtained to gain an unfair competitive advantage. *Duffner* v. *Alberty*, 19 Ark. App. at 139-40, 718 S.W.2d at 112.

At trial, evidence was introduced that, after appellee began employment with the Fulmer Agency, he provided some insurance policies to several of his former customers but only sold them types of insurance that they could not obtain from appellants; appellee did not sell any policy that replaced one of appellants' policies. Appellants also did not lose any profits as a result of appellee's employment with the Fulmer Agency.

Billy Roses, appellants' district marketing manager for Arkansas and Louisiana, testified that, after marketing representatives are hired, they are sent to Owatonna, Minnesota, for three weeks' training. After they return, he assists them in their offices for four days. Then, for a seven-month period, his practice is to provide two to three days of on-site supervision every other week. After four months, appellants send the marketing representatives to Atlanta for seminars and, at the end of a year, to Owatonna for an additional seminar. Periodically, each marketing representative comes into the district office for further

training. Mr. Roses also testified that it takes approximately one and a half to two and a half years to fully train a new agent.

Mr. Roses stated that the clients' only contact with the company is through the agent at the customers' places of business. He provided a list of forty-eight commercial accounts in appellee's territory as of the day appellee left and testified that information about these accounts was available to appellee. This information included "[e]verything that pertains to the insurance they have and all the coverages they have." There is no evidence, however, that appellee utilized such information to entice away any of appellants' clients.

Mr. Roses testified that having a personal relationship with clients and having already sold them some kind of insurance is helpful in selling them additional types of insurance. He stated that appellants had no objection to appellee's soliciting business of any kind with anyone not on the list but did want to prevent him from selling any type of insurance to the customers listed thereon. He stated: "Well, Mr. Bennett is a sales person and, obviously, he's got to know these people very well and he's got his foot in the door and as a sales person, I can't control what he says to those insureds pertaining to the business that we have on the books."

Appellee admitted that he has sold some insurance to several of appellants' clients but testified that appellants did not make these policies available to these clients. He also stated that he has written some collateral protection policies to the customers of Williams Ford Tractor, with the lending institutions listed as the named insureds. He stated that, at one time, appellants sold a few collateral protection policies to customers of Williams Ford Tractor but that the insureds listed on those policies were Williams Ford and its customers. Appellee also testified that another client of appellants, Stanley Greenwood, asked to buy some life insurance from appellee but appellee refused to sell it because Mr. Greenwood had already bought a policy from Federated Life Insurance.

At the end of the trial, the chancellor stated:

> I don't see any problems with the geographical area. As I see it, though, there is one other major difference in the matter here. Mr. Roses says, "Judge, we not only are

> interested in seeing that Mr. Bennett doesn't compete with us for business we are writing now, but we don't want him competing with us for the same companies or business that we're not writing now." That clause is big enough to include it. . . . But by being big enough to include that, the Court finds that that in itself makes the clause unreasoanble. Because. . . there is no evidence in this case that Mr. Bennett is competing directly with Federated Insurance Company for any business that Federated is now selling. . . . Federated is wanting to stop him from writing any other insurance.

The chancellor concluded that appellee was not exercising unfair competition in selling a product that appellants did not sell and found the covenant not to compete to be overly broad and void. We agree.

For their second point on appeal, appellants argue that the chancellor erred in refusing to admit evidence of appellee's actions prior to leaving appellants. Appellants attempted to introduce testimony and documentary evidence of appellee's failure to follow appellants' policy concerning the referral of business by its marketing representatives and proffered evidence that appellee referred business to the Fulmer Agency while still employed by appellants. The chancellor found the evidence to be outside the pleadings and sustained appellee's objection. The chancellor said that the sole issue before the court was whether the covenant not to compete was enforceable and not whether appellee had violated some other clause in the contract. We agree and cannot say that the chancellor erred in refusing to admit this evidence.

In their third point on appeal, appellants argue that the chancellor erred in refusing to apply the severability clause of the contract. They assert that the chancellor should have severed the offending language of the covenant not to compete, thereby allowing this provision to remain valid as to lines of insurance actually offered by appellants. Simply striking the offending language of the covenant not to compete, however, would not suffice. In order to accomplish appellants' purpose, it would be necessary to rewrite the covenant not to compete, and this we will not do. It has long been the rule that, when a covenant not to

compete is too far-reaching to be valid, we will not make a new contract for the parties. *Rector-Phillips/Morse, Inc.* v. *Vroman*, 253 Ark. 750, 753, 489 S.W.2d 1, 4 (1973).

Affirmed.

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

ARKANSAS DEPARTMENT OF HUMAN SERVICES, Child Support Enforcement Unit *v.* Richard Allen CAMERON

CA 90-425 818 S.W.2d 591

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

Department of Human Services, by: *Candace Landers* and *Don H. Ross*, for appellant.

Kenneth E. Suggs, for appellee.

JUDITH ROGERS, Judge. This appeal comes from an order of the Chicot County Chancery Court which dismissed appellant's petition seeking a judgment for arrearages in child support on a finding that the custodial parent, Kathy Elaine Sims, was estopped from collecting the arrearages. On appeal, the Child Support Enforcement Unit of the Arkansas Department of Human Services argues that the court erred in invoking the doctrine of equitable estoppel because it had not been affirma-

tively pled, and that the evidence did not support application of the doctrine. We disagree and affirm.

The record discloses that Kay Sims and appellee, Richard Cameron, were married on February 7, 1975. They were divorced by a decree of the Chicot County Chancery Court on January 13, 1977. The decree awarded custody of Ashley Cameron, then one year old, to Sims, and provided for appellee to pay child support in the amount of $28 per week when Sims was working and $44 per week when she was not. Appellee was to have visitation rights at all reasonable times.

On October 24, 1980, appellee gave his consent for George Payne Oakman, Jr., Sims' husband at the time, to adopt Ashley by signing a Consent to Adoption. At about the same time, appellee paid accrued arrearages of child support in the amount of approximately $4,500.

On September 12, 1989, a URESA petition was filed in the Chicot County Chancery Court on behalf of Sims and the State of Georgia. Among other things, the petition asked for judgment for arrearages of child support in the amount of $15,888, and for appellee to be held in contempt for failure to pay child support. The record does not contain a responsive pleading filed by the appellee. At trial, appellee testified that he quit paying child support when he signed the adoption papers because he believed that act had the effect of terminating his parental rights and obligations. He also testified that he has not exercised any visitation with his daughter since that time, and has seen her only three times when she visited his parents in Arkansas. The Consent to Adoption, signed by appellee on October 24, 1980, was entered into evidence.

The trial judge found that Sims was "estopped because of her actions into leading this man into thinking there was or was going to be an adoption . . . from collecting the arrearages and support." Accordingly, that portion of the petition was dismissed. The court did, however, order appellee to pay child support at the rate of $250 per month beginning January 15, 1990.

Appellant first argues that appellee did not affirmatively plead the defense of equitable estoppel and, therefore, it was improper for the court to apply it. We disagree. As a general

rule, estoppel must be affirmatively pled. *Beeson* v. *Beeson*, 11 Ark. App. 79, 667 S.W.2d 368 (1984). However, our supreme court has held that this rule disappears when facts regarding estoppel are admitted in evidence or become an issue in the case without objection. *Howard Building Centre* v. *Thornton*, 282 Ark. 1, 665 S.W.2d 870 (1984); *Aclin* v. *Carpenter*, 229 Ark. 718, 318 S.W.2d 141 (1958). In the case at bar, evidence was admitted regarding appellee's act of signing the Consent to Adoption, as well as the ramifications he perceived from this act, without objection. In these circumstances, we believe the issue of estoppel was before the court.

Next, appellant argues that the evidence does not support a finding of estoppel, and that the court erred in remitting the accrued arrearages. The principle of equitable estoppel is that a party who by his act or failure to act when he should, either designedly or with willful disregard of the interests of others, induces or misleads another to change his position to his detriment is estopped to assert his right afterwards. *Howard Building Centre* v. *Thornton*, 282 Ark. at 3, 665 S.W.2d at 871. We have stated the elements of estoppel as:

> (1) the party to be estopped must know the facts; and (2) he must intend that his conduct shall be acted on or must so act that the party asserting estoppel has a right to believe the other party so intended; and (3) the party asserting estoppel must be ignorant of the facts; and, (4) the party asserting estoppel must rely on the other's conduct to his detriment.

Moore v. *Moore*, 21 Ark. App. 165, 176, 731 S.W.2d 215, 221 (1987).

In *Roark* v. *Roark*, 34 Ark. App. 250, 809 S.W.2d 822 (1991), we recognized that, in order to comply with federal regulations, Arkansas has enacted statutes which provide that any decree, judgment, or order which has a provision for payment of child support shall be a final judgment as to any installment or payment which has accrued, and that the court may not set aside, alter, or modify any decree, judgment or other which has accrued unpaid support prior to the filing of the motion. *See*, Ark. Code Ann. §§ 9-14-234, 9-12-314 (Repl. 1991). We then stated:

> [w]hile it appears that there is no exception to the prohibition against remittance of unpaid child support, the commentary to the federal regulations which mandated our resulting state statutes, makes it clear that there are circumstances under which a court might decline to permit the enforcement of a child support judgment.

Roark v. *Roark*, 34 Ark. App. at 252-53, 809 S.W.2d at 824. That commentary refers to the defense of equitable estoppel as an example of a circumstance under which enforcement of a child support judgment may not be permitted. 54 Fed. Reg. 15,761 (April 19, 1989).

Although we review chancery cases *de novo*, we do not disturb the chancellor's findings unless they are clearly against the preponderance of the evidence. *Roark* v. *Roark*, 34 Ark. App. at 252, 809 S.W.2d at 824 (1991). Appellee testified that Sims contacted him concerning the adoption and wanted him to sign the consent. He said it was his understanding that when he signed he did away with his legal rights and his obligation to pay child support, and because of this belief, he no longer sought to exercise his visitation rights. We believe these circumstances are sufficient to establish the elements of estoppel, and we cannot say that the chancellor's finding is clearly erroneous.

Affirmed.

COOPER, and JENNINGS, JJ., agree.

Bob COTNAM, Sr. *v.* STATE of Arkansas

CA CR 90-279 819 S.W.2d 291

Court of Appeals of Arkansas
Division I
Opinion delivered November 13, 1991
[Rehearing denied December 18, 1991.]

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

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. Appellant, Bob Cotnam, Sr., was convicted in a bench trial of defrauding a creditor, a violation of Ark. Code Ann. § 5-37-211 (1987). The trial court suspended appellant's three-year sentence, and ordered him to make restitution to the victim. For reversal, appellant contends that the trial court erred in denying his motions for a directed verdict, and that the trial court lacked subject matter jurisdiction to include restitution as a condition of his suspended sentence. We find no merit in either contention, and affirm.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *McIntosh* v. *State*, 296 Ark. 167, 753 S.W.2d 273 (1988). On appeal in criminal cases, whether tried by 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. *Woodberry* v. *State*, 35 Ark. App. 129, 811 S.W.2d 339 (1991). 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).

A person commits the offense of defrauding a judgment creditor if, with the purpose to defraud and with knowledge that civil proceedings have been or are about to be instituted, he conceals, assigns, conveys, or otherwise disposes of property to prevent that property from being made liable for the payment of a judgment. Ark. Code. Ann. § 5-37-211(a)(2) (1987). A person acts purposely with respect to his conduct or a result thereof when it is his conscious object to engage in conduct of that nature or to cause such a result. Ark. Code Ann § 5-2-202(1) (1987).

At trial, there was evidence introduced that on March 10, 1989, a judgment was entered against appellant in favor of Caneta R. Bledsoe in the amount of $5,800, plus costs, interest and attorney's fees, for which a writ of execution was issued on the twenty first of April. Deputy Leroy McFarland of the Garland County Sheriff's Office testified that he and Deputy Debbie Wadlow attempted to serve appellant with the writ at his residence on May 3, 1989. McFarland related that he was familiar with appellant as two of appellant's vehicles were levied upon pursuant to a previous writ of execution the past year. McFarland said that on May 3rd he spoke with appellant's wife, Yvonne Cotnam, telling her that he needed to speak with appellant in reference to the civil lawsuit, and he testified that Ms. Cotnam said that she would have appellant telephone him. McFarland stated that appellant did call him later that afternoon and that in this conversation he told appellant about the writ of execution in the total amount of $6,513.94. McFarland related that appellant indicated that he was aware of the judgment and told him that the matter would be taken care of promptly.

Deputy McFarland further testified that on May 10, 1989, he and Deputy Wadlow again attempted to serve the writ, and made contact with appellant's son, Bob Cotnam, Jr., at the home of the appellant. McFarland advised Bob that appellant needed to

resolve the matter, and also made known the intent to levy on a 1979 Ford pickup truck owned by appellant, which was listed on the writ for execution. He testified that the truck was not at the residence when these attempts were made to serve the writ. After this visit, McFarland said that he requested Deputy Wadlow to determine what property of appellant would be available for execution since he felt appellant was not resolving the matter. By May 17th, when a third attempt to serve the writ was made, it was discovered that on May 10th, appellant had transferred title to the Ford truck to his wife, Yvonne.

Deputy Debbie Wadlow also testified, giving essentially the same testimony as that of Deputy McFarland. Yvonne Cotnam was also called as a witness to testify on behalf of the prosecution. She recalled Deputy McFarland's visit to her home on May 3rd, but denied that she was informed of its purpose or that she was asked to have appellant contact Deputy McFarland. She testified that she had knowledge of the judgment, but denied that the truck was conveyed to her with the purpose of defrauding the creditor, Ms. Bledsoe. She testified that she and appellant were having financial difficulties and that title was transferred to her so that she could place the truck on her insurance, which would yield a savings of $50 every six months in insurance premiums. She also testified that on March 27, 1989, she and appellant offered Ms. Bledsoe a deed to a piece of property worth approximately $6,500 in order to satisfy the judgment. As evidence of this offer, a cover letter, setting forth the offer, dated March 27, 1989, from appellant's to Ms. Bledsoe's attorney was introduced, along with a copy of the unrecorded deed.

George Callahan, the attorney who represented Ms. Bledsoe in the civil action, testified that he did not specifically recall this particular offer, explaining that several such offers were made during the course of the civil litigation. He stated that he had no recollection of discussing this offer with his client.

Ms. Caneta R. Bledsoe testified that the civil lawsuit involved a lot in Hot Springs, Arkansas, in the Diamond Head Subdivision. She said that she had turned the lot over to appellant to sell as he had represented that he had a buyer for it. She related that appellant failed to sell the lot, but that appellant said that he would buy it instead. Ms. Bledsoe testified that the check

appellant wrote for the lot bounced, and that she sued appellant to recover the purchase price. Ms. Bledsoe recalled the offer of a deed to another lot in the subdivision made in March, but testified that she did not want that lot, stating that the lot involved in the lawsuit was a waterfront lot, and that if she took a lot back in the subdivision, she wanted the waterfront lot back.

Appellant testified that he was aware of the judgment entered against him in March 1989. He testified that he and his wife signed a deed over to Ms. Bledsoe to satisfy the judgment, and that the lot reflected on the deed, eight feet of which was on the waterfront, was valued at $6,500. He stated that the truck had an appraised value of $750, and that it was conveyed to his wife to save on insurance. He denied that the transfer was made to prevent it from being levied upon. Appellant testified that his wife told him about Deputy McFarland's visit to his home on May 3rd, but denied that he was given a message to call. He also testified that he did not telephone or speak with Deputy McFarland on that date. When asked about the status of the civil judgment, appellant replied that the judgment had subsequently been discharged in bankruptcy. On cross-examination, appellant testified that he had property levied upon before. He said that he had no knowledge that Deputy McFarland had been to his home and had spoken with his son on the tenth of May. He testified that it was a coincidence that the truck was transferred to his wife on that date.

On appeal, appellant argues that there was insufficient evidence introduced to demonstrate that he possessed the requisite purposeful intent to defraud the creditor in conveying the truck to his wife. Appellant contends the lack of such intent was shown by evidence that he tendered a piece of property of equivalent value to Ms. Bledsoe to satisfy the judgment; that other valuable property existed to satisfy the judgment; and that the evidence shows that the transfer was made to save on insurance. He further argues that the state's evidence was only circumstantial, and is insufficient to sustain a finding of guilt. We disagree.

Purpose or intent is a state of mind that is not ordinarily capable of proof by direct evidence but may be inferred from the circumstances. *Alford* v. *State*, 34 Ark. App. 113, 806

S.W.2d 29 (1991). It is only when circumstantial evidence leaves the factfinder solely to speculation and conjecture that it is insufficient as a mater of law. *Id.* The drawing of reasonable inferences from the testimony is for the trial judge as the factfinder. *Faulkner* v. *State*, 16 Ark. App. 128, 697 S.W.2d 537 (1985). Notwithstanding appellant's arguments, we think that there is substantial evidence in the record from which the trial court could infer that appellant conveyed the truck to his wife to prevent it from being made liable for the payment of the judgment. We note that appellant also presents the argument that the evidence of intent was insufficient because state law gave him, as a judgment debtor, the right to select property with which to satisfy an execution. We do not consider this circumstance because there is no indication in the record whatsoever that such an election was made.

Appellant next argues that, because the underlying judgment had been discharged in bankruptcy, it was error for the trial court to have ordered him to make restitution to Ms. Bledsoe for the full amount of the judgment. Appellant acknowledges that he interposed no objection to this portion of this sentence and is thus raising this issue for the first time on appeal. He argues, however, that the trial court lacked subject matter jurisdiction to sentence him to pay restitution "because such a restitutionary sentence is void under the Supremacy Clause of the United States Constitution as being in conflict with 11 U.S.C. § 524(a)(2), which prohibits actions to collect a discharged debt." Citing *Palmer* v. *State*, 31 Ark. App. 97, 788 S.W.2d 440 (1986), appellant also contends that the order of restitution constitutes an illegal sentence, and that this court may consider this issue despite the absence of an appropriate objection in the trial court.

11 U.S.C. § 524(a)(2), which is relied upon by appellant, provides as follows:

> A discharge in a case under this title operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.

The cases applying this statute referred to us by appellant, as decided by various bankruptcy courts, speak in terms of *enjoining*

state criminal courts from ordering the payment of restitution on discharged debts. While it appears that § 524(a)(2) authorizes a bankruptcy court to enjoin state criminal prosecutions, none of these decisions indicate that the state trial courts were deprived of jurisdiction to prosecute the debtor for a related criminal offense simply by virtue of a discharge in bankruptcy. For instance, in the case of *In re Brown*, 51 B.R. 51 (Bkrtcy. E.D. Ark. 1985), the bankruptcy court specifically declined to enjoin the prosecution of the debtor for a hot check violation under Arkansas law, even though the underlying debt had been discharged.

In *Banning* v. *State*, 22 Ark. App. 144, 737 S.W.2d 167 (1987), we said:

> The rule of almost universal application is that there is a distinction between want of jurisdiction to adjudicate a matter and a determination of whether the jurisdiction should be exercised. Jurisdiction of the subject matter is power lawfully conferred on a court to adjudge matters concerning the general question in controversy. It is power to act on the general cause of action alleged and to determine whether the particular facts call for the exercise of that power. Subject matter jurisdiction does not depend on a correct exercise of that power in any particular case. If the court errs in its decision or proceeds irregularly within its assigned jurisdiction, the remedy is by appeal or direct action in the erring court. If it was within the court's jurisdiction to act upon the subject matter, that action is binding until reversed or set aside.

Id. at 149, 737 S.W.2d at 170 (citations omitted). There, we also recognized that the circuit courts of Arkansas have subject matter jurisdiction to hear and determine cases involving violations of criminal statutes. We conclude that appellant's claim of error is one that does not involve subject mater jurisdiction, which precludes him from raising this issue for the first time on appeal. While appellant may have been entitled to an injunction as issued by a bankruptcy court, appellant took no affirmative action to obtain relief nor did he present this argument to the trial court. It is not for this court to redress this matter in the first instance.

As appellant correctly points out, we have held, however, that when a court has imposed an illegal sentence, we

will review it regardless of whether an objection was raised below. *Jones* v. *State*, 27 Ark. App. 24, 765 S.W.2d 15 (1987). An illegal sentence is a sentence that is illegal on its face. *Lovelace* v. *State*, 301 Ark. 519, 785 S.W.2d 212 (1990). The power to sentence appellant to make restitution is clearly prescribed by law, and thus the sentence was not illegal on its face. Ark. Code. Ann. § 5-4-104(d)(4) (Supp. 1991).

We hold that this issue was not properly preserved for appellate review because appellant failed to object to the sentence at the time it was entered. *See Dennis* v. *State*, 26 Ark. App. 294, 764 S.W.2d 466 (1989).

Affirmed.

COOPER and JENNINGS, JJ., agree.

PAUL M. *v.* TERESA M.

CA 90-527 818 S.W.2d 594

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

Denver L. Thornton, for appellant.

Shackleford, Shackleford & Phillips, P.A., by: *Teresa Wineland*, for appellee.

JUDITH ROGERS, Judge. This is a paternity case. On October, 16, 1989, appellee filed a complaint before the Chancery Court of Union County seeking a determination that appellant was the father of her two-year-old son, and an order requiring appellant to pay child support. Appellant answered the complaint and also filed a counterclaim in which he presented a tort claim against appellee for deceit, and also asserted the defenses of waiver, estoppel and laches. Based on these claims appellant requested judgment over against appellant for any sums awarded and directed by the court to be paid by him on behalf of the minor child.

Thereafter, appellee filed a motion to dismiss appellant's counterclaim stating that appellant had failed to allege facts upon which relief could be granted, pursuant to Ark. R. Civ. P. 12(b)(6). By order of September 26, 1990, the chancellor found that appellant was the father of the child in question. Consequently, appellant was ordered to pay $30 a week in child support, and appellee was granted judgment in the amount of $4,620 for accrued support. The chancellor also denied appellant's counterclaim. It is from this order that this appeal arises.

Appellant does not appeal from those portions of the order finding that he is the father of the child and requiring him to pay child support. As his only issue for reversal, appellant contends that the chancellor erred in denying his counterclaim against appellee. We hold that the chancellor properly dismissed appellant's counterclaim, and affirm.

In the counterclaim, appellant alleged that in her deposition, dated November 27, 1989, appellee testified that the child was born on September 30, 1987; that her filing of the paternity action was the first demand made against appellant for support; that appellant told her that he did not want to get married and did not want a child; that appellee testified that it was her election not to have an abortion, even though appellant would have paid for it; and that appellee testified that she wanted to have another child and agreed at the time to take full responsibility for the child when she refused to have an abortion. On appeal, appellant asserts that a valid cause of action was stated based on the alleged understanding of the parties whereby appellee agreed to assume financial responsibility for the child once she declined to terminate the pregnancy. This court, sitting *en banc*, certified this case to the supreme court pursuant to Rule 29(1)(c), 29(1)(o) and 29(4)(b) of the Rules of the Supreme Court and Court of Appeals as one involving the construction of an Act of the General Assembly and rules of the court, as presenting a question in the law of torts, and as one involving an issue of significant public interest and a legal principal of major importance. However, certification was refused and the case was returned to this court for decision.

Inasmuch as appellant's theory of recovery is founded upon the alleged agreement of appellee to provide for the support of the child, we hold that appellant's argument must fail as such an agreement is not enforceable because it is not supported by consideration and is violative of public policy.

Consideration is any benefit conferred or agreed to be conferred upon a promisor to which she is not lawfully entitled, or any prejudice suffered or agreed to be suffered by a promisor other than such as she is lawfully bound to suffer. *See Bass* v. *Service Supply Co., Inc.*, 25 Ark. App. 273, 757 S.W.2d 189 (1988). At common law, it is the mother who is bound to support a

child born out of wedlock, not the putative father. *Rogue* v. *Frederick*, 272 Ark. 392, 614 S.W.2d 667 (1981). Since appellee was already obliged to support the child, an agreement by her to undertake this self-same obligation consequently fails for want of consideration. *See e.g. Davis* v. *Herrington*, 53 Ark. 5, 13 S.W. 215 (1890).

The major purpose of Arkansas' filiation laws is to provide a process by which the putative father can be identified so that he may assume his equitable share of the responsibility to his child. *Eaves* v. *Dover*, 291 Ark. 545, 726 S.W.2d 276 (1987). Once paternity is established, the law with regard to child support proceedings subsequent to a divorce is made applicable to paternity cases as is provided under Ark. Code Ann. § 9-10-109(a)(1) (Supp. 1991). *See White* v. *Winston*, 302 Ark. 345, 789 S.W.2d 459 (1990). In the context of divorce litigation, while parties may enter into contractual agreements with regard to contributions for child support, nevertheless, it is settled law in this state that the duty of child support cannot be bartered away permanently to the detriment of the child. *Storey* v. *Ward*, 258 Ark. 24, 523 S.W.2d 387 (1975); *Robbins* v. *Robbins*, 231 Ark. 184, 328 S.W.2d 498 (1959). *See also Barnhard* v. *Barnhard*, 252 Ark. 167, 477 S.W.2d 845 (1972). Likewise, we have held that an agreement not to seek any increases or decreases in child support is void as against public policy. *Crow* v. *Crow*, 26 Ark. App. 37, 759 S.W.2d 570 (1988). These holdings are based on the principles that the interests of minors have always been the subject of jealous and watchful care by courts of chancery, and that a chancery court always retains jurisdiction over child support as a matter of public policy, such that regardless of what an independent contact states, a chancellor has the authority to modify an agreement for child support to meet changed conditions. *Id.* Insofar as the agreement at issue here represents an attempt to permanently deprive the child of support, it is void as against public policy, and thus cannot form the basis for an actionable claim against appellee.

We note appellant's argument that the chancellor appears to have recognized part of the agreement when he declined to award appellee judgment for costs connected with the birth of the child. Even so, this does not alter our decision as an award for lying-in expenses is not mandatory, but is a matter that

is left to the sound discretion of the chancellor. *Eaves* v. *Dover, supra.*

In denying appellant's counterclaim, it is unclear as to whether the chancellor was granting appellee's motion to dismiss, or whether he was treating the motion as one for summary judgment as is permitted under Ark. R. Civ. P. 12(b)(6) when matters outside the pleadings are considered. Nevertheless, the counterclaim was subject to dismissal under Rule 12(b)(6) because the complaint failed to state facts upon which relief could be granted. When the result is correct, the appellate court will sustain the trial court if the decision reached by the chancellor is correct. *Carter* v. *F. W. Woolworth Co.*, 287 Ark. 39, 696 S.W.2d 318 (1985); *Guthrie* v. *Tyson Foods, Inc.*, 285 Ark. 95, 686 S.W.2d 164 (1985). We affirm.

Affirmed.

COOPER and JENNINGS, JJ., agree.

Frederick Eugene HARRIS *v.* STATE of Arkansas

CA CR 90-350 819 S.W.2d 30

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

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

Winston Bryant, Att'y Gen., by: *Sandy Moll,* Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Chief Judge. Frederick Eugene Harris appeals from his conviction at a jury trial of battery in the second degree. He contends that the trial court erred in admitting as substantive evidence an unsworn prior inconsistent statement of a State's witness. We agree and reverse.

On December 3, 1989, Damon Spencer was shot in the stomach during an altercation that took place on the parking lot of a nightclub in Monticello. As a result of the wound, Damon was hospitalized for several weeks and a portion of his stomach had to be removed. At trial, he testified that he was shot while he was fighting with David Karon Ridgell, but did not know who shot him.

Brenda Spencer, sister of the victim, testified that she was present when the fight between her brother and David took place. She stated that David knocked Damon to the ground and that appellant, who was not initially engaged in the fight, came up while Damon was on the ground, "shot him and took off. The gentleman ran up and stuck a pistol in his stomach while he was lying on the ground." While the testimony indicates that a number of persons were present at the time, there were no other witnesses purporting to have seen the shooting.

The State also called Janice Ridgell, wife of David Ridgell, as a witness. She testified that although she was watching the fight at the time Damon was shot, she did not see who shot him.

She admitted that she had given a statement to the police shortly after the incident but denied that she told them she had seen appellant on the parking lot or that she made the statement that appellant came up to where the victim and David were fighting and "reached down and shot him in the stomach."

A police officer was subsequently called and produced a written, but unsworn, statement signed by Janice Ridgell in which she stated, "I was trying to pull [David] off because I thought [David] had knocked [Damon] out. Then I saw Damon trying to get up and go between [David's] legs. He was trying to get to his car and get a gun. [Appellant] came up and reached down and shot Damon in the stomach. [Appellant] just disappeared."

Appellant's objection to the introduction of the written statement was overruled. Appellant then requested that the jury be advised that the evidence of the prior inconsistent statement could only be considered as affecting the credibility of Janice Ridgell and not as substantive proof of the truth of the matters asserted in the statement. The court refused to give such an instruction and permitted the statement to go to the jury as substantive evidence. We agree that this was error.

Rule 801(d)(1) of the Arkansas Rules of Evidence provides that a prior inconsistent statement is not hearsay when offered in a criminal proceeding if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement given *under oath and subject to the penalty of perjury* at a trial, hearing, or other proceeding, or in a deposition. *Ford* v. *State*, 296 Ark. 8, 753 S.W.2d 258 (1988); *Smith* v. *State*, 279 Ark. 68, 648 S.W.2d 490 (1983). Rule 613 permits extrinsic evidence of prior inconsistent statements of a witness for purposes of impeachment if the witness is afforded the opportunity to explain or deny the statement and does not admit having made it, and the other party afforded the opportunity to interrogate the witness on that statement. *Ford* v. *State*, *supra*. Unsworn prior statements made by a witness cannot be introduced as substantive evidence in a criminal case to prove the truth of the matter asserted therein. *Smith* v. *State*, 279 Ark. 688, 648 S.W.2d 490 (1983); *Chisum* v. *State*, 273 Ark. 1, 616 S.W.2d 728 (1981). Here, although the statement in question was signed,

it was not given under oath and subject to the penalty of perjury. Therefore, it was hearsay and inadmissible as substantive evidence.

Although the statement was inadmissible to prove the truth of the matter asserted, it was admissible for the purposes of impeachment. Whenever evidence that is admissible as to one party or for one purpose but not admissible as to another party or for any other purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly. Ark. R. Evid. 105. Therefore, we conclude that it was error for the trial court to refuse to give the requested limiting instruction.

The State contends that even if the court erred in its ruling, the error was not prejudicial because appellant admitted in his testimony to having shot the victim. It is true that appellant did admit firing the shot, but that admission was accompanied by his testimony of justification for the shooting, which was his sole defense to the charge. He also denied that he "reached down" and shot Damon in the stomach, stating that he (appellant) was "on the ground" and that Damon was "over" him when he fired the shot. The State's reliance on *Russell* v. *State*, 289 Ark. 533, 712 S.W.2d 916 (1986), and *Orr* v. *State*, 288 Ark. 118, 703 S.W.2d 438 (1986), is unavailing. The evidence of guilt in this case was not overwhelming as it was in *Russell*, nor was the objectionable statement merely cumulative or repetitious of numerous other witnesses as in *Orr*. Of the number of persons said to have been at the scene of the crime, only Brenda Spencer, the sister of the victim, testified in contradiction to appellant's testimony that he acted in self-defense and his testimony about the manner of the shooting.

From our review of the record, we cannot conclude that the error was not prejudicial. The conviction is therefore reversed and the cause remanded for a new trial.

Reversed and remanded.

DANIELSON and MAYFIELD, JJ., agree.

INSURANCE COMPANY OF NORTH AMERICA *v.* FORREST CITY COUNTRY CLUB

CA 90-533 819 S.W.2d 296

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

Tatum Law Firm, by: *Tom Tatum,* for appellant.

Easley, Hicky & Clive, by: *R. Alan Cline,* for appellee.

JAMES R. COOPER, Judge. The appellant in this contract case issued to the appellee a commercial general liability policy providing certain types of liability coverage for the appellee, a private country club which operates tennis courts and a golf course in Forrest City for their members and guests. On April 26, 1988, during the time period the insurance coverage was in effect, Theresa Whitfield was advised that she could not play at the country club tennis court because of country club rules. Ms. Whitfield, who is black, filed through her parents a civil rights action in Federal District Court alleging that the policy of the appellee country club on the use of the tennis facility violated her rights under 42 U.S.C. §§ 1981 and 1983, and also violated the Interstate Commerce Clause in that Ms. Whitfield was denied equal access to a place of public accommodation because of her race. In addition to the civil rights violations alleged, Ms. Whitfield asserted that the combined action of the defendants constituted the tort of outrage. The appellee brought an action against the appellant seeking a declaratory judgment that the appellant had a duty to defend it against Ms. Whitfield's lawsuit. The trial court found that the factual allegations in Ms. Whitfield's complaint fell within the policy coverage and that the appellant had the duty to defend. From that decision, comes this appeal.

Although the issue of the appellant's duty to pay is now moot because the federal suit resulted in a verdict in appellee's favor, the appellant contends on appeal that the trial court erred in finding that the appellant had a duty to defend the suit of *Whitfield* v. *Forrest City Country Club.* We find no error, and we affirm.

■ As a general rule, the pleadings against the insured determine the insurer's duty to defend. *Baxley* v. *Colonial Insurance Company*, 31 Ark. App. 235, 792 S.W.2d 355 (1990). Although it has been held that there can be situations where the duty to defend cannot be determined solely from the pleadings, the Arkansas Supreme Court has stated that the duty to defend is broader than the duty to pay damages, and it is enough if the possibility of damages exists; if injury or damage within the policy

coverage could result, the duty to defend arises. *Home Indemnity Company* v. *City of Marianna*, 291 Ark. 610, 727 S.W.2d 375 (1987). The pleadings in Ms. Whitfield's suit alleged:

> 10. That Plaintiff Theresa Whitfield, hereinafter referred to as "Plaintiff", is a student in attendance in the Defendant Earle School District and a member of the Earle High School tennis team, one of the schools of that district.
>
> 11. That on April 26, 1988 the Plaintiff was in Forrest City, Arkansas, as a member of the Earle High School Girls' Tennis Team pursuant to a scheduled match between Earle High School and the Forrest City High School Girls' tennis teams. After the Earle High School Tennis Team had arrived in Forrest City, the coaches for both teams, Defendant Charles Bowlin for Forrest City and Defendant Jack Hosford for Earle drew up the bracketing for the tennis matches. The Defendants determined that some of the players would go play at the tennis facilities owned by the Defendant Forrest City Country Club and other players would go play their matches at the tennis courts of the Forrest City Civic Center. The Earle High Girls Tennis Team was transported to the Defendant Forrest City Country Club tennis facilities to begin their matches. The Plaintiff was with the team at the time. After the team had unloaded from the van in which they had been transported, the Defendant Bowlin saw that the Plaintiff was with the team. At that time the Defendant Bowlin approached the Defendant Hosford and stated that he did not think that the "little black girl" could play at the Country Club. The Defendant Bowlin then approached Plaintiff and told her that she could not play her match at the Defendant Forrest City Country Club tennis courts because "they do not allow it". (Do not allow Blacks to play at the Country Club). The Defendant Hosford told the Plaintiff that he was sorry but this was a Country Club rule. The Plaintiff was then transported back to the Forrest City Civic Center to play her match. The Plaintiff was visibly upset and crying as a result of the humiliation she experienced.

> 12. That the Plaintiff was not allowed to play at the Defendant Forrest City Country Club tennis court and was transferred to the Forrest City Civic Center tennis court to play her match because of her race.

In addition, Ms. Whitfield alleged that Forrest City Country Club entered into an agreement for the use of the Country Club facilities with the understanding that the Forrest City School District would not allow black participants to play on the tennis court, and that the actions of Coach Bowlin and the other defendants were in the furtherance of a conspiracy to violate Ms. Whitfield's civil rights. Finally, Ms. Whitfield alleged that the acts of the defendants constituted the common law tort of outrageous conduct and the common law tort of infliction of emotional distress.

The insurance policy issued by the appellant to the appellee country club provided that the appellant insurance company would have the right and duty to defend any suit seeking damages for "personal injury." "Personal injury" was defined as injury, other than bodily injury, arising out of enumerated offenses, including "wrongful entry into, or eviction of a person from a room, dwelling or premises that the person occupies . . . ."

The crux of the appellant's argument is that the facts alleged in the civil rights action brought by the Whitfields did not constitute an "eviction" from the country club property under the terms of the insurance policy. The appellant urges us to strictly construe "eviction" as a term limited to interference with a tenant's enjoyment of the property; because Ms. Whitfield was a mere licensee and not a tenant, the appellant argues, no eviction occurred and no duty to defend arose under the terms of the policy. We do not agree because we conclude that the term "eviction" was ambiguous as used in the insurance policy at issue in the case at bar.

In order to be ambiguous, a term in an insurance policy must be susceptible to more than one reasonable construction. *Watts* v. *Life Insurance Company of Arkansas*, 30 Ark. App. 39, 782 S.W.2d 47 (1990). Moreover, the language in an insurance policy is to be construed in its plain, ordinary, popular sense. *Columbia Mutual Casualty Insurance Company* v. *Coger*, 35 Ark. App. 85, 811 S.W.2d 345 (1991). The appellant

correctly states that the term "eviction" has been defined as meaning "interference with a tenant's enjoyment of the premises." *See Burdan* v. *Walton*, 286 Ark. 98, 689 S.W.2d 543 (1985). However, the word "evict," used in its popular sense, also means merely to force out or eject. *American Heritage Dictionary* (2d College ed. 1982). An insurance policy, having been drafted by the insurer without consultation with the insured, is to be interpreted and construed liberally in favor of the insured and strictly against the insurer. *Baskette* v. *Union Life Insurance Company*, 9 Ark. App. 34, 652 S.W.2d 635 (1983). Construing the term "eviction" in that fashion, we hold that the allegations in Ms. Whitfield's complaint sufficiently stated a cause of action within the policy coverage to give rise to the duty to defend.

Affirmed.

JENNINGS and ROGERS, JJ., agree.

Corwin HATTISON *v.* STATE of Arkansas

CA CR 90-288 819 S.W.2d 298

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

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

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

MELVIN MAYFIELD, Judge. On February 5, 1987, appellant, Corwin Dale Hattison, entered a plea of guilty to keeping a gambling house and was sentenced, pursuant to Act 346 of 1975, to three years in the Arkansas Department of Correction with two years ten months suspended and the remaining sixty days to be served in the Pulaski County Jail. On January 4, 1990, a felony information and a petition to revoke were filed which alleged that appellant was guilty of delivering a controlled substance (cocaine) on October 23, 1989. The revocation hearing was held along with a bench trial on the underlying charge on July 10, 1990; appellant was convicted of delivery of a controlled substance and his suspended sentence was revoked. He was then sentenced to ten years in the Arkansas Department of Correction on the delivery conviction and three years on the revocation. On appeal Hattison challenges the sufficiency of the evidence.

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 substantial evidence to support the finding of the trier of fact. *Lane* v. *State*, 288 Ark. 175, 702 S.W.2d 806 (1986); *Harris* v. *State*, 15 Ark. App. 58, 689 S.W.2d 353 (1985). Substantial

evidence is that which is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Jones* v. *State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984).

At the trial and revocation hearing it was first established that appellant had pleaded guilty to keeping a gambling house and had been given a suspended sentence subject to certain conditions, including that he "refrain from violating any law (Federal, State, Local) which is punishable by imprisonment." North Little Rock Police Office Charise Crutchfield testified that on October 23, 1989, while working as an undercover narcotics investigator, she purchased $20.00 worth of "rock crack cocaine" from appellant. She said she immediately returned to the office and performed a field test on the rock, which tested positive for cocaine.

Mary Buehler, a chemist in the drug section of the Arkansas State Crime Laboratory, testified that she had received the specimen from Officer Crutchfield, analyzed it and determined that it contained cocaine base. She said the initial weight of the sample was zero point one four grams or one hundred fourteen milligrams. She was then asked, "In your opinion would that be a usable amount of that type of substance?" Defense counsel objected but was overruled by the court. The witness then testified that it was an average amount of rock cocaine. She said the cocaine rocks they analyze are often half the size of this one, "perhaps" as little as .04 or .05 grams. When asked again if this would be a usage amount the witness said, "Yes. Based on what we normally see, I would assume that it would be a usable amount." Ms. Buehler testified the specimen was visible to the naked eye, enclosed in a plastic bag and was not what she would call residue.

Officer Crutchfield returned to the witness stand and testified that she had made approximately fifty to a hundred cocaine buys which usually consisted of one rock of cocaine; that cocaine rocks of similar price are usually about the same weight; that in this particular purchase she received a "normal amount" sold on the street; and that it was "a usable amount."

The defendant testified that at the time Officer Crutchfield

said he sold her cocaine, he was working for the North Little Rock Sanitation Department and had been for six years. He said he got up around 7:00 a.m., was not out on the streets at 9:15 p.m., doesn't sell drugs and did not sell any drug to Officer Crutchfield.

Appellant's first argument on appeal is that the state failed to prove every element of its case by sufficient evidence in that it failed to prove he possessed a usable amount. In support of this argument the appellant relies upon *Harbison* v. *State*, 302 Ark. 315, 790 S.W.2d 146 (1990), in which the Arkansas Supreme Court held that possession of less than a usable amount of a controlled substance will not support a conviction. In *Harbison* the appellant had been convicted of possession of cocaine on evidence about a brown glass bottle containing white powder. Although there was no specific evidence about the bottle or its contents, a drug chemist testified that he identified a substance found inside two plastic drinking straws as being a "trace amount" of cocaine "residue" too small to weigh with state crime laboratory equipment which could weigh nothing smaller than one milligram. The prosecution stipulated that the expert testimony would have been the same with respect to the amount of cocaine found in the brown bottle.

The *Harbison* opinion states:

> The laboratory's chief toxicologist then testified that the amount found in the two straws was not sufficient to have any effect on the "human system" and a drug user would not attempt to use it because it "would not be an amount that someone would be interested in trying to use."

302 Ark. at 316. Appellant relies on this statement in arguing that "the laboratory's chief toxicologist was needed to testify as to what amount was sufficient to have any effect on the human system and what would be 'an amount that someone would be interested in trying to use.' " Appellant quotes further from *Harbison*, 302 Ark. at 322:

> We recognize the possibility that one may be in possession of an amount of a controlled substance sufficient to permit knowledge of its presence and yet still not be in possession of a usable amount.

Appellant argues that the same rationale applies to delivery of a controlled substance.

Appellee first argues that the appellant has not preserved this argument for appeal because he failed to specifically argue to the trial judge that the prosecution had not proven that he sold a usable amount of cocaine. In *Moore* v. *State*, 304 Ark. 257, 266, 801 S.W.2d 638 (1990), the Arkansas Supreme Court held that the defendant must specifically argue the *Harbison* issue in his motion for directed verdict or the issue is not preserved for appeal. *See also, Saul* v. *State*, 33 Ark. App. 160, 803 S.W.2d 941 (1991). Our reading of the record discloses that defense counsel objected every time someone mentioned the term "usable amount" and even though he may not have specifically argued the point after making his motion for directed verdict, we think counsel adequately brought to the court's attention that he was challenging the prosecution's proof on that issue.

In addition, appellee again makes an impassioned plea for us to change the rule set out in *Doby* v. *State*, 28 Ark. App. 23, 770 S.W.2d 666 (1989), in which we held that a defendant is not required to request a directed verdict in a bench trial to preserve the sufficiency of the evidence issue, citing Ark. R. Crim. P. 36.21(b). We reiterated this rule in *Smith* v. *State*, 30 Ark. App. 111, 783 S.W.2d 72 (1990) and *Ryan* v. *State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990), and we consider the issue settled. Furthermore, our reading of the record shows that appellant made his motion for directed verdict at the close of the State's case and again when the defense rested.

Nevertheless, we do not find cause to reverse appellant's conviction. The appellants in *Harbison, Moore,* and *Saul, supra*, were all convicted of possession of a controlled substance. In the instant case appellant was convicted of delivery of a controlled substance. We do not think that one would be successful in selling less than a usable amount of contraband. Moreover, Officer Crutchfield testified that the rock she purchased from appellant was a normal amount that is sold on the street, and that it was a usable amount; and the crime lab chemist testified the specimen she examined was twice the size of many they receive. We believe there is substantial evidence to support the conviction.

Appellant also argues that the evidence was not sufficient to support the revocation. This argument, the appellant says, is based upon the same argument made in regard to the

conviction for delivery of a controlled substance — that appellant was not shown to have transferred a "usable" amount of a controlled substance. That conviction required a finding of guilt "beyond a reasonable doubt," but the revocation required a finding based upon only "a preponderance of the evidence," *Ellerson* v. *State*, 261 Ark. 525, 531, 549 S.W.2d 495 (1977). On appeal we do not reverse the trial judge's decision to revoke unless it is clearly against the preponderance of the evidence, *Brandon* v. *State*, 300 Ark. 32, 776 S.W.2d 345 (1989); *Reese* v. *State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988). We find that the judge's decision to revoke is supported by a preponderance of the evidence.

Affirmed.

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

David WOMACK *v.* STATE of Arkansas

CA CR 90-309 819 S.W.2d 306

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

William R. Simpson, Jr., Public Defender, by: *Richard Lewallen*, Deputy Public Defender, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with rape, kidnapping, and aggravated assault, all of which were alleged to have occurred on February 11, 1990. He was found not guilty of rape but guilty of kidnapping and aggravated assault and he was sentenced to sixteen years in the Arkansas Department of Correction. On appeal, he claims the trial judge erred in admitting evidence of his prior bad acts and that the judge erred in failing to instruct the jury as to the specific purpose for which this particular evidence was to be considered. We find no error and affirm.

The alleged victim was the former girlfriend of the appellant, Dorris Hill, whose testimony included not only the events of February 11, but also other acts she said were committed against her by the appellant within the two-month period preceding the abduction. Ms. Hill testified that she ended her relationship with the appellant after he held her at gunpoint on December 8, 1989. She alleged that he burglarized her residence on December 22, 1989, and she described a phone conversation on December 31,

1989, in which he threatened suicide, admitted that he had burglarized her residence, and offered to return her belongings if she would agree to see him. The last incident prior to the abduction occurred on January 4, 1990, when the appellant followed her home and was arrested on an unrelated warrant. The appellant objected to testimony about each incident and the jury was repeatedly instructed not to find the appellant guilty or not guilty of these incidents, but to consider this evidence giving it whatever weight it deemed appropriate in regard to the offenses for which the appellant was being tried.

On appeal, the appellant claims the introduction of this evidence was error in that its purpose was to show that he was a bad person and that he acted in conformity with his bad character on February 11, 1989. The trial judge admitted the evidence to show the appellant's state of mind. Ark. R. Evid. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

For evidence of prior bad acts to be admissible as an exception under Ark. R. Evid. 404(b), the evidence must (1) have independent relevance to the issues being tried, and (2) its probative value must not be substantially outweighed by the danger of unfair prejudice. *Price* v. *State*, 268 Ark. 535, 597 S.W.2d 598 (1980); *Crutchfield* v. *State*, 25 Ark. App. 227, 763 S.W.2d 94 (1988).

As to the first requirement, the evidence must have independent relevance in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal. *Carter* v. *State*, 295 Ark. 218, 748 S.W.2d 127 (1988). The appellant argues that his state of mind was not at issue; therefore, these acts had no independent relevancy as they were neither charged nor related to the transaction at issue. We disagree. Ms. Hill was the victim in several incidents each occurring within two months of the termination of her relationship with the appellant. This evidence had relevance to show motive, plan and intent. In *White* v. *State*, 290 Ark. 130, 717 S.W.2d 784 (1986), the fact that the appellant's wife was the

victim in two incidents was the basis for admitting similar evidence as it reflected a specific propensity to commit the particular sort of crime in question with the same person. The Court held the evidence relevant "to show the relation and familiarity of the parties, their disposition and antecedent conduct towards each other, and as corroborative of the testimony of the prosecuting witness touching the crime charged in the indictment." As in *White*, this appellant's bad acts were not admitted to show him to be of bad character, but rather to show his state of mind and his motive and intent to abduct his former girlfriend.

The second element, the balancing test, is a question within the discretion of the trial judge, and we will not disturb that decision absent an abuse of discretion. *Beebe* v. *State*, 301 Ark. 430, 784 S.W.2d 765 (1990); *Carter, supra*. We find no abuse of discretion here as the prior incidents are highly probative of the appellant's motive and intent, which is not substantially outweighed by any unfair prejudice that may have resulted.

The appellant further claims that these prior bad acts do not fall under any exception specified in Rule 404(b). To the contrary, motive and intent are stated exceptions for which prior bad acts may be admitted. *See* Arkansas Rule of Evidence 404(b). We also note that the list of exceptions in Rule 404(b) is exemplary only and is not exclusive, for it discusses admission of such evidence for "other purposes, such as" the ones listed, *Thrash* v. *State*, 291 Ark. 575, 726 S.W.2d 283 (1987); *White* v. *State, supra*, and the Supreme Court has held that the State is entitled to introduce evidence showing all circumstances which explain the act, show a motive for acting, or illustrate the accused's state of mind. *Richmond* v. *State*, 302 Ark. 498, 791 S.W.2d 691 (1990).

The appellant claims the trial judge further erred by failing to admonish the jury as to the specific exception for which this evidence was to be considered; however, he cites no authority for this proposition and we do not consider arguments on appeal which are not supported by convincing argument or authority. *Ross* v. *State*, 300 Ark. 369, 779 S.W.2d 161 (1989); *Hall* v. *State*, 15 Ark. App. 309, 692 S.W.2d 769 (1985). Because we find the evidence to be independently relevant and probative, we hold

that the trial judge did not err in ruling the evidence admissible.

Affirmed.

JENNINGS and ROGERS, JJ., agree.

HOLSUM SHIPLEY BAKING COMPANY *v.* Jay TERWILLIGER, Director of Labor, and Tracy Jennings

E 91-28 819 S.W.2d 303

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

Barbara Oswald, for appellant.

Allan Pruitt, for appellee.

JOHN E. JENNINGS, Judge. This is an unemployment compensation case. Neither party is represented by counsel and no briefs have been filed. The claimant, Tracy Jennings, worked in appellant's bakery as a packaging room helper and in loading ovens with bread until March of 1990 when she took a medical leave to have surgery performed for carpal tunnel syndrome. She was released by her doctor to return to work on August 18, 1990. She attempted to return to her former duties but found that she could not physically perform the work. When the claimant asked the employer whether there was any work which she could

physically do, she was told that there was not. The Board of Review found that she had been discharged and allowed benefits.

The document which serves as a notice of appeal to this court is a letter from Barbara Oswald, the personnel director of Holsum Shipley Baking Company. The letter states:

> We would like to "petition for review" the decision in this case.
>
> Shipley Baking Company *does not* wish to appeal the decision that benefits be allowed.
>
> Shipley Baking Company from the onset of this claim has asked that the statutory provision involved be under "Law: A.C.A. 11-10-513(b)"; that her reasons for leaving her job were after making a reasonable effort to preserve her job rights, she left because of her injury. [Emphasis in original.]

We do not reach the question of whether the Board's finding that the claimant had been discharged is supported by substantial evidence, because to do so would merely constitute an advisory opinion. *See generally Cozad* v. *State*, 303 Ark. 137, 792 S.W.2d 606 (1990); *Dilday* v. *State*, 300 Ark. 249, 778 S.W.2d 618 (1989). As a general rule, no appeal lies from findings of fact, conclusions of law, or "mere rulings." 4 Am. Jur. 2d *Appeal and Error* § 76 (1962). The posture of the present case is analogous to that presented to the supreme court in *Long* v. *Henderson*, 249 Ark. 367, 459 S.W.2d 542 (1970). There the court said:

> Appellee asserts that the court erred in excluding consideration of the evidence relating to the broken leg received by Ruth Henderson in her fall, contending that the evidence linked the 1967 automobile accident with the 1968 fall from the truck. However, she says, "Appellee wants the issues on the cross appeal decided but does not want a remand if a direct appeal is affirmed". We decline to grant the request to determine this issue, having stated that we do not render advisory opinions. *Kays* v. *Boyd*, 145 Ark. 303, 224 S.W. 617 (1920).

Likewise, the appellant in the case at bar asks us, in effect, to affirm the decision of the Board of Review but to change

the basis for the decision. Under the authority cited above we decline to do so. The appeal is dismissed; *see Beatty* v. *Clinton*, 299 Ark. 547, 772 S.W.2d 619 (1989).

CRACRAFT, C.J., concurs in the result.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree to affirm the Board of Review's decision in this case. The case, in my opinion, should be remanded to the Board with directions for it to decide the issue relied upon by the appellant.

Neither the employer nor the employee was represented by counsel in this case and neither party field a brief. We have said, however, that unemployment benefits cases are not treated by our appellate rules the same as other civil cases are treated, and that it is not necessary for briefs to be filed in unemployment cases. *Hunter* v. *Daniels*, 2 Ark. App. 94, 616 S.W.2d 763 (1981). Therefore, it is both necessary and proper for us to read the transcript in this case.

The transcript reveals that when the appellee applied for unemployment benefits the appellant's personnel director, Ms. Oswald, wrote the Arkansas Employment Security Division a letter stating that the appellee's status as an employee was "that of an active one." The letter states that the appellant was waiting for the doctor to release the appellee to "regular duty," and that the appellee "has neither resigned nor have we discharged her."

The appellee, however, was awarded unemployment insurance benefits by the Employment Security Division upon a finding that she had been discharged for reasons other than misconduct in connection with the work.

So, the employer appealed to the Appeal Tribunal, again contending that the appellee had not been discharged but was considered by the employer to be on medical leave, and the employer asked whether the agency's decision of "not disqualified" for benefits could be upheld under Ark. Code Ann. § 11-10-513(b). That section allows benefits if an employee, after making reasonable efforts to preserve his or her job rights, left the job because of (among other reasons) "illness, injury, pregnancy, or other disability." At the hearing conducted by the Tribunal's

referee, Ms. Oswald testified to the events that occurred prior to the appellee's application for unemployment benefits and stated that it was the employer's position that the appellee had not been discharged but was still on medical leave. Again, Ms. Oswald informed the appeals referee that appellant agreed that the appellee's benefits should be upheld but that her benefits should come under Ark. Code Ann. § 11-10-513(b) (1987). The decision of the referee found that the appellee "never indicated any intent to quit her job" and that she "was discharged for a reason that does not constitute misconduct connected with the work." The decision does not even mention the appellant's contention that appellee should have benefits under Ark. Code Ann. § 11-10-513(b).

The employer then appealed to the Board of Review, and by letter dated December 6, 1990, again stated its position that the appellee had not been discharged. The letter states that the appellee "resigned after making a reasonable effort to return to work; but due to her physical disability could not do her job." And, the letter concludes: "Her award of benefits, we feel should be allowed under Ark. Code Ann. § 11-10-513(b)." That contention was not discussed by the Board. It simply adopted and affirmed the decision of the Appeal Tribunal.

On appeal to the court of appeals, appellant again stated its position that it does not wish to contest the decision that benefits be allowed; it asks only that the benefits be allowed under Ark. Code Ann. § 11-10-513(b) (1987). I think the appellant's contention should be addressed. It has made the same contention at each step of these proceedings but its contention has not been discussed at any level. The issue presented by appellant is a simple issue of fact. Was the employee discharged for reasons other than misconduct connected with the work or did she voluntarily leave her work because of illness, injury, or other disability. This court is not authorized to decide that factual question. It is our duty only to review the factual findings of the Board and determine if they are supported by substantial evidence. Since the Board has not discussed the appellant's contention in regard to section 11-10-513(b) but has only adopted the findings of the Appeal Tribunal, this matter should be remanded to the Board and the Board directed to make a finding upon the issue the appellant has raised each step of the proceedings.

In *Lawrence* v. *Everett*, 9 Ark. App. 138, 653 S.W.2d 140 (1983), this court remanded an unemployment case to the Board of Review for it to make a finding upon an issue it had failed to decide. The Board had affirmed an Appeal Tribunal decision holding that the appellant was liable to repay unemployment benefits which the appellant had received but to which he was not entitled. The appellant had raised the issue that it would be against equity and good conscience for him to be required to make the repayment. The Board made no finding on that issue. We said that a statute excused repayment if the benefits were received without fault and repayment would be against equity and good conscience. Therefore, we remanded for the Board to make a finding on the equity and good conscience issue. Quoting from *Hays* v. *Batesville Mfg. Co.*, 251 Ark. 659, 473 S.W.2d 926 (1971), we said:

> When an administrative agency fails to make a finding upon a pertinent issue of fact, the courts do not decide the question in the first instance; the cause is remanded to the agency so a finding can be made on that issue. *Reddick* v. *Scott*, 217 Ark. 38, 228 S.W.2d 1008 (1950).

The majority opinion of this court takes the position that the appellant is asking us to affirm the decision of the Board of Review but simply change the basis for its decision. That, the majority opinion indicates, would be like rendering an advisory opinion and cases are cited which hold that this would not be proper. The trouble with that position is twofold. First, the appellant says that it is not merely seeking an advisory opinion; it contends the issue it presents is one that directly affects its financial interest. Second, the majority opinion cites no authority and gives no reason in support of its assertion that the appellant is seeking an advisory opinion.

The appellant's personnel director, Ms. Oswald, testified that after her surgery the appellee returned to work on August 18, 1990, but after working one and one-half days, she stopped work and went to see her doctor. Then the appellee came back on September 17, 1990, and told Ms. Oswald, "More than likely, I'll no longer be able to do this kind of work." Ms. Oswald said:

> [S]o the position we take, is that on August the 18th, that she did, indeed, come back and make a reasonable effort to

> preserve her job, but, due to a personal emergency, and after this reasonable effort, because of her disability, she can no longer do this type work, which is why we consider it a resignation, and that her benefits, should they be upheld and allowed, should come under ACA law § 11-10-513(b), which provides the benefits, *but provides no liability for the employer.* [Emphasis supplied.]

It appears to me that the appellant thinks that the tax it must pay for unemployment compensation would not be increased by benefits received by the appellee under section 11-10-513(b). This seems to be correct under Ark. Code Ann. § 11-10-703(a)(3) (1987) which provides:

> (3) However, regular benefit payments shall not be charged to the separate account of any employer if the employer provides the director with notices regarding separation from work as are required by regulations of the director if the director finds that:
>
> > (A) The claimant voluntarily left the employer without good cause connected with the work; . . . .

Thus, if the appellee in the present case left her work with appellant (after reasonable efforts to preserve her job rights) because of illness, injury or other disability as provided in section 11-10-513(b), then the unemployment benefits paid to her would not be charged to appellant's account and would not cause any increase in appellant's unemployment compensation tax. Appellant, therefore, is not raising an issue which calls for an advisory opinion. It is raising an issue which directly affects its financial interest, and this is an issue which I believe should be addressed in this case.

It can be argued that this issue was addressed because the Appeal Tribunal found that the appellee "never indicated any intent to quit her job" and that she was "discharged for a reason that does not constitute misconduct connected with the work," and these findings were adopted by the Board of Review. But the Appeal Tribunal's decision makes it clear that it did not address the appellant's contention under section 11-10-513(b). In fact the Tribunal's decision states that appellee is entitled to benefits under section 11-10-514. That section simply provides that an

individual shall be disqualified for benefits if "he is discharged from his last work for misconduct in connection with the work." The Tribunal has said (and this was adopted by the Board) that appellee was "discharged for a reason that does not constitute misconduct." However, the Board does not say what this reason is. Therefore, we cannot review the finding it did not make. *See Hays* v. *Batesville Mfg. Co., supra.* This case needs to be remanded and the Board directed to make a finding on the issue presented by the appellant.

I dissent from the holding of the majority opinion.

COOPER, J., joins in this dissent.

CAMPBELL & COMPANY *v.* UTICA MUTUAL INSURANCE COMPANY

CA 90-492 820 S.W.2d 284

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

Laser, Sharp, Mayes, Wilson, Bufford and Watts, P.A. by: *Dan F. Bufford* and *Brian Allen Brown*, for appellant.

Davidson, Horne, & Hollingsworth, by: *Allan W. Horne* and *Mark H. Allison*, for appellee.

ELIZABETH W. DANIELSON, Judge. In June of 1989 appellant Campbell & Company obtained a default judgment against Bloomburg Insurance Agency based on Bloomburg's negligent failure to insure. Appellant then sued appellee Utica Mutual Insurance Company pursuant to an errors and omissions policy appellee had issued to Bloomburg. Appellee moved for summary judgment based on the facts that no claim was made against the insured and no written notice was given to appellee during the policy period, both of which were required under the terms of the policy. Appellant contends on appeal that the trial court erred in granting the motion for summary judgment. We affirm.

Our summary judgment procedure is designed to prevent unnecessary trials where the record shows there is no genuine issue of fact to be litigated. *Krantz* v. *Mills*, 240 Ark. 872, 402 S.W.2d 661 (1966). Summary judgment is an extreme remedy, and on appeal from the granting of a motion for summary

judgment, we review the evidence in the light most favorable to the party resisting the motion. *Moeller* v. *Theis Realty, Inc.*, 13 Ark. App. 266, 683 S.W.2d 239 (1985). The appellee has the burden of proving that even though the facts might be in dispute, reasonable minds could not differ as to the conclusion to be drawn from them. *Id.*

In March of 1986 appellant was asked to procure an insurance policy to cover a piece of logging equipment. Appellant in turn went to Bloomburg, who gave an oral binder to place coverage with one of its authorized companies and accepted the premium.

The insured property was destroyed in September of 1986 and the loss was reported to Bloomburg. Although Bloomburg retained an adjuster and purported to be investigating the claim, it was later discovered that Bloomburg had failed to obtain the coverage. Appellant ultimately paid $40,000 to settle the claim and subsequently received a $40,000 default judgment against Bloomburg.

At the time of the loss of the equipment, Bloomburg had an errors and omissions policy issued by appellee. Prior to the settlement of the claim and the subsequent default judgment against Bloomburg, appellant contacted appellee about the claim, demanding that appellee undertake the defense of Bloomburg. Appellee denied coverage and refused to defend, maintaining that the conditions precedent to its liability under the policy had not been met. Appellant was awarded a default judgment against Bloomburg, then pursued the claim directly against appellee for payment of the judgment.

The errors and omissions policy issued to Bloomburg by appellee covered the period from April 7, 1986 to April 7, 1987. The policy was a "claims-made" policy, which provides coverage only if a claim is presented during the policy period, in contrast to an "occurrence" policy, which provides coverage if the event insured against takes place within the policy period, regardless of when the claim is presented. The policy issued to Bloomburg provides, in pertinent part, as follows:

> [The insurer agrees] to pay on behalf of the insured all sums which the insured shall become legally obligated to

> pay as money damages because of any *claim or claims first made against the Insured during the policy period*, arising out of any negligent act, error or omission, occurring subsequent to the retroactive date. . .
>
> A claim is first made during the policy period . . . if during the policy period . . . the insured shall have knowledge or become aware of any negligent act, error or omission which could reasonably be expected to give rise to a claim under this policy and *shall during the policy period . . . give written notice thereof to the company.*

(Emphasis supplied.) Coverage is therefore provided under this policy when two conditions are met: first, a claim based on the insured's negligent acts must be made against the insured during the policy period, and second, written notice of the claim must be given to Utica during the policy period. Although the loss occurred during the policy period and Bloomburg was made aware of it, no claim based on Bloomburg's negligence was made against Bloomburg during this time. The first notice appellee received regarding the claim was in May of 1988, more than a year after the expiration of the policy. Because no claim was made against the insured and no written notice was given to appellee during the policy period, the trial court granted appellee's motion for summary judgment.

Campbell's first argument on appeal is that the trial court erred in granting summary judgment because appellee had actual notice during the policy period of another claim against Bloomburg and that Bloomburg's owner had disappeared. Appellant contends that because of this knowledge, appellee had notice that additional claims would be forthcoming. The basis of this contention is a report filed on April 8, 1987, with appellee by its employee, Mr. Trzcinski. The report revealed that in March of 1987, appellee was informed of a lawsuit against Bloomburg by D. E. Thompson, a resident of Georgia. Thompson had applied for property insurance through a Georgia agency, which had in turn orally bound the risk with Bloomburg. After the property was destroyed, it was discovered that Bloomburg had taken the premium but never obtained the coverage. After attempting to contact Bloomburg and finding the telephone had been disconnected, Mr. Trzcinski stated in his report, "I can only deduce that

there is a possibility that this insured (Bloomburg) had either some sort of financial problems or simply took premium dollars from clients and/or other agents and never placed the coverage." Appellant contends that this April 8, 1987, report gave appellee actual notice of its claim.

In *Safeco Title Ins.Co.* v. *Gannon*, 774 P.2d 30 (Wash. App. 1989), the Washington Court of Appeals denied coverage under a claims-made policy even though the insurer knew of the event giving rise to the suit. Gannon, who had a claims-made policy with Safeco, notarized a signature that turned out to be a forgery. Gannon's insurance policy was effective from May 20, 1982 to May 20, 1983. On January 20, 1983, an attorney notified Gannon of the forgery and he notified his employer, who had processed the forged deed of trust. Around January 28 Gannon was notified by an agent of Safeco that there was a forgery and that Gannon should see his attorney. Gannon contended on appeal that these facts constituted notice of Safeco's "imminent subrogation claim," but the Washington Court of Appeals held that these facts did not constitute a demand for compensation. Instead, the court said, these were facts and circumstances that later gave rise to Safeco's claim, and, accordingly, "no claim was made by [appellant Gannon against Safeco] within the policy period and appellant was thus not entitled to receive coverage under the claims made clause." 774 P.2d 30 at 33.

As appellee points out, Mr. Trzcinski's report makes absolutely no reference to appellant or the loss involved in this case, and dealt with an entirely separate event involving an insured and insurance agent in Georgia. The existence of appellant's claim could not be ascertained from the report. Mr. Trzcinski's deduction that Bloomburg was in financial trouble and may have taken premiums from clients or agents in no way constitutes notice that appellant had a claim against Bloomburg. Mere suspicion that something is awry cannot be said to provide notice of a particular claim involving specific parties of which the insurer has no knowledge. Because the report dealt with an entirely separate event from the instant claim and the existence of this claim could not be ascertained from the information in the report, we hold that the report did not constitute actual notice of appellant's claim.

Appellant contends that the adequacy of notice is a question for the jury and cites cases in which the adequacy of the notice question was properly presented to the jury. The question here, however, is not whether the notice given was adequate, but whether the knowledge of an unrelated claim constituted notice at all under the terms of the policy. In *Reynolds* v. *New York Life Ins. Co.*, 202 Ark. 1013, 154 S.W.2d 817 (1941), the supreme court stated that it is the function of the court to construe insurance policies in litigation, ascertain their meaning, and give effect thereto. The construction and legal effect of a written contract are to be determined by the court as a question of law except where the meaning of the language depends upon disputed extrinsic evidence. *Duvall* v. *Massachusetts Indem. & Life Ins. Co.*, 295 Ark. 412, 748 S.W.2d 650 (1988). The information in Mr. Trzcinski's report did not constitute notice to appellee as required by the policy and the trial court did not err in granting summary judgment.

Appellant's second contention is that the trial court erred in granting summary judgment in favor of appellee in that Bloomburg had concealed the loss and intentionally failed to notify appellee of the claims during the policy period, and that the refusal of an insured to notify its carrier should not deprive the innocent injured party of recovery. In *Southern Farm Bur. Cas. Co.* v. *Jackson*, 262 Ark. 152, 555 S.W.2d 4 (1977), the court reversed a decision in favor of the injured parties, stating that since the injured parties' rights were no greater than the insured's and the insured could not enforce the liability policy against the defense of failure to cooperate, the trial court should have entered a verdict in favor of the insurer; the injured person stands in the shoes of the insured. 262 Ark. 152 at 157-158. Although *Jackson* involved an automobile liability policy, we believe the same principle applies under the circumstances of this case. Since Bloomburg could not enforce the policy against the defense that no claim was made within the policy limitations, and appellant's rights were no greater than Bloomburg's, the trial court did not err in granting summary judgment in favor of appellee.

As part of its second argument on appeal appellant also contends that appellee had waived its right to raise the lack of timely notice because in a June 14, 1988, letter to Bloomburg, appellee disclaimed coverage for the reason that "the date of the

first notice of claim made against you in this instance case . . . is subsequent to your expiration date of April 7, 1987." Appellant argues that Bloomburg first had notice of the loss within a few days of its occurrence, not in January of 1988 as stated in appellee's letter, and that where an insurance company disclaims coverage on one ground or set of grounds, it has waived any other grounds of which it had knowledge at the time. We agree with appellee's statement that this argument misses the principal issue in this case, which is not whether there is a defense to appellee's liability that appellee waived or is estopped from asserting, but whether there was any coverage under the policy for appellant's claim in the first place. This court has said that "it is well settled in this state that the doctrines of waiver and estoppel, based upon the conduct or action of the insurer, cannot be used to extend the coverage of an insurance policy to a risk not covered by its terms or expressly excluded therefrom." *Brown* v. *Cudis Ins. Society, Inc.*, 11 Ark. App. 255, 669 S.W.2d 207 (1984), citing *Life & Cas. Ins. Co.* v. *Nicholson*, 246 Ark. 570, 439 S.W.2d 648 (1969).

Appellant's third point on appeal is that the trial court erred in granting summary judgment because there was no showing that appellee was prejudiced by the failure to receive timely notice. The position that an insurer must show it was prejudiced by lack of notice in order to escape liability or its duty to defend is based on the reasoning that the purpose of the notice requirement is to give the insurer an opportunity to investigate, so that the insured's rights should not be forfeited unless the insurer shows, for example, that it did not have an opportunity to investigate and was thereby prejudiced. *See* Charles B. Marvel, Annotation, *Modern Status of Rules Requiring Liability Insurer to Show Prejudice to Escape Liability Because of Insured's Failure or Delay in Giving Notice of Accident or Claim, or in Forwarding Suit Papers*, 32 A.L.R. 4th 141 (1984). The notice prejudice rule was "created fundamentally to preserve the insured's coverage in those cases where the lack of notice does not prejudice the insurer." *Safeco Title Ins. Co.* v. *Gannon*, 774 P.2d 30 at 34 (Wash. App. 1989).

We are aware of no Arkansas law on the issue of whether the notice/prejudice rule applies to claims-made policies; our discussions on whether prejudice must be shown have dealt with occurrence-type policies. *See*, e.g., *American Fidelity & Cas. Co.*

v. *Northeast Arkansas Bus Lines, Inc.*, 201 Ark. 622, 146 S.W.2d 165 (1941); *Hope Spoke Co.* v. *Maryland Cas. Co.*, 102 Ark. 1, 143 S.W. 85 (1912); *American General Life Ins.* v. *First American Nat'l Bank*, 19 Ark. App. 13, 716 S.W.2d 205 (1986). The federal district court has reviewed Arkansas case law and determined that where a notice requirement is a condition precedent, the insurer is not required to show that he is injured or prejudiced by the failure of the insured to provide the required notice. *Hartford Accident and Indemnity Co.* v. *Loyd*, 173 F. Supp. 7 at 11 (W.D. Ark. 1959); *M.F.A. Mutual Ins. Co.* v. *Mullin*, 156 F. Supp. 445 at 460 (W.D. Ark. 1957).

We agree with the court in *Safeco* that "[w]hile there are sound reasons for applying the notice prejudice rule to the typical notice provision in an occurrence policy, those reasons do not apply with equal force to the notice provision [in a claims-made policy]." 774 P.2d 30 at 34. A claims-made policy is designed so that the insurer can more accurately predict the limits of its exposure and the premium needed to cover the risk undertaken. The benefit to the insured is a lower premium than would be necessary in an occurrence policy. 7A J. Appleman, *Insurance Law and Practice* § 4504.01 (Supp. 1990). Notice is critical to the insurer in a claims-made policy; it not only gives the insurer an opportunity to investigate, it defines the very risk the insurer contracted to undertake. To allow an extension of reporting time where the insurer failed to demonstrate prejudice in a claims-made policy would extend the coverage the parties contracted for and, in effect, rewrite the contract between the parties. *See Safeco*, 774 P.2d 30 at 34. Because the notice requirement defines the coverage contracted for in a claims-made policy and is a condition precedent to coverage, we hold that the insurer is not required to demonstrate prejudice caused by the untimely filing of notice under a claims-made policy such as the one in this case.

Since there was no claim made against Bloomburg and no notice given to appellee during the time Bloomburg's errors and omissions policy was in effect, appellant's claim was not covered by the policy and the trial court properly granted summary judgment in favor of appellee.

Affirmed.

ROGERS, J., concurs.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I cannot agree to affirm the summary judgment granted by the trial court in this case. The judgment was granted upon matters of record which include the pleadings, depositions, answers to interrogatories and admissions, and affidavits. These matters include a number of exhibits which are also in the record.

Summary judgment is an extreme remedy and any proof submitted must be viewed most favorably to the party resisting the motion, and any doubts and inferences must be resolved against the moving party. *Leigh Winham, Inc.* v. *Reynolds Ins. Agency*, 279 Ark. 317, 651 S.W.2d 74 (1983). In *Baggett* v. *Bradley County Farmers Coop.*, 302 Ark. 401, 789 S.W.2d 733 (1990), the court said that "the object of a summary judgment is not to try the issue but to determine if there are issues to be tried," and "if there is any doubt whatever, it should be denied." The court quoting from a previous case, also said:

> Summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypotheses might reasonably be drawn and reasonable men might differ.

302 Ark. at 403.

There is no dispute about the essential facts in this case. The appellant is an insurance agency in Arkansas. A customer of that agency, Carlton Dorey, applied to appellant for insurance on a piece of logging equipment referred to as a "loader." Appellant obtained an oral quotation and binder for the coverage from an insurance agency in Texas. Appellant forwarded a check to the Texas agency, Bloomburg Insurance Agency, and some six months later the loader was destroyed by fire. The loss was promptly reported to Bloomburg and it retained an adjuster and purported to be acting to investigate and settle the claim, but it was ultimately learned that Bloomburg had negligently failed to obtain insurance on the loader and there was, in fact, no coverage for Dorey's loss.

The majority opinion holds that the errors and omissions

policy issued by the appellee to Bloomburg did not cover Bloomburg's negligence because the policy is a "claims-made" policy, and no coverage exists unless the claim is made within the period of time provided in the policy. The majority agrees with the appellee that this is a condition of coverage and that this policy is different from an "occurrence" policy which provides coverage for loss within the policy period.

The policy issued by appellee provides that "upon any insured becoming aware of any negligent act, error or omission which would reasonably be expected to give rise to a claim against any insured, written notice with all available particulars shall be given by or for the insured to the [appellee] or its authorized agent." The policy also provides that this notice must be given during the policy period. The period of the policy issued by the appellee in this case was April 7, 1986, to April 7, 1987. Although Dorey's loss occurred during the period of Bloomburg's errors and omissions policy and it is undisputed that the loss was reported to Bloomburg during the period of that policy, the appellee contends it is not liable because Bloomburg's failure to secure the insurance coverage for Dorey was not reported to appellee during the period of the policy it issued to Bloomburg. My view is that the appellee's motion for summary judgment should not have been granted because (1) there is a genuine issue of fact as to whether Bloomburg's error or omission was reported to appellee within the policy period, and (2) under the evidence in this case, public policy considerations should prevent appellee from avoiding liability on its policy unless it was unfairly prejudiced by failing to receive notice, within a reasonable period of time, of the negligent acts, errors, or omissions of its insured.

The majority opinion recognizes that the record contains a report to appellee from its employee, Walter Trzcinski, which states that in March of 1987 a letter was forwarded to him by a claimant named D.E. Thompson who said that Bloomburg was supposed to obtain a policy for Thompson but that Bloomburg cashed the premium check and never placed the insurance. The report also said that attempts to reach Bloomburg had failed because its telephones had been disconnected or were not in service. Mr. Trzcinski's report concluded: "I can only deduce that there is a possibility that this insured had either some sort of financial problems or simply took premium dollars from clients

and/or other agents and never placed the coverage." This report was dated April 8, 1987. It refers to information forwarded to Trzcinski on March 20, 1987. Appellee's policy period ran from April 7, 1986, to April 7, 1987. Thus, it is clear that this employee of appellee received notice within the policy period of a "negligent act, error or omission" on the part of Bloomburg "which would reasonably be expected to give rise to a claim against" appellee's insured Bloomburg. And there is surely, at least, a genuine issue of fact as to whether Trzcinski was appellee's "authorized agent" to receive this information.

The majority opinion, however, cites the case of *Safeco Title Ins. Co.* v. *Gannon*, 774 P.2d 30 (Wash. App. 1989), as authority for holding that Trzcinski's "mere suspicion that something was awry" was not sufficient notice to appellee of the existence of "appellant's claim." Now the appellant is Campbell & Company, the Arkansas insurance agency who attempted to place insurance coverage for Dorey with the Bloomburg agency in Texas. When Dorey sued Campbell and Bloomburg, the suit was settled by Campbell who cross-complained against Bloomburg and obtained a judgment against it for the amount of the settlement with Dorey. The appellant, Campbell, then brought this present suit against the appellee under Campbell's right to be subrogated to Bloomburg's rights against appellee. The appellee's errors and omissions policy which was issued to Bloomburg required notice to appellee of Bloomburg's claim. However, the insuring agreement of appellee's policy states that it will pay all sums the insured (Bloomburg) becomes legally obligated to pay for "any claim or claims first made against the Insured during the policy period, arising out of any negligent act, error or omission . . . in the conduct of Insured's business." And the policy also provides that "a claim is first made" if the insured "shall during the policy period" give written notice of "any negligent act, error or omission which could reasonably be expected to give rise to a claim under the policy."

Therefore, I strongly disagree with the majority opinion's statement that "mere suspicion that something was awry" was not sufficient to constitute notice of a claim as required by the policy issued to Bloomburg by the appellee. In my opinion, the information received by appellee's employee, Trzcinski, was more than enough to cause a "mere suspicion" that something

was wrong at Bloomburg's. It was exactly the information the appellee's policy called for—"any negligent act, error or omission which could reasonably be expected to give rise to a claim under the policy." The majority opinion also states that "it is the function of the court to construe insurance policies in litigation, ascertain their meaning, and give effect thereto." But what is overlooked is the following rule:

> 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.

Home Indemnity Co. v. *City of Marianna*, 297 Ark. 268, 272, 761 S.W.2d 171 (1988). *See also* the case of *American Home Assurance Co.* v. *Ingeneri and Foss*, 479 A.2d 897 (Me. 1984), where the insurance company had issued a claims-made policy to Ingeneri. The court said:

> It is undisputed that Ingeneri did not himself give written notice as required by the policy; however, Foss's new counsel did give written notice of the suit to the agent of the insurer by letter dated July 17, 1980.
>
> . . . .
>
> . . . By virtue of the July 17 letter from Foss's new counsel, plaintiff had ample opportunity to investigate the claim and to protect its interests prior to the entry of the default judgment. The evidence does not support the Superior Court's finding that plaintiff was prejudiced by Ingeneri's failure to give notice. In the absence of prejudice to the insurer, we hold that notice by a third party constituted sufficient compliance with the provisions of the policy. *See generally* Couch on Insurance, *supra*, at § 49:101.

Id. at 902. Under the circumstances of the present case, I think the issue regarding the sufficiency of the notice of the claim should not have been decided by summary judgment.

I also think that public policy considerations, under the circumstances of this case, should prevent the appellee from

avoiding liability on its policy unless it is established that the appellee was unfairly prejudiced by failing to receive notice, within a reasonable period of time, of the negligent acts, errors, or omissions of its insured. I am aware that is not as yet the majority view in this country. Perhaps typical of the majority view is *Esmailzadeh* v. *Johnson and Speakman*, 869 F.2d 422 (8th Cir. 1989), where the court affirmed a Minnesota District Court decision holding that an insurance company was not liable on a claims-made professional-liability policy because the insured law firm did not report the claim against it to the insurance company within the policy period. Finding no convincing reason to disturb the district court's holding that the policy provisions did not violate Minnesota public policy, the appellate court said:

> As a result, plaintiffs, initially injured by their law firm's professional neglect, are again injured by the same firm's negligent failure to give notice to its insurance company. This is a grievous wrong, but it is not one which the insurance company agreed to protect against. Under this kind of policy, the company clearly disclaims the risk of failure on the part of its insured to give it timely notice.

869 F.2d at 425.

The obvious harshness of such a result has caused some courts to soften the application of the claims-made policy. This is not different from what has been occurring for many years in other areas of insurance law. A law review article written by Professor Clarence Morris, *Waiver and Estoppel in Insurance Policy Litigation*, 105 U. Pa. L. Rev. 925 (1957), states:

> Indexes to the great nineteenth century insurance texts do not list waiver and estoppel. But times had changed. The 1951 third edition of Vance on Insurance enfolds an excellent and important seventy-six page "Waiver & Estoppel" chapter—about a fourteenth of the book's bulk. What has fostered this growth in the last hundred years? My thesis is that waiver and estoppel are two of several guises that cloak the courts' part in changing insurance from a service safely bought only by sophisticated businessmen to a commodity bought with confidence by untrained consumers. Judges, at the urging of policyholders' advocates, have used waiver and estoppel to

> convert insurance from a custom-made document designed in part by knowing buyers to a brand-name staple sold over the counter by mine-run salesmen to the trusting public.

A recent treatise on insurance law has observed that the courts have considered thousands of cases in which insureds have sought to assert rights that have conflicted with the terms specified in an insurance policy, and in hundreds of appellate decisions judges have held that the rights of the insureds were at variance with the policy terms. Pointing out that from 1945 to the mid 1960's the appellate courts increasingly sustained variance claims, the treatise states that by 1970 it was possible to discern that several justifications provide a common foundation for a significant portion of what otherwise appeared to be unrelated judicial decisions in favor of claimants. It is then stated:

> The determinations were implicitly, and occasionally explicitly, predicated on one or more of the following three principles:
>
> > An insurer will be denied unconscionable advantages in an insurance transaction.
> >
> > An insurance contract embodies an implied covenant of good faith and fair dealing.
> >
> > The reasonable expectations of applicants, insureds, and in some instances third party beneficiaries, should be protected.

R. Feeton & A. Widiss, *Insurance Law* 614-15 (1988). This treatise also notes that the judicial decisions of recent decades have sustained a large number of variance claims on the ground that provisions of the insurance policy, if literally enforced, would conflict with public policy. *Id.* at 646-47. The case of *Sparks* v. *St. Paul Ins. Co.*, 495 P.2d 406 (N.J. 1985), is cited as an example of such a holding. This case involved a claims-made legal-malpractice policy which was found to violate the state's public policy because it afforded such minimal protection it did not conform to the objectively reasonable expectations of the insured and the public. The court stated:

> Although we held today in *Zuckerman* v. *National Union Fire Ins. Co.*, *supra*, 100 N.J. 304, 495 A.2d 395 (1985), that a "claims-made" policy that fulfills the reasonable expectations of the insured with respect to the scope of coverage is valid and enforceable, the policy at issue here is substantially different from the standard "claims-made" policy.

495 A.2d at 414.

The Arkansas Supreme Court in *Arkansas Blue Cross & Blue Shield* v. *Long*, 303 Ark. 116, 792 S.W.2d 602 (1990), affirmed a trial court's decision that a policy exclusion was against public policy. The exclusion stated that "No benefits are provided for inpatient services where you terminate such inpatient admission against medical advice." The court held this provision would divest an insured of benefits already accrued. The insurer said its purpose was to encourage patients to follow the advice of their physicians and remain hospitalized until fully recovered, but the court said that while the purpose might be worthy, when weighed against the consequences for the insured, the policy provision did not "square with public policy." Even more recently, in *Ferrell* v. *Columbia Mutual Casualty Ins. Co.*, 306 Ark. 533, 816 S.W.2d 593 (1991), the court stated:

> Many courts have interpreted "no fault" insurance legislation, *see* Ark. Code Ann. § 23-89-202 (1987), and compulsory motor vehicle acts, *see* Ark. §§ 27-22-101 — 104 (Supp. 1991), as expressing a public policy that one who suffers a loss as the result of an automobile accident shall have a source and means of recovery.

306 Ark. at 537-38. However, in that case the court pointed out that only the insurer and the insured were involved, and the loss involved only the insured's property, so "there is no public policy reason to hold that the insurance company's common law right to rescission has been abrogated." *Id.* at 538.

In the present case the appellee's policy was issued to "Bloomburg Insurance Agency, Inc.," and the appellee points out that Texas statutory law requires that a corporation licensed as an insurance agent must have the ability to pay up to $25,000 for which it might become legally obligated to pay on account of any

claim made against it for any "negligent act, error or omission" of the corporation in the conduct of its business as an insurance agent. One of the statutory ways to prove such ability to pay is "an errors and omissions policy." *See* Tex. Ins. Code § 21.14 (Vernon 1990 Cum. Supp.). Thus, there is a public policy consideration involved in this case. It is obvious that Bloomburg was not inclined to give appellee notice of Bloomburg's failure to secure coverage for Dorey's loader. Therefore, unless Trzcinski's report to the appellee is sufficient to meet the notice provisions of appellee's claims-made policy, the reasonable expectations of the statutory beneficiary (Dorey) will not be protected. Based upon the *Blue Cross* and *Columbia Mutual* cases, *supra*, I would hold that, under the circumstances in this case, public policy considerations will prevent the appellee from avoiding liability unless it can establish that it was unfairly prejudiced by failing to receive notice, within a reasonable period of time, of Bloomburg's negligent acts, errors, or omissions which could have reasonably been expected to give rise to the Bloomburg claim under which recovery is sought in this case.

For reasons discussed above, I would reverse and remand.

COOPER, J., joins in this dissent.

Hal KIDD of Value Line Company *v.* CLARK COUNTY EQUALIZATION BOARD

CA 90-524 820 S.W.2d 67

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

Mathis & DeJanes, by: *Travis Mathis*, for appellant.

John A. Thomas, for appellee.

MELVIN MAYFIELD, Judge. On October 27, 1989, the County Court of Clark County affirmed the appraisal of the

Clark County Assessor on certain parcels of real estate owned by the appellant. (The property may be owned by Mr. Kidd who does business under the name of Value Line Property, but this is not important to the issue involved in this case.) On December 14, 1989, appellant gave a notice of appeal to circuit court from the county court's ruling. The appellee filed a motion to dismiss in circuit court on the grounds that the appeal was not perfected because the appellant failed to file the affidavit required by Ark. Code Ann. § 16-67-201 (1987). On March 29, 1990, the circuit court granted appellee's motion and dismissed the appeal on the finding that appellant "failed to perfect the appeal as required by A.C.A. 16-67-201 in that Petitioner failed to file an affidavit as required and the Defendant has not waived the requirement."

On April 26, 1990, appellant filed a second notice of appeal accompanied by the required affidavit, and also filed a petition for reconsideration which stated the "Affidavit has now been timely filed within the time required."

After a hearing held August 10, 1990, on appellant's motion for reconsideration, the circuit court held that the appellee had not waived the requirement of the affidavit for appeal; that no such affidavit had been filed prior to the dismissal on March 29, 1990; and that the court's order of March 29, 1990, barred the subsequent filing of the new notice of appeal and affidavit of appeal in behalf of the appellant.

On appeal to this court, appellant contends the six months' time for filing of the appeal did not expire until April 27, 1990, and that appellant's second notice of appeal and affidavit for appeal were filed within that time period. Appellant argues further that the March 29, 1990, order is not *res judicata* because it was not a judgment on the merits of the case, in that the trial court simply found the appellant had not filed the affidavit as required by the statute and that the filing had not been waived by the appellee.

The Rules of Appellate Procedure govern the procedure in appeals to the Arkansas Supreme Court and Court of Appeals, but Ark. Code Ann. § 16-67-201 (1987) governs appeals from county court. Under that statute the aggrieved party must file an affidavit and prayer for an appeal within six months (unless a bond issue is involved) after rendition of the

judgment of the county court.

In the instant case the court's order of March 29, 1990, dismissing appellant's appeal for failure to file the affidavit was correct. However, on April 26, 1990, when appellant filed its second notice of appeal accompanied by the required affidavit, and its motion for reconsideration, the time for appeal had not yet run, and we know of no rule prohibiting the filing of the second notice of appeal, accompanied by the required affidavit, within the statutory time period.

In 4 C.J.S. *Appeal and Error* § 34 at 136-37 (1957), it is stated:

> Although the rule does not apply where the previous appeal is dismissed as not timely taken, or where there is a statute making the dismissal of an appellate proceeding the equivalent of an affirmance, and final, it is generally held that, where an appeal or writ of error has been dismissed voluntarily or by the court for failure to comply with some requirement of the law governing the proceeding, a second appeal or writ of error is not barred if taken in due time. This rule has been applied in cases of dismissal of premature writs of error or appeals, to dismissals for irregularity or insufficiency in the steps taken to perfect the appeal or error proceedings, and to dismissals for want of authority in appellant to maintain the proceeding.

In *O'Brien* v. *People*, 192 P.2d 428 (Colo. 1948), the appellant was found guilty in a justice of the peace court of careless driving. The appellant filed an appeal to county court but failed to pay the necessary docket fee. The county court ordered the appeal dismissed and a procedendo issued because the docket fee had not been paid. (Procedendo is a writ by which a cause which has been removed from an inferior to a superior court is sent down again to the inferior court to be "proceeded in there." *Blacks' Law Dictionary* 1083 (5th ed.)) Subsequently the appellant filed a second appeal in county court and paid the requisite docket fee. After a hearing, the county court concluded that the appellant by filing his appeal and failing to pay the required docket fee, failed to perfect his appeal as required by statute even though the time to appeal had not elapsed. The county court held the appeal had not been perfected and that the order for the

issuance of procedendo should be sustained. This order was appealed to the Colorado Supreme Court and reversed. The court said:

> In *Mente & Co.* v. *Martin Rourke & Co.*, 8 La. App. (Orleans) 18, 19, the court said: "Whilst it is true that but one appeal can be allowed in a case, nevertheless so long as the appellant has not an opportunity to present the merits of his appeal he has in fact had no appeal at all. If an appeal be dismissed for some informality or irregularity in the granting or perfecting of the same, such decree of dismissal does not pass upon the issues involved in the judgment appealed from nor yet upon appellant's right to appeal, but merely decides that under the conditions then existing the appeal cannot be heard. The dismissal of an appeal on such grounds is not *res judicata* either as to the merits of the cause, or as to appellant's right to an appeal. The right to have his appeal heard still exists unless it has been lost by the lapse of time or by forfeiture through acquiescence in the judgment or abandonment.

192 P.2d at 430. *See also, La Borde* v. *Di Leo*, 128 So. 2d 262 (La. 1961) (where appellant has failed to meet a requirement of law under which his appeal must be dismissed, a second appeal may be obtained even though the first has been dismissed, if the second appeal is applied for within the time limit provided by law).

In the early case of *Turner* v. *Tapscott, Adm'r*, 29 Ark. 318 (1874), the Arkansas Supreme Court considered the question of whether a party who has once taken an appeal and failed to perfect it by filing the transcript in the proper time, or the same has for any cause been dismissed, has the right to take another appeal at any time within the period in which appeals are allowed. Our supreme court held that the appellant, notwithstanding the fact that he took an appeal in the court below but failed to perfect it by filing the transcript in time, still has a subsisting right to an appeal.

Moreover, the trial court's order of March 29, 1990, was not *res judicata*. In *Cooper* v. *McCoy*, 116 Ark. 501, 173 S.W. 412 (1915), the court said:

> It is well settled that a former judgment in order to be a bar

> must have been a decision of the merits of the cause. . . . "In order that a judgment may constitute a bar to another suit it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases and must be determined on the merits. If the first suit was dismissed for defect in pleadings or parties, or a misconception of the form of the proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

116 Ark. at 505-06 (citations omitted). The above language was cited with approval in *Hatch* v. *Scott, Admx.*, 210 Ark. 665, 197 S.W.2d 559 (1946), which has recently been cited by this court in *Guinn* v. *Holcombe*, 29 Ark. App. 206, 780 S.W.2d 30 (1989). And in *Swanson* v. *Johnson*, 212 Ark. 340, 205 S.W.2d 702 (1947), the court stated:

> To render a judgment in one suit conclusive of a matter sought to be litigated in another, it must appear from the record, or from extrinsic evidence, that the particular matter sought to be concluded was raised and determined in the prior suit, or that it might have been litigated in that case.

212 Ark. at 343 (citations omitted). *See also Appleby Road Street Imp. Dist.* v. *Powell*, 282 Ark. 398, 669 S.W.2d 3 (1984).

In the instant case, the issue of whether appellant's second appeal (perfected on April 26, 1990, by filing of the second notice of appeal and affidavit) was properly filed could not have been before the trial court on March 29, 1990, because the second appeal had not yet been filed. While the two attempted appeals were between the same parties and arose out of the same issue, the March 29, 1990, order did not, and indeed, could not have considered the question of whether the subsequent appeal was perfected on April 26, 1990. Therefore, the doctrine of *res judicata* did not apply to the issue presented by the filing of the second notice of appeal.

Reversed and remanded.

DANIELSON and ROGERS, JJ., agree.

Elsie M. BLACK and George BLACK, Sr. *v.* AMERICAN GENERAL FIRE AND CASUALTY COMPANY

CA 90-408 819 S.W.2d 308

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

Ian W. Vickery, for appellant.

Barber, McCaskill, Amsler, Jones & Hale, P.A., by: *M. Stephen Bingham*, for appellee.

JUDITH ROGERS, Judge. Elsie M. Black and George Black, Sr., have appealed from the Union County Circuit Court's order granting summary judgment to appellee, American General Fire and Casualty Company, and ruling the appellants were not entitled to insurance coverage under their policy with appellee. We find it was not error to grant the summary judgment and affirm.

In December 1987, appellants were injured in an automobile accident. The driver of the other vehicle was uninsured, and appellants made a claim with appellee for coverage under the uninsured motorist provisions of their automobile policy. Appellee denied coverage, contending appellants were not in a "covered auto," as that term is defined in the policy, because the car they

were driving at the time of the accident was owned by the appellants but was not disclosed to the insurance company and listed for coverage.

Appellants filed suit, seeking coverage under their insurance policy and contending that they did not own the 1974 Toyota pickup. Appellee moved for summary judgment, alleging appellants had owned the vehicle in question for several months but had never notified appellee and, therefore, it was not a covered automobile under the policy.

The statements contained in the deposition of Elsie Black as well as affidavits filed on behalf of appellants indicate that, although appellants stated that they considered the car as being owned by their sons, they were in possession of it at the time the policy in question was obtained; that they purchased it from a relative for $600.00 and received title which was signed in blank almost twenty months prior to the accident; that it needed brake work but the motor was in good shape; that appellant Elsie Black intended to register the car but never did; that the vehicle sat on their property and was not used often except when their sons drove it to the woods to hunt and when George Black, Sr., drove it to the garden and the lake; that it was inoperable some of the time but was repaired a few days before the accident because the automobile which was listed on their insurance policy had broken down; that they drove it on the day of the accident because it was necessary to take Mr. Black to receive his daily medical treatment at a nearby town; that Elsie Black put her license plate on the car the day of the accident; and that they had not mentioned the vehicle to the insurance company because they did not consider themselves to be the owners. We note that another reason given by Elsie Black for not mentioning the vehicle was that she and her husband did not want to register it and be subject to additional taxes and insurance costs.

The Toyota had once belonged to Mr. and Mrs. Emmett Lum, who were related to the Blacks. Emmett Lum died in 1979. The record is silent as to whether title was transferred to Emmett's son Jack Lum through probate proceedings or in another manner, but a certificate of title introduced into evidence reflects that, in 1984, Jack Lum was the registered owner of the Toyota. Mrs. Black testified that, in 1986, Mrs. Lum indicated

the car was for sale and that she would like to keep it in the family. Mrs. Black stated she purchased it for $600.00 and received title to the car. The certificate of title was signed in blank by Jack Lum on April 8, 1986, and was given to Mrs. Black.

Appellee contended that the appellants did own the vehicle in question at the time they applied for coverage with appellee yet intentionally failed to disclose their ownership and that appellants failed to notify appellee at any time thereafter. Appellee also points out that, in the deposition of appellant Elsie M. Black, she admitted she did not register the vehicle but merely held onto the certificate of title, which was signed in blank, because she could not afford taxes and insurance on two vehicles. The circuit judge found that the 1974 pickup was owned by the appellants; that appellants had failed to so notify appellee; and that the vehicle was not a "covered auto" under the terms of the policy. The trial judge, therefore, ruled that the appellants were not entitled to coverage, and granted appellee's motion for summary judgment.

Rule 56(e) of the Arkansas Rules of Civil Procedure provides that, when a motion for summary judgment is made and supported by affidavits and other documents, the adverse party may not rest upon mere allegations or denials of the pleadings but his response, by affidavits or as otherwise provided in the rule, must set forth specific facts showing there is a genuine issue for trial. *Lubin* v. *Crittenden Hospital Ass'n*, 295 Ark. 429, 432, 748 S.W.2d 663, 665 (1988); *Mathews* v. *Garner*, 25 Ark. App. 27, 31, 751 S.W.2d 359, 361 (1988). Appellants wholly failed to satisfy this burden. Appellants do not dispute the evidence offered by appellee, that the appellants had purchased the car and received title twenty months before and that they had not registered it because they could not afford insurance and taxes on two vehicles. In response, appellants merely state their position that they did not own the car in question. Based on the pleadings, deposition, and affidavits which were presented to the trial court, we believe the court could conclude as a matter of law that the appellants owned the vehicle. *Hinkle* v. *Perry*, 296 Ark. 114, 118-19, 752 S.W.2d 267, 268-69 (1988). In *Hinkle*, the supreme court affirmed the granting of summary judgment on facts similar to the case at bar. The court determined that the appellant there owned the vehicle based on facts showing that he purchased the

vehicle, it was titled in the name of his business, and he was in possession of the certificate of title. The court noted that possession of personal property is *prima facie* evidence of ownership, which would, however, yield to actual title. The court concluded that he had possession and title and that Hinkle had not shown sufficient evidence to overcome the *prima facie* showing of ownership made by appellee.

Once the moving party makes a *prima facie* showing of entitlement to summary judgment, however, the party opposing summary judgment must meet proof with proof by showing a genuine issue of material fact. *Neel* v. *Citizens First State Bank*, 28 Ark. App. 116, 119-20, 771 S.W.2d 303, 305 (1989). Appellants wholly failed to satisfy this burden, and we therefore find summary judgment appropriately granted.

Affirmed.

MAYFIELD and COOPER, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I do not agree that summary judgment should have been granted in this case. The appellants owned a 1977 Honda Civic which was insured by a policy issued by the appellee insurance company. That policy provided uninsured motorist coverage for damage to appellant Elsie M. Black and "any family member" if caused by an uninsured vehicle. There was an exclusion, however, for bodily injury to Elsie Black or "any family member" while occupying a motor vehicle which was not insured under the policy. To be a "family member" under the "definitions" section of the policy a relative had to be a resident of the insureds' household, and the policy stated that a "covered auto" meant any vehicle shown in the "Declarations" (which was the 1977 Honda Civic). The "definitions" also stated that any other private passenger auto, or a "pickup or van" would be covered on the date the insured became the owner of that vehicle if it was acquired during the policy period and the insured asked the company to insure it "within 30 days after you become the owner." However, the policy also provided that if the acquired vehicle "*replaces one shown in the Declarations, it will have the same coverage as the vehicle it replaced.*" (Emphasis added).

The appellants, Elsie Black and her husband were injured in

an accident with an uninsured vehicle while the appellants were occupying a 1974 Toyota pickup. The insurance company denied coverage on the contention that the pickup had been owned by Elsie Black for more than 30 days without the insurance company being asked to insure it. The appellants deny that contention and they contend that the pickup had replaced their 1977 Honda Civic.

Mrs. Black's deposition was taken and filed for record, interrogatories were served and answered, and two affidavits were filed by the appellants. No affidavit was filed by the insurance company.

The affidavits and deposition show that the pickup had been owned by Mr. and Mrs. Emmett Lum who were related to the appellants. After Mr. Lum died, the appellants gave Mrs. Lum $600.00 for the pickup. Although they had the vehicle about 20 months prior to the accident, it had not been registered in their names. The vehicle sat on their property and was rarely used except when their sons (who did not live with appellants) drove it in the woods to hunt. It was inoperable most of the time but was repaired a few days before the accident because appellants' 1977 Honda Civic had broken down. Appellants drove the pickup on the day of the accident to take Mr. Black to receive his daily medical treatment at a nearby town. They had not mentioned the vehicle to the insurance company because they had not been using the vehicle and because they did not consider that they owned it. They gave Mrs. Lum the $600.00 just to keep the pickup in the family and so their sons would have a vehicle to work on and drive in the woods. No one drove it on the highway. Mrs. Black's affidavit states that if either of her sons had wanted the pickup, he could have taken it and registered it in his own name.

The certificate of title to the pickup was signed in blank by Jack Lum in April 1986. Jack was Emmett Lum's son and the record does not show how Jack got title to the pickup, however, the title was never transferred to the appellants. In *Rook* v. *Mosley*, 236 Ark. 290, 365 S.W.2d 718 (1963), the appellant Rook denied ownership of a vehicle which was involved in an accident. The court pointed out that it was not claimed that Rook had properly endorsed the title certificate to the vehicle; but the court said:

> Of course, if he had made a *bona fide* sale to Livingston before the traffic mishap such could have avoided his liability. . . . but the question of a *bona fide* sale to Livingston was the question in dispute; and we think a case was made for the jury as to ownership of the car at the time of the traffic mishap.

236 Ark. at 292. And in *Stipp* v. *Jenkins*, 239 Ark. 15, 386 S.W.2d 695 (1965), the court stated:

> Appellee and his wife in their testimony referred to the damaged car as their son's car, however they both testified that title was in appellee's name and appellee testified that he had bought and paid for the car. With such uncontroverted testimony, ownership of the car properly became a question for determination by the trier of fact.

239 Ark. at 17.

It is well settled that summary judgment should be granted only when a review of the pleadings, depositions, and other filings reveals that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Cummings, Inc.* v. *Beardsley*, 271 Ark. 596, 598, 609 S.W.2d 66, 68 (1980); Ark. R. Civ. P. 56. The object of the procedure for summary judgment is not to determine an issue, but to determine whether there is an issue to be tried. *Ashley* v. *Eisele*, 247 Ark. 281, 293, 445 S.W.2d 76, 82 (1969). In *Talley* v. *MFA Mutual Insurance Company*, 273 Ark. 269, 620 S.W.2d 260 (1981), the court said that summary judgment is an extreme remedy and proof submitted with the motion for such judgment "must be viewed in the light most favorable to the party resisting the motion with all doubts and inferences being resolved against the moving party." 273 Ark. at 271.

In the present case there was no failure by appellants to meet proof with proof as stated in the majority opinion. Nor was there a *prima facie* showing of entitlement to summary judgment made by the appellee. The burden was on the *appellee* to show that there was no genuine issue of fact for trial. It was not the appellants' burden, as stated in the majority opinion, to show that there was a genuine issue of fact. Given the policy provisions about coverage, the record in this case shows, in my judgment, a

genuine issue of fact with regard to whether the pickup truck was owned by the appellants for more than 30 days before the accident and even if it was, I think there is a genuine issue of fact as to whether the pickup replaced the 1977 Honda Civic on the day before the accident as Mrs. Elsie Black stated in her affidavit. I believe that this sworn statement is, by itself, enough to make summary judgment improper in this case.

For the reasons stated above, I dissent from the decision to affirm the summary judgment granted in this case.

COOPER, J., joins in this dissent.

Roderick BUNTON *v.* STATE of Arkansas

CA CR 91-77 820 S.W.2d 466

Court of Appeals of Arkansas
Division II
Opinion delivered December 4, 1991
[Rehearing denied January 22, 1992.]

Jeff Rosenzweig, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Senior Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Roderick Bunton was charged with aggravated assault as a result of an incident that occurred at the My Generation nightclub in Little Rock. Bunton waived a jury trial, was found guilty of the charge by the trial judge, and was sentenced to five years imprisonment. There was evidence at trial that Bunton fired a pistol at Officer Jerry Best outside the club on the night of May 13, 1990.

For reversal Bunton contends that the trial court erred in denying his motion for new trial and erred in denying his petition for a writ of error *coram nobis*. We find no error and affirm.

The defendant's motion for new trial was based on Ark. Code Ann. § 60-89-130 (1987). That code section provides that the court may grant a new trial:

> (5) Where the verdict is against the law or the evidence;
>
> (6) Where the defendant has discovered important evidence in his favor since the verdict;
>
> (7) Where, from the misconduct of the jury, or from any other cause, the court is of opinion that the defendant has not received a fair and impartial trial.

In support of the motion the defendant submitted his own affidvit and those of Anita Williams and Cynthia Wilkins. In her affidavit, Ms. Williams stated that she had seen the defendant and Joseph Stewart the evening of May 13 before they left for the nightclub. She said that she saw that Stewart, not the defendant, had a gun. She also stated that the day after the defendant was arrested, Stewart admitted shooting the gun.

Ms. Wilkins stated in her affidavit that she had been at Stewart's house when he and the defendant left. She said she saw

Stewart with a gun but did not see that Bunton had one.

At the hearing on the motion for new trial the defendant admitted that he had been aware of these witnesses but had not told his lawyer about them because he thought their testimony would be hearsay.

Whether to grant a new trial is a decision left to the sound discretion of the trial judge. *Vasquez* v. *State*, 287 Ark. 468, 701 S.W.2d 357 (1985). We do not reverse that decision absent an abuse of discretion. *Harvey* v. *State*, 261 Ark. 47, 545 S.W.2d 913 (1977). One of the primary factors to be considered is the diligence of the defendant in discovering the testimony. *See Newberry* v. *State*, 262 Ark. 334, 557 S.W.2d 864 (1977). In the case at bar the defendant was aware of the witnesses and their testimony. We do not think that his lack of diligence in bringing these witnesses to the attention of his trial counsel is excused by his own opinion as to the inadmissibility of their testimony. We find no abuse of discretion in the denial of the motion for new trial.

After the motion for new trial was denied the trial court held a hearing on the defendant's petition for a writ of error *coram nobis*. Bunton testified that after his conviction he happend to encounter a man named Clarence Fair, whom he had seen at a club before but had never met. In talking with Fair, Bunton learned that Fair had been at the nightclub the night of the shooting. Fair testified that he had been at the club on that night. He said he saw Joseph Stewart, not the defendant, shoot a gun outside the club. Fair testified that there were no police officers around when he saw the shot fired. In denying the petition for the writ, the trial judge noted that he did not think Fair's testimony would have made a difference because the evidence at trial was that police officers were present when the shot was fired. The trial judge inferred that Fair had observed a different incident.

In *Penn* v. *State*, 282 Ark. 571, 670 S.W.2d 426 (1984), the supreme court described the writ of error *coram nobis* as an excessively rare remedy, more known for its denial than its approval. The court said "[t]he writ is granted only when there is an error of fact extrinsic to the record such as insanity at the time of trial, a coerced plea of guilty, or material evidence withheld by the prosecutor." *Penn* at 573. While strictly limiting the decision to the facts of the case, the court in *Penn* held that a subsequently

discovered confession made by a third party might be grounds for issuance of the writ.

Recently, the supreme court has made it clear that newly discovered evidence is not a basis for relief under *coram nobis*. *Smith* v. *State*, 301 Ark. 374, 784 S.W.2d 595 (1990). In our view the proffered evidence of Clarence Fair was merely newly discovered evidence and as such will not support the issuance of the writ.

For the reasons stated we find no error and affirm.

Affirmed.

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

Michael David COX *v.* STATE of Arkansas

CA CR 91-75 820 S.W.2d 471

Court of Appeals of Arkansas
Division I
Opinion delivered December 11, 1991
[Rehearing denied January 15, 1992.]

Joel O. Huggins, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case was charged with one count of delivery of a controlled substance, a Class Y felony. After a jury trial, he was convicted of that offense and was sentenced to 25 years in the Arkansas Department of Correction and fined $3,500.00. From that conviction, comes this appeal.

For reversal, the appellant contends that the trial court erred in not granting a mistrial after the state assertedly commented during *voir dire* on the appellant's failure to testify; that the trial

court erred in overruling the appellant's objection to evidence not provided to the appellant by the State in discovery; and that the trial court erred in denying the appellant's motion to dismiss on the grounds that the appellant's due process right to a speedy trial was violated. We find no error, and we affirm.

We first address the appellant's contention that the trial court erred in denying his motion for a mistrial following the State's asserted comment on the appellant's failure to testify. During *voir dire*, the prosecution made the following remark to the potential jurors:

> You, the jury, are the judges of credibility . . . the credibility of the witness. You make a decision that witness sitting right there answering questions, talking to you, about whether what they are telling you is the truth. And you base that on the same way you decide whether I'm telling you the truth, whether the Judge is telling you the truth, or whether anybody else is, by you looking at them, knowing that you . . . determining what you can determine from the way they're . . . use what you use everyday.
>
> What I'm asking you to do is that you will not . . . or will you do the same thing with a police officer, or with the defendant, or with the witnesses, based on what you see and hear and your perception of them, not necessarily based on their appearance to you. . . .

It is improper for a prosecutor to directly call the jury's attention to a defendant's failure to testify on his own behalf. *Williams* v. *Lockhart*, 797 F.2d 344 (8th Cir. 1986). Clearly, the statements made to the potential jurors in the case at bar did not directly call their attention to the defendant's failure to testify. However, even indirect references are impermissible if they either: (1) manifest the prosecutor's intention to call attention to the defendant's failure to testify, or (2) are such that the jury would naturally and necessarily take them as a comment on the defendant's failure to testify. *United States* v. *Nabors*, 762 F.2d 642 (8th Cir. 1985). Taking the prosecution's remarks in context, as we must, *see Nabors, supra*, we find no impermissible comment. The incidental mention of the defendant along with a police officer and other witnesses in the context of a remark concerning the jury's function in determining the credibility of

witnesses does not manifest an intention to call attention to the defendant's failure to testify. Nor do we think that the jury would naturally and necessarily take a reference to the defendant in this context as a comment on the defendant's failure to testify. Nor do we think that the jury would naturally and necessarily take a reference to the defendant in this context as a comment on the defendant's failure to testify. The appellant argues that the prosecution's comment constituted reversible error because one or more of the jurors may have expected, based on the prosecution's statement, that they would be given the opportunity to judge the defendant's credibility on the witness stand. We do not agree. Although some juror might conceivably have viewed the remarks in the manner suggested by the defendant, the test is whether the jury would necessarily or probably have done so. *United States* v. *Nabors, supra.* Because we do not think that the jury would necessarily or probably have adopted the view of the prosecution's remarks suggested by the appellant, we find no error on this point.

We next address the appellant's contention that the trial court erred in overruling his objection to evidence not provided to him by the State in discovery. There was evidence at trial to show that Officer Lance King of the Arkansas State Police, working with a confidential informant, purchased 1.5 grams of cocaine from the appellant at the appellant's home. There was also evidence that, when Officer King asked about purchasing some cocaine, the appellant responded that he was waiting on a shipment and that the appellant's companion, Joe Lockhart, was going to the airport to pick up a load of cocaine. There was testimony that, before Mr. Lockhart left for the airport, he asked to borrow some scales to weigh the cocaine. The appellant agreed, went into the front bedroom, and returned carrying a set of triple beam scales, which he handed to Mr. Lockhart in a box. Officer King and the confidential informant then told the appellant that they were leaving and that they would return for the cocaine. Officer King and the informant returned to the appellant's residence at about 8:30 p.m., before Mr. Lockhart returned. When Mr. Lockhart arrived, he and the appellant went into the front bedroom for about ten minutes; Mr. Lockhart then left the house, and the appellant motioned to Officer King and the confidential informant to come into the bedroom with him. In the

bedroom, the appellant handed the cocaine to Officer King in exchange for $200.00. Officer King testified that, while he was in the front bedroom, he saw a set of triple beam scales with some cocaine on them. The appellant objected to Officer King's testimony concerning the triple beam scales seen in the bedroom on the grounds that the State failed to inform him that Officer King would testify to having seen a set of scales with cocaine on them in the appellant's bedroom.

Under Ark. R. Crim. P. 17.1, the prosecuting attorney is obliged to disclose to the defendant upon timely request specific material and information, including the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial. Although under Rule 17.1 the State is required to disclose statements made by the defendants, any co-defendants, and any experts involved in the case, the rule does not require the disclosure of statements made by other witnesses. In the case at bar, the appellant was provided with a copy of the written request made by Officer King, and the defense counsel interviewed Officer King prior to trial. Neither the report nor the interview revealed that Officer King had observed the triple beam scales and cocaine in the appellant's bedroom on the night the transaction occurred; apparently, this fact came to light during a conference between the prosecutor and Officer King prior to trial. The appellant contends that the State violated the discovery rule by failing to inform him that Officer King intended to testify concerning the presence of the triple beam scales and cocaine in the appellant's bedroom, and that the trial court erred in allowing Officer King to so testify. We do not agree. The appellant cites no authority to support the proposition that the State is required to disclose the substance of a witness's testimony to a defendant. Rule 17.1(a)(i) requires only that the names and addresses of witnesses be disclosed by the prosecuting attorney. *See Shuffield* v. *State*, 23 Ark. App. 167, 745 S.W.2d 630 (1988). Because the precise details of Officer King's testimony were not subject to discovery, we hold that the trial court did not err in overruling the appellant's objection to the testimony concerning the triple beam scales found in the bedroom.

Finally, the appellant contends that the trial court erred in denying the appellant's motion to dismiss on the grounds that his due process right to a speedy trial was violated. The record shows

that the offense was committed on February 5, 1988; the information was filed sixteen months later on June 12, 1989; the appellant was arrested on December 5, 1989; and trial was held eight months after his arrest, on August 21, 1990. In addition, several continuances were granted at the request of the defendant, and these periods of delay are excluded in computing the time for speedy trial under Ark. R. Crim. P. 28.3(c). The appellant concedes that he was brought to trial prior to the technical time required by the speedy trial time as set out in Ark. R. Crim. P. 28; however, he argues that the twenty-two month span between the commission of the offense and his arrest violated his constitutional right to a speedy trial and that the charges against him should therefore have been dismissed. We do not agree.

Four basic factors must be considered in determining whether a defendant's constitutional right to a speedy trial has been violated. These are: (1) the length of the delay; (2) the reason for the delay; (3) the defendants' assertion of his rights; and (4) the prejudice to the defendant. *Stephens* v. *State*, 295 Ark. 541, 750 S.W.2d 52 (1988). In the case at bar, the appellant was tried approximately eight months after his arrest, and his speedy trial argument is based on his assertion of prosecutorial delay in filing charges against him and affecting his arrest. Although it is true that there are instances where prosecutorial delay in the bringing of criminal charges may constitute prejudicial error requiring dismissal, the key element is whether or not prejudice results which would require dismissal of those charges. *Bennett* v. *State*, 302 Ark. 179, 789 S.W.2d 436; *cert. denied*, ___ U.S. ___, 111 S. Ct. 144 (1990). In *Bennett, supra*, the Arkansas Supreme Court held that a delay of nine years in the filing of charges did not mandate dismissal. Although the appellant's attorney, who was present when the appellant gave his statement to the Sheriff, died before the appellant was charged with murder, the Supreme Court held that no prejudice was established in the absence of an allegation that the deceased attorney had any special knowledge which would have proved beneficial to the appellant at trial. *Bennett, supra*, 302 Ark. at 182. The appellant in the case at bar argues that he was prejudiced by the asserted prosecutorial delay in bringing charges because several witnesses who were present at the drug buy were unable to recall details of the night in question. However, the appellant has made no

showing to support a finding that these witnesses would have remembered the events of the night in question more completely even if trial had commenced earlier. *See Halfacre* v. *State*, 292 Ark. 331, 731 S.W.2d 179 (1987). There is a presumption that a trial occurring within the time limit set out in Ark. R. Crim. P. 28 meets constitutional requirements, *see Halfacre, supra*, and on this record we cannot say that the appellant has made a sufficient showing of prejudice to overcome that presumption. *See id.*

Affirmed.

DANIELSON and MAYFIELD, JJ., agree.

Maurice Eugene FIELDS, Jr. *v.* STATE of Arkansas

CA CR 90-337 820 S.W.2d 467

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

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

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

ELIZABETH W. DANIELSON, Judge. Appellant Maurice Fields was charged with aggravated robbery and entered a plea of not guilty by reason of mental disease or defect. Appellant waived his right to a jury trial and was found guilty of the offense of aggravated robbery. He was sentenced as an habitual offender to twenty-eight years in the Arkansas Department of Correction. Appellant contends on appeal that (1) the trial court erred in finding he could appreciate the criminality of his conduct and conform his conduct to the requirements of the law and (2) the trial court erred in considering appellant's exercise of his *Miranda* rights in finding appellant mentally responsible. We find no error and affirm.

The evidence reveals that on February 16, 1988, appellant entered a Union National Bank and handed a teller a note that stated: "This is a robbery. Don't make it murder." Appellant opened a bag and had the teller put money into it. He then left the

bank on foot, pursued by a customer who was in the bank at the time of the robbery. Shortly thereafter, appellant was apprehended by the police, and charged with aggravated robbery.

After appellant entered a plea of not guilty by reason of mental disease or defect, he was evaluated by the Arkansas State Hospital. The hospital staff diagnosed appellant as not fit to stand trial, and requested that he be admitted for treatment. After three months of treatment, the State Hospital reported that appellant was fit to proceed, but concluded that he lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time the crime was committed.

Appellant first contends that the trial court erred in finding appellant could appreciate the criminality of his conduct and conform his conduct to the requirements of the law. Appellant relies on Ark. Code Ann. § 5-2-313 (1987), which provides that on the basis of a psychiatric report filed pursuant to Ark. Code Ann.§ 5-2-305, "the court may, after a hearing if a hearing is requested, enter judgment of acquittal on the ground of mental disease or defect if it is satisfied that, at the time of the conduct charged, the defendant lacked capacity, as a result of mental disease or defect, to conform his conduct to the requirements of the law or to appreciate the criminality of his conduct." Lack of capacity due to mental disease or defect is an affirmative defense and must be proved by a preponderance of the evidence. Ark. Code Ann. § 5-2-312 (1987); *Franks* v. *State*, 306 Ark. 75, 811 S.W.2d 301 (1991). A motion for directed verdict based on this defense may be granted only when no factual issues exist. *Franks*, 306 Ark. 75, 811 S.W.2d 301.

Appellant did present evidence in support of his contention that he lacked the capacity to appreciate the criminality of his conduct at the time the crime was committed. However, there was also substantial evidence to support the trial court's finding that appellant failed to prove his affirmative defense by a preponderance of the evidence. In reaching its decision, the trial court considered the medical testimony, testimony by family members, and evidence of appellant's demeanor at the time of the crime and shortly thereafter.

The night before the robbery, appellant was trying to get

money to leave town. He asked his parents for the money, but they declined to give it to him. The next day he robbed the bank. Witnesses to the crime testified that there was nothing unusual or bizarre about appellant's appearance or actions on that day. Police officers who spoke with appellant shortly after the crime testified that he was lucid and in control, and that there was nothing bizarre about his behavior. A psychologist who had found appellant insane with regard to an earlier robbery testified that he had relied in part on the opinions of the police and eyewitnesses, and that his opinion might very well change in this case if the eyewitnesses and police officers described appellant as appearing normal at the time of the robbery.

Medical evidence that a defendant lacks the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law does not obligate a judge to acquit under § 5-2-313 if there is substantial evidence presented that would support the judge's finding that the affirmative defense of mental defect was not proved by a preponderance of the evidence. *See Franks*, 306 Ark. 75, 811 S.W.2d 301; *Robertson* v. *State*, 304 Ark. 332, 802 S.W.2d 920 (1991). Substantial evidence is evidence of sufficient force and character to compel a conclusion of reasonable and material certainty. *Addison* v. *State*, 298 Ark. 1, 765 S.W.2d 566 (1989). We cannot say the trial court erred in finding appellant failed to prove by a preponderance of the evidence that he was incapable of conforming his conduct to the requirements of the laws at the time the crime was committed.

Appellant's second contention is that the trial court erred in considering his exercise of his *Miranda* rights in finding appellant mentally responsible. During presentation of the state's case, there was testimony by one of the officers involved in appellant's arrest that appellant carried on normal conversation with them but invoked his right to remain silent and refused to make a statement.

For reversal on this point, appellant relies on *Wainwright* v. *Greenfield*, 474 U.S. 284 (1986), in which the United States Supreme Court held that use of a defendant's exercise of his *Miranda* rights as evidence of his sanity violates due process. In *Greenfield*, the prosecutor introduced the testimony of two police

officers who described the occasions on which the defendant had exercised his right to remain silent and had expressed his desire to talk to an attorney before answering any questions. Both officers repeated several colloquies with the defendant. In his closing argument, over defense counsel's objection, the prosecutor reviewed the testimony of the officers and suggested that the defendant's repeated refusals to answer questions demonstrated a degree of comprehension that was inconsistent with his claim of insanity.

On appeal, Greenfield relied on the case of *Doyle* v. *Ohio*, 426 U.S. 610 (1976), in which the Supreme Court held that cross-examination regarding a defendant's post-*Miranda* warnings silence was fundamentally unfair and violated the Due Process Clause of the Fourteenth Amendment. The court noted that the source of the unfairness was the implicit assurance contained in the *Miranda* warnings that one's choice to remain silent would carry no penalty.

The court in *Greenfield* found that it was equally unfair to breach the implied promise of the *Miranda* warnings by using the defendant's silence to overcome his plea of insanity. 474 U.S. at 292. In so holding, however, the court noted that "the State's legitimate interest in proving that the defendant's behavior appeared to be rational at the time of his arrest could have been served by carefully farmed questions that avoided any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel." 474 U.S. at 295. In a footnote to this statement, the court observed that the defendant had not contested the point that a prosecutor may legitimately inquire into and comment upon purely demeanor or behavior evidence. *Id.*

In *Greer* v. *Miller*, 482 U.S. 756 (1987), the court again applied *Doyle* v. *Ohio* in determining whether a prosecutor's question regarding a defendants' postarrest silence required reversal of the conviction. In *Miller*, the trial court had sustained an objection to the prosecutor's question about the defendant's silence. The jury was instructed to disregard any questions to which an objection was sustained. The United States Supreme Court found no constitutional error, noting that the prosecutor was not allowed to undertake impeachment on or call attention to

the defendant's silence. 483 U.S. at 764. In *Sims* v. *State*, 30 Ark. App. 168, 786 S.W.2d 839 (1990), we held that "where a defendant's silence is mentioned by the State, it is harmless error if there is no prosecutorial focus by repetitive questioning or arguing on a defendant's silence where the evidence of guilt is overwhelming." 30 Ark. App. at 172.

In the case at bar, the trial judge was aware of *Wainwright* v. *Greenfield* and the restrictions it imposed. In a letter to counsel for both parties, he stated, "[*Wainwright* v. *Greenfield*] would not prohibit police officers who had contact with Fields to be called to respond to carefully phrased questions about the defendant and his demeanor. It only prohibits this being coupled with reference to his *Miranda* warnings."

There was certainly no prosecutorial focus on the defendant's exercise of his rights; in fact, the prosecutor carefully framed her questions regarding appellant's demeanor and instructed the witness not to testify as to what the defendant said. She asked questions such as whether appellant was coherent, whether he had exhibited bizarre behavior, and whether he had responded in an appropriate conversational manner. During the trial, the prosecutor never asked any questions regarding appellant's exercise of his *Miranda* rights.

In response to the prosecutor's question about appellant's demeanor, one officer made reference to the fact that the defendant had exercised his rights and chose not to make a formal statement. The focus of the officer's testimony was not on appellant's exercise of his rights but on appellant's demeanor and behavior as he conversed with the police officers. In *Lindgren* v. *Lane*, 925 F.2d 198 (7th Cir. 1991), the Seventh Circuit Court of Appeals found no violation of due process, although an officer did make a reference to the defendant's post-*Miranda* silence, because the prosecutor did not call attention to the silence and the silence was not submitted to the jury as evidence of the defendant's sanity. 925 F.2d at 201.

In response to objections to the officer's testimony in this case, the judge replied in part that he did not have a problem with the reference to the *Miranda* rights being a little out of line because he, not a jury, was hearing the matter. He pointed out that in the *Greenfield* case a jury was involved, which created a

potential problem, but that he knew "those things" happened, referring to the defendant's choice to exercise his rights.

In cases tried without a jury, the judge is presumed to have considered only competent evidence, and this presumption is overcome only when there is an indication that the trial judge did give some consideration to the inadmissible evidence. *Summerlin* v. *State*, 7 Ark. App. 10, 643 S.W.2d 582 (1982). Here all indications are that the trial judge was well aware that he could not use appellant's exercise of his *Miranda* rights as evidence of appellant's sanity and that he did in fact restrict his considerations to evidence concerning appellant's demeanor and behavior during the time appellant was conversing with the officers. Because there was no prosecutorial focus on appellant's exercise of his *Miranda* rights and the judge did not use appellant's exercise of his rights as evidence of sanity, the officer's brief reference to the fact that appellant had exercised his rights did not result in a violation of appellant's due process rights.

Affirmed.

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

Carlene RHODES *v.* PROGRESSIVE CASUALTY INSURANCE COMPANY

CA 91-130 820 S.W.2d 293

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

Gregory E. Bryant, for appellant.

Matthews, Sanders, Liles & Sayes, by: *Marci Talbot Liles*, for appellee.

MELVIN MAYFIELD, Judge. Carlene Rhodes brings this appeal from a summary judgment in favor of appellee, Progressive Casualty Insurance Company. We find no error and affirm.

This case was submitted to the trial court upon a motion for summary judgment; the motion attached and incorporated the appellant's deposition and other exhibits. From these matters, we can determine that, on February 15, 1989, appellant applied for insurance coverage through AAA Auto Club on her 1987 Chevrolet Silverado truck. The appellant dealt with Randal M. Crossland, an agent for AAA, and Mr. Crossland obtained coverage for appellant's vehicle with Progressive Casualty Insurance Company. On the day the application was made, appellant made a down payment of $198.00 toward the premium. On April 4, 1989, she made the first of two remaining installment payments. Appellant subsequently received a cancellation notice citing non-payment of premium. She then contacted Mr. Crossland, and he assured her that she did in fact have coverage even though there had been a mix-up in the processing of her check for the April installment. Appellant then received a bill from the

company through whom the vehicle was financed, stating that they were securing coverage for her because the vehicle was uninsured. She again contacted Mr. Crossland, who indicated he had made a mistake with her policy but would take care of it and again assured her that she had coverage with appellee.

Appellant was involved in an accident on August 23, 1989, and her truck was damaged. Shortly thereafter, she went to Mr. Crossland's office and was assured by him that the coverage was in effect. Appellant then told Mr. Crossland that her vehicle had been damaged in an accident, and Mr. Crossland, at that point, informed appellant that she was not insured.

Subsequently, appellant met with Greg Castleman, a local agent for appellee; he admitted that there had been a mistake but stated that appellee and AAA would "work it out." During the course of their conversation, he denied that there was any liability on the part of appellee. On October 20, 1989, appellant filed suit against Mr. Crossland and appellee, alleging her lapse of insurance coverage was a result of Mr. Crossland's negligence. Her complaint contained no allegations that appellee was negligent.

On October 30, 1990, appellant settled her claim against Mr. Crossland and executed a release on his behalf. In the release, she stated that she reserved any rights, claims, or causes of action she might have against appellee.

On November 5, 1990, appellee filed the motion for summary judgment, arguing that no cause of action remained against it because of appellant's release of her claim against Mr. Crossland. The trial court agreed and granted summary judgment on behalf of appellee. From that ruling, comes this appeal.

Appellant contends that the court erred in finding the release of Mr. Crossland eliminated any cause of action against appellee. The cases relied upon by appellant, however, deal with joint tortfeasors and are inapplicable here. In the present case, any liability that appellee might have would be imposed upon it because of its position as Mr. Crossland's principal. In *Porter-DeWitt Constr. Co.* v. *Danley*, 221 Ark. 813, 819, 256 S.W.2d 540, 543 (1953), the Arkansas Supreme Court, quoting from *Bradley* v. *Rosenthal*, 154 Cal. 420, 97 P. 875, 877 (1908), stated:

> Where a recovery is sought in an action against a principal and his agent based upon the act or omission of the agent which the principal did not direct and in which he did not participate and for which his responsibility is simply that cast upon him by law by reason of his relationship to the agent, a judgment in favor of and exonerating the agent generally *ex proprio vigore* relieves the principal of responsibility and may be availed of by the principal for that purpose.

In *Barnett v. Isabell*, 282 Ark. 88, 89, 666 S.W.2d 393, 394 (1984), the supreme court repeated the rule:

> [When] liability is claimed on the ground of the alleged negligence of a servant or agent, a judgment in favor of either the master or principal on the one hand, or the servant or agent on the other, sued alone, is res judicata, or conclusive, as to such issue of negligence, in a subsequent action against the other, a derivative responsibility being present.

(quoting *Davis* v. *Perryman*, 225 Ark. 963, 969, 286 S.W.2d 844, 847 (1956)).

In the present case, appellant's claim against appellee for liability is based solely upon the relationship of appellee and Mr. Crossland as principal and agent. Appellant admitted appellee played no active role in the mix-up concerning her insurance and that she placed no blame on the company independent of Mr. Crossland's actions. Where the liability of a master for a tort of his servant is based solely on the doctrine of *respondeat superior*, a valid release of the servant operates to release the master:

> In regard to a release of the servant as releasing the master, it has been said that the same rule should apply when the question of a servant's liability is finally determined by a release as when it is determined by a verdict. One view expressed is that because the basis of liability on the theory of respondeat superior is that the master is liable only for the act of his servant, and not for anything he himself did, therefore, when the servant is not liable, the master for whom he was acting at the time should not be

liable.

53 Am. Jr. 2d *Master & Servant* § 408 (1970). Thus, when appellant released Mr. Crossland from liability and settled her claim with him, there remained no cause of action against appellee based on the acts of its agent.

Appellant also asserts that all premiums for her insurance contract were paid and that the appellee failed to acknowledge her coverage. There is no evidence in the record, however, to support this argument. The record reflects that only the first two of three installment payments were paid. Additionally, the policy's term began on February 15, 1989, and was for a period of six months. If all premiums had been paid, coverage would have expired on August 15, 1989, eight days before the accident. The record lacks any evidence that her policy contained a grace period which would have extended coverage beyond the policy's expiration date. Appellant also asserts that the issues of whether Mr. Crossland was actually an agent of appellee and whether the appellant attempted to re-establish insurance coverage with appellee are material issues of fact which would preclude the entry of summary judgment. Once the moving party makes a prima facie showing of entitlement to summary judgment, however, the party opposing summary judgment must meet proof with proof by showing a genuine issue of material fact. *Neel* v. *Citizens First State Bank*, 28 Ark. App. 116, 119-20, 771 S.W.2d 303, 305 (1989). Appellant wholly failed to satisfy this burden. We agree with the trial court that no material issues of fact remained and that summary judgment was properly granted to appellee.

Affirmed.

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

GENCORP POLYMER PRODUCTS *v.* Sadie LANDERS

CA 91-7 820 S.W.2d 475

Court of Appeals of Arkansas
En Banc
Opinion delivered December 18, 1991

Bill H. Walmsley, for appellant.

Bill B. Wiggins, for appellee.

JAMES R. COOPER, Judge. This appeal comes from the decision of the Arkansas Workers' Compensation Commission. The appellant contends there is no substantial evidence to support the Commission's finding that the appellee sustained a compensable injury to her wrists and hands in February 1989, and that the Commission erred in reserving the issue of the appellee's entitlement to temporary total disability benefits for the period from February to June 1989. We affirm on the substantial evidence issue but we reverse as to the reservation of the temporary total disability issue.

As of February 1989, the appellee had been employed by the

appellant for four years as a splicer on the appellant's production line. The job required extensive use of her hands which she testified caused her to have pain in her hands and wrists. During the four year period, she was treated by the company doctor who prescribed medication for the condition which flared up sporadically. About two weeks prior to February 1989, the appellee noticed an increased amount of pain in her wrists after operating a certain gasket. The pain slacked off until she operated this gasket again on February 14, 1989, when she experienced extreme pain in her neck, shoulders and upper arms. Shortly thereafter, she saw a local orthopedic surgeon and was diagnosed with cervical myofascitis. This condition improved, and it was not until May 1989 that she was diagnosed with carpal tunnel syndrome in both wrists and hands which worsened until she ultimately had surgery performed on the left wrist in September 1989, and on the right wrist in November 1989. She had missed some work between February and June 1989, and was off continuously after June 10, 1989. In December 1989, she was examined by another orthopedic surgeon at the appellant's request, and that doctor did not contest the previous doctor's diagnosis.

The appellee filed a workers' compensation claim as a result of the bilateral carpal tunnel syndrome. A hearing was held before an administrative law judge in December 1989. He found that the appellee had sustained a compensable injury, or injuries, during February 1989, or some subsequent date prior to May 1989. He found her to be temporarily totally disabled beginning June 10, 1989, and continuing to a date yet to be determined. He also found the record incomplete to determine the appropriate periods of temporary total disability benefits between February and June 1989, and reserved this issue for future determination. The decision was appealed to the Arkansas Workers' Compensation Commission, and in October 1990, the decision of the administrative law judge was affirmed and adopted without any further determination of entitlement to benefits for the period reserved.

On appeal, the appellant concedes that the appellee may have had a compensable injury to her neck, shoulders, and upper arms in February 1989, but it contests the finding of a causal connection between any compensable injury the appellee

may have suffered and the manifestation of carpal tunnel syndrome. In a workers' compensation case, the burden rests on the claimant to establish her claim for compensation by a preponderance of the evidence. *Bragg* v. *Evans St. Clair, Inc.*, 15 Ark. App. 53, 688 S.W.2d 959 (1985). In reviewing the sufficiency of the evidence to support the findings of the Workers' Compensation Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Tiller* v. *Sears, Roebuck & Co.*, 27 Ark. App. 159, 767 S.W.2d 544 (1989).

The appellee was the only witness at the hearing. She testified that the problems with her wrists decreased until she had to operate a particular gasket sometime just before February 1989, and again on February 14, 1989. She also stated that the pain in her neck and shoulders ceased after the surgery on each wrist. The question of credibility and the weight to be given testimony is a matter exclusively within the province of the Commission. *Hardin* v. *Southern Compress Co.*, 34 Ark. App. 208, 810 S.W.2d 501 (1991).

The orthopedic surgeon's opinion letters which were introduced as evidence stated that the carpal tunnel syndrome was "most likely secondary to multiple repetitious use of the hands at work, and that, therefore, it would seem to be reasonable that it was directly related to her employment." This Court has stated that causal connection is generally a matter of inference, and possibilities may play a proper and important role in establishing that relationship. Moreover, medical opinions need not be expressed in terms of reasonable medical certainty when there is supplemental evidence supporting the causal connection. *Hope Brick Works* v. *Welch*, 33 Ark. App. 103, 802 S.W.2d 476 (1991). The claimant's own testimony was that her job involved extensive use of hands for eight hours per day, and that she had lived with this pain for the four years she was employed as a splicer. In view of this evidence coupled with the doctor's opinion, one could infer her injury was causally connected to her employment. On this evidence, the Commission found that the appellee's carpal tunnel syndrome was directly related to her employment.

We may reverse the Commission's factual decisions only when we are convinced that fair-minded persons, with the

same facts before them, could not have reached the conclusion arrived at by the Commission. *Snow* v. *Alcoa*, 15 Ark. App. 205, 691 S.W.2d 194 (1985). The question is whether the evidence supports the findings made by the Commission and even if the decision is against the preponderance of the evidence, we will not reverse where its decision is supported by substantial evidence. *Id.* Though the causal connection here may only be by mere inference, we believe that reasonable minds could reach the same conclusion as that of the Commission, and we therefore hold that substantial evidence supports the Commission's conclusion that the appellee sustained a compensable injury to her wrists and hands subsequent to February 1989, but prior to June 10, 1989.

The appellant also contends that the Commission erred in reserving the issue of the appellee's entitlement to temporary total disability benefits between February 1, 1989 and June 10, 1989. We agree. The Commission affirmed and adopted the decision of the administrative law judge, which includes the following:

> 7. The record concerning the appropriate periods of temporary disability prior to June 10, 1989, and subsequent to February 1, 1989, is not sufficiently complete to allow a determination which would be fair and just to all parties concerned, and a determination in regard to the claimant's entitlement to such benefits during this period is reserved for future determination upon further development of the record, if necessary.

It is the duty of the Workers' Compensation Commission to translate the evidence on all issues before it into findings of fact. *Sanyo Manufacturing Corporation* v. *Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984). The Commission's statutory obligation is to make specific findings of fact and to decide the issues before it by determining whether the party having the burden of proof on an issue has established it by a preponderance of the evidence. *White* v. *Air Systems, Inc.*, 33 Ark. App. 56, 800 S.W.2d 726 (1990); Ark. Code Ann. § 11-9-705(a)(3) (1987). The quoted paragraph is not a finding of fact, but is a declination to find a fact.

Ark. Code Ann. § 11-9-705(c)(1) provides that all evidence shall be presented to the Commission at the initial hearing on the controverted claim. The burden of proving a case beyond specula-

tion and conjecture is on the claimant. *Bragg, supra*; 3 Arthur Larson, *The Law of Workmen's Compensation*, § 80.33(a) (1952).

By reserving the issue of whether the appellee was entitled to temporary total disability benefits for the period from February to June 1989, the Commission simply declined to say that the appellee failed to meet her burden of proof on this issue. This constitutes error on the part of the Commission as our workers' compensation statute states that the evidence shall be weighed impartially, and without giving the benefit of the doubt to any party. Ark. Code Ann. § 11-9-704(c)(4). The Commission has allowed the appellee a "second bite at the apple" by giving her another opportunity to present evidence substantial enough to carry her burden. Though we do not interfere with the actions of the Commission unless we find it has acted without or in excess of its authority, *Allen Canning Company* v. *McReynolds*, 5 Ark. App. 78, 632 S.W.2d 450 (1982), disregarding its duty to find the facts in order to give the appellee the benefit of the doubt is not within the Commission's authority.

Therefore, we hold that reserving the issue of the appellee's entitlement to temporary total disability benefits from February 1 to June 10, 1989 is reversed. We hold that the appellee failed to meet her burden of proof on this issue, and therefore, she is denied benefits for the reserved period.

Affirmed in part; reversed in part.

ROGERS, J., concurs in the result.

JENNINGS and MAYFIELD, JJ., concur in part; dissent in part.

JOHN E. JENNINGS, Judge, concurring in part, dissenting in part. I agree with the majority's view that there is substantial evidence to support the Commission's finding of a causal connection between the claimant's injury and her employment. I disagree, however, with the majority's view that the administrative law judge exceeded his authority in reserving the issue of temporary disability for the period of time between February 1, 1989, and June 10, 1989. The majority is of course right in saying that the Commission has a duty to make findings of fact and to decide the issues presented to it. It is also true that the claimant had the burden of proof.

The duty to decide issues does not arise, however, until all the evidence is in. Until that point is reached the "burden of proof" is irrelevant. The determination as to whether all the evidence is in, or stated another way, whether the record is fully developed, is one which must be made initially by the administrative law judge who hears the case. Arkansas statute law expressly authorizes the action taken by the administrative law judge in this case. "Further hearings for the purpose of introducing additional evidence will be granted only at the discretion of the hearing officer or commission." Ark. Code Ann. § 11-9-705(c)(1) (1987). So do the Commission's own rules: "The Commission may, in its discretion, postpone or recess hearings at the instance of either party or on its own motion." W.C.C. Rule 13 (1988). Although an agency's interpretation of its own rules is not binding upon the courts, it is highly persuasive. *Sparks Reg. Med. Ctr.* v. *Arkansas Dept. of Human Serv.*, 290 Ark. 367, 719 S.W.2d 434 (1986). Arkansas Code Annotated Section 11-9-705(a)(1) provides that the Commission, in conducting a hearing, is not bound by technical rules of procedure, but may conduct the hearing "in a manner as will best ascertain the rights of the parties." The Commission may even institute an investigation of a claim on its own. *See* Ark. Code Ann. § 11-9-205(b)(1) and (c) (1987).

In the case at bar there is no inconvenience to appellant, nor for that matter to this court, associated with the administrative law judge's decision. Necessarily, the question of when the claimant's healing period ends remains to be decided. There is no apparent reason why the issue reserved cannot be decided at the same time.

Even in a criminal case, where the court is undoubtedly "bound by technical rules of procedure," after the state has rested and the defendant has moved for a directed verdict, a circuit judge has the discretionary authority to permit the state to reopen. *See Cameron* v. *State*, 278 Ark. 357, 645 S.W.2d 943 (1983). That authority is inherent, not statutory. Surely the ALJ likewise had the inherent authority to recess the hearing for the purpose of taking additional evidence, but that question need not be reached because the action taken was expressly authorized by statute and the Commission's own rule.

I would affirm the Commission's decision.

MAYFIELD, J., joins.

James Russell McLAIN *v.* Norma Jean McLAIN

CA 91-84 820 S.W.2d 295

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

Randell Templeton, appellant.

Honey & Honey, P.A., by: *Charles L. Honey*, for appellee.

JAMES R. COOPER, Judge. The parties to this chancery case were married in July 1966. Subsequent to their separation in November 1989, the appellee filed a complaint seeking a decree of divorce and equitable division of property. After a hearing, in a decree entered on November 21, 1990, the chancellor granted the appellee's prayer for divorce and division of property. From that decision, comes this appeal.

For reversal, the appellant contends that the chancellor erred in finding that certain securities were the appellee's separate, non-marital property; and in making an unequal division of the parties' marital property without stating its basis and reasons for not dividing the marital property equally in the decree. We agree with the appellant's first argument and, therefore, we reverse and remand.

The record shows that, when the appellee was fourteen years old, she inherited stock from her father; the appellee continued to hold the stock until 1986 when, during the marriage, she sold the stock for $50,000.00. The appellee also received a gift of three acres of land on Lake Hamilton from her mother in 1977, which she sold in 1984 for $90,000.00. The appellee also inherited from her parents treasury notes in the amount of $15,000.00, some U.S. Bonds valued at approximately $500.00, and approximately

$3,000.00 in a checking account. The proceeds from the properties were placed in the parties' joint bank account and remained in that account for approximately nine months to one year. The parties then withdrew $125,000.00 from the joint accont to purchase securities in the names of both the parties. In its decree, the chancery court found:

> That the stocks, bonds and securities are specifically found by the court to be property which was purchased by inherited funds by Norma Jean McLain and under the principle of tracing are found not to be marital property; therefore, the same should be, and are hereby, found to be the sole and separate property of Norma Jean McLain.

The appellant argues that the stocks, bonds, and securities were held by the parties as a tenancy by the entirety, and that the chancellor therefore erred in finding that they were the appellee's separate, non-marital property. We agree.

Arkansas Code Annotated § 9-12-317(a) (Repl. 1991) is the only authority for dividing estates by the entirety, and it provides for the equal division of property without regard to gender or fault. *Askins* v. *Askins*, 5 Ark. App. 64, 632 S.W.2d 249 (1982). In the case at bar, it is undisputed that the stocks, bonds, and securities were held in the parties' joint names. In *Lofton* v. *Lofton*, 23 Ark. App. 203, 745 S.W.2d 635 (1988), we held that once property, whether personal or real, is placed in the names of persons who are husband and wife without specifying the manner in which they take, there is a presumption that they own the property as tenants by the entirety and clear and convincing evidence is required to overcome that presumption.[1] Clear and convincing evidence is evidence by a credible witness whose memory of the facts about which he testifies is distinct, whose narration of the details is exact and in due order, and whose testimony is so direct, weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitation, of the truth of the facts related. *First National Bank* v. *Rush*, 30 Ark. App. 272, 785 S.W.2d 474 (1990). On review, the issue is whether

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[1] We note that the present case does not present issues concerning the ownership of checking accounts, savings accounts, or certificates of deposit held in the names of two or more persons. *See* Ark. Code Ann. § 23-32-1005 (1987).

the chancellor's finding that the appellee overcame the presumption that the account was held by the entirety by clear and convincing evidence, is against a preponderance of the evidence. *Reed* v. *Reed*, 24 Ark. App. 85, 749 S.W.2d 335 (1988).

In the case at bar, the appellee's separate funds were placed in a joint account and remained there for a period of nine months to one year before being withdrawn and used to purchase the stocks, bonds, and securities at issue. Although it is conceded that the stocks, bonds, and securities were purchased primarily with funds ultimately derived from the appellee's separate property, that does not end the inquiry. The fact that money or other property may be traced into different forms is an important matter, but tracing is merely a tool, a means to an end, and not an end in itself. *Canady* v. *Canady*, 290 Ark. 551, 721 S.W.2d 650 (1986). Because the stocks, bonds, and securities at issue were purchased and held in the parties' joint names, the overriding question in the case at bar is whether the appellee presented sufficient evidence to overcome the presumption that the parties owned the property as tenants by the entirety. *See Lofton* v. *Lofton, supra.* We hold that she did not. The appellee testified at the hearing that the parties filed joint income tax returns throughout the time that they were married, and that those returns listed the income and dividends from the investments as joint property. There was also evidence that, beginning in 1984, the appellant overwithheld state and federal income taxes from his paycheck to avoid the need to file estimated taxes or pay a large lump sum tax payment on the securities and other things at the end of the year. The only evidence presented by the appellee to rebut the presumption that she intended to make a gift was her testimony that she always thought of the stocks, bonds, and securities as being her property and that the appellant was entitled to the income or whatever the income could buy as long as he was married to her. To this, the appellee added that "like most married people we considered them all for one and one for all." Given the relatively long period of time that the appellee's separate funds were commingled in the joint account, and the evidence that marital funds derived from the appellant's paycheck were used to meet the tax consequences stemming from ownership of the stocks, bonds, and securities at issue, we think that the appellee's contradictory statements concerning her

intent in placing the stocks, bonds, and securities in the joint names of the parties falls short of the quantum of proof required to rebut the presumption that the property is owned by the parties as tenants by the entirety. *See Reed* v. *Reed*, 24 Ark. App. 85, 749 S.W.2d 335 (1988). We hold that the chancellor erred in finding that the stocks, bonds, and securities were the appellee's separate property, and we remand for the chancellor to modify his judgment to reflect that these properties were owned by the parties as tenants by the entireties prior to divorce and to divide the properties pursuant to Ark. Code Ann. § 9-12-317 (Repl. 1991).

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, because our holding in this case affects a significant portion of the parties' marital property and constitutes a substantial deviation from the property division ordered by the chancellor, and because we cannot on this record plainly see where the equities lie, 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 his prior determination regarding 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. *See Dunn* v. *Dunn*, 35 Ark. App. 89, 811 S.W.2d 336 (1991).

Reversed and remanded.

DANIELSON and MAYFIELD, JJ., agree.

DEPARTMENT OF HUMAN SERVICES *ex rel.* Tamara D. DAVIS *v.* Steve SEAMSTER

CA 91-107 820 S.W.2d 298

Court of Appeals of Arkansas
En Banc
Opinion delivered December 18, 1991

G. Keith Griffith, for appellant.

Eddie N. Christian, for appellee.

ELIZABETH W. DANIELSON, Judge. This case presents the

question of whether a paternity action brought by the Department of Human Services on behalf of a child born out of wedlock is barred by the doctrine of *res judicata* or collateral estoppel after a previous paternity action brought by the mother, without joining the child as a party, resulted in a finding of non-paternity. We attempted to certify this case to the Arkansas Supreme Court under Supreme Court and Court of Appeals Rule 29(4)(b) as one involving an issue of significant public interest, but certification was refused.

Tamara Davis was born out of wedlock to Pamela Davis on April 12, 1978. Pamela Davis brought an action against Steve Seamster in the Sebastian County Court, alleging that he was Tamara's father. On May 15, 1979, the county judge denied Pamela's complaint and found that she had failed to establish that appellee was the father of the child. From this judgment, which is included in the record in this appeal, it is apparent that Tamara was not a party to the action.

On March 13, 1990, the Department of Human Services, *ex rel.* Tamara Davis, brought a complaint against appellee, seeking support for Tamara and a declaration that appellee is Tamara's father. In his answer, appellee affirmatively pled *res judicata*, relying on the 1979 judgment by the Sebastian County Court.

In a letter opinion dated November 6, 1990, the chancellor stated:

> It is obvious to me that the issue of whether or not Steve Seamster is the father of Tamara Davis has been litigated, regardless of the parties in the suit. Accordingly, the Court finds that the issue of paternity of Tamara Davis has been adjudicated and that this matter is now res judicata.

An order finding that this issue is *res judicata* was entered on November 27, 1990. From that order, comes this appeal.

In its brief, DHS argues that *res judicata* should not bar this action because Tamara and DHS were not parties or in privity with parties to the previous county court action. DHS also argues that Tamara's interests in establishing paternity are not identical with those of her mother. Appellee argues that this case simply raises the same issue litigated before and that the doctrine of *res*

judicata should apply even if the parties are not the same or in privity with the parties in the 1979 action.

Under the doctrine of *res judicata*, a valid and final judgment rendered on the merits by a court of competent jurisdiction bars another action by the plaintiff or his privies against the defendant or his privies on the same claim or cause of action. *Toran* v. *Provident Life & Accident Ins. Co.*, 297 Ark. 415, 419, 764 S.W.2d 40, 42 (1989). The doctrine of collateral estoppel or issue preclusion bars the relitigation of issues of law or fact actually litigated by the parties in the first suit. *Id.*

It has been generally recognized that a husband and wife are estopped from later raising paternity as an issue where there has been a prior paternity determination in a divorce or annulment decree. *See Benac* v. *State*, 34 Ark. App. 238, 239, 808 S.W.2d 797, 798-99 (1991). In *McCormac* v. *McCormac*, 304 Ark. 89, 90-91, 799 S.W.2d 806, 807 (1990), the supreme court held that a mother could not, following a divorce decree awarding custody of a child, fixing child support, and setting visitation rights, relitigate the issue of paternity. Therefore, there is no question that, in the courts of this state, the parents of the child are bound by the doctrine of *res judicata* when the issue of paternity has been litigated in a prior action between them. On the other hand, it has been held that a finding in regard to a child's paternity in a divorce or annulment proceeding is not binding on the child in any subsequent action unless the child was a party to the prior proceeding. *See Shatford* v. *Shatford*, 214 Ark. 612, 217 S.W.2d 917 (1949).

Arkansas Code Annotated § 9-10-104 (Repl. 1991) provides that a petition for establishment of paternity may be filed by (1) a biological mother; (2) a putative father; (3) a person for whom paternity is not presumed or established by court order; or (4) the Arkansas Department of Human Services. This statute, however, was not in effect when Pamela Davis brought the first action against appellee to establish his paternity of Tamara. In that action, Pamela complied with the law then in effect by filing the complaint as provided by Ark. Stat. Ann. § 34-702 (Repl. 1962) which required the mother of the child to make the complaint. Under Ark. Stat. Ann. § 34-704 (Repl. 1962), the action could be revived in the name of the child if the mother died before the final

order. The paternity statutes then in effect did not otherwise provide for the child to be listed as a named plaintiff. Nevertheless, there was no doubt that such an action was brought on behalf of the child:

> The statutes recognize only one fundamental reason for a bastardy action, the recovery of support money for the infant. In some instances the mother might not see fit to bring an action at once; she might, for instance, be self-supporting. But the child is the real party in interest and should not be deprived of needed support by the mother's failure to bring an action.

Dozier v. *Veasley*, 272 Ark. 210, 211, 613 S.W.2d 93, 94 (1981).

Hence, Pamela brought the original paternity action against appellee in compliance with the statutes then in effect. It is also clear that she brought that action to obtain support for Tamara. We therefore cannot say that the chancellor erred in finding this action, which was also brought to obtain support for Tamara, to be barred by *res judicata. See Guziejka* v. *Desgranges*, 571 A.2d 32 (R.I. 1990); *T.R.* v. *A.W.*, 470 N.E.2d 95 (Ind. Ct. App. 1984).

We point out, however, that the paternity statutes have been extensively rewritten since 1979 and that the statutes currently in effect specifically provide that paternity actions may be filed by the child as a named party. The current statutes also recognize that, in some instances, the child's rights in such matters may be different from those of the mother. Accordingly, our decision in the case at bar necessarily applies only to paternity determinations made under the statutes in effect when the 1979 decision was rendered.

Affirmed.

MAYFIELD, J., concurs.

Glenn Miller BRATCHER, Jan Daggett Bratcher, Layne Bratcher, Arthur B. Bratcher, Jr. *v.* Norma Jean BRATCHER

CA 91-23 821 S.W.2d 481

Court of Appeals of Arkansas
Division II
Opinion delivered December 26, 1991
[Rehearing denied January 29, 1992.]

Hoover, Jacobs & Storey, by: *John Kooistra III* and *Lawrence J. Brady*, for appellants.

Meeks and Carter, P.A., by: *W. Russell Meeks III*, for appellee.

GEORGE K. CRACRAFT, Chief Judge. Appellants Glenn Miller Bratcher, Jan Daggett Bratcher, Layne Bratcher, and Arthur B. Bratcher, Jr., appeal from an order of the Pulaski County Probate Court ordering distribution of certain funds in the estate of their deceased father, Arthur B. Bratcher, to appellee Norma Jean Bratcher, his surviving spouse. Appellants make several arguments for reversal, but we do not reach the merits of the case because we have determined that the probate court was wholly without jurisdiction to resolve these issues. In order to understand the decision we have reached, a brief statement of some of the essential background of the matter is necessary.

Arthur Bratcher and Norma Jean Bratcher were married in 1977. At that time, Arthur Bratcher's total net worth consisted of 175 shares of stock in Twin City Beverage Company (TCB) and Twin City Development Company (TCD). Prior to the marriage, the parties entered into an antenuptial agreement under which appellee agreed that in the event of Bratcher's death, she would forego all of her rights as surviving spouse in exchange for a "dower interest in the increase in value [after the date of the marriage] of the husband's surviving ownership interest" in those two corporations. The agreement also awarded her several other items that are not in dispute here. In 1979, Bratcher sold all but twenty-five shares of his interest in the two corporations for $500,000.00 in cash and a promissory note for $1,800,000.00 bearing interest at the rate of ten percent. He also received other related benefits that were not involved in this litigation. The remaining shares of TCB and TCD were converted into stock of D & F Corporation and finally into stock certificates representing seventy percent of the stock in White River Beverage Company. In 1982, Bratcher created a revocable trust to which the bulk of

his assets, including the White River Beverage Company stock, were eventually transferred. Appellants, Bratcher's children by a former marriage, were named as beneficiaries of the trust in the event of his death. No provision was made for appellee in that trust.

In 1988, Bratcher died leaving a will that contained no provision for appellee but left his entire estate to his children. Appellee filed a petition in probate court electing to take against the will. The decedent's children contested the petition, setting up the ante-nuptial agreement as a bar to her right to so elect. The probate court ruled that the agreement was valid and enforceable and served as a complete bar to appellee's right to elect to take against the will. That ruling is not challenged on appeal.

Subsequently, appellee filed a motion seeking to have the probate court interpret the antenuptial agreement and set out with specificity the amounts to which she was entitled thereunder. The probate court held hearings on these issues, and by subsequent orders found that all of the assets of the estate at the time of death were traceable to the proceeds of the sale of the TCB and TCD stock. The court then determined the value of the stock as of the date of the marriage and the increase in value since that date, and directed the executor to pay appellee one-third of the amount of that increase in value, plus interest from the date of the decedent's death. The probate court further determined that the White River Beverage Company stock, then in the hands of a trustee (who was not named as a party in the action), was also traceable to the proceeds of the TCB and TCD stock. The probate judge directed that the White River stock be obtained by the executor, that it be sold, and that one-third of the proceeds be delivered to appellee in accordance with the antenuptial agreement as he had interpreted it. He further ordered the executor to reimburse appellee for the expense incurred by her in obtaining the experts who assisted her in tracing and evaluating the assets involved, and calculating their value.

The order of the probate court determining that the contract was a valid one and effectively barred appellee's right to elect to take against the will was within the jurisdiction of the probate court and has not been appealed. However, we conclude that all the provisions of the subsequent order with respect to the tracing

of assets mentioned in the agreement and the award to appellee, calculated on the value of those assets, were wholly outside the jurisdiction of the probate court and void.

It has long been established that the probate court is a court of limited jurisdiction and has only such jurisdiction and powers as are conferred on it by the constitution or by statute, or are necessarily incident thereto. The extent of the jurisdiction of the probate court to resolve controversies between the personal representative and third persons or strangers to the estate has been the subject of exhaustive analysis by our courts in *Hilburn* v. *First State Bank*, 259 Ark. 569, 535 S.W.2d 810 (1976), and *Estate of Puddy* v. *Gillam*, 30 Ark. App. 238, 785 S.W.2d 254 (1990). These cases adhere to our long-established rule that probate courts have no jurisdiction to resolve disputes as to property rights between a personal representative and third persons claiming adversely to the estate. They reaffirmed previous holdings that persons who are neither heirs, devisees, distributees, nor beneficiaries of the estate are third persons and "strangers" within the meaning of this rule. *See Ellsworth* v. *Cornes*, 204 Ark. 756, 165 S.W.2d 57 (1942).

Here, Bratcher's will made no provision for appellee. The probate court had held that she was barred from asserting her wish to take against the will and could not participate in the distribution of the estate as surviving spouse. Appellee's claim was based entirely upon the antenuptial agreement and, therefore, was one by a third person or stranger to the estate. Probate courts lack jurisdiction to enforce such contracts. *See Morton* v. *Yell*, 239 Ark. 195, 338 S.W.2d 188 (1965); *Merrell* v. *Smith*, 226 Ark. 1016, 295 S.W.2d 624 (1956). The probate court likewise lacked the power to afford the equitable relief that it granted after tracing the assets into the hands of the trustee of the revocable trust and the executor. *See Hilburn* v. *First State Bank, supra; Estate of Puddy* v. *Gillam, supra.* Nor does the fact that part of the assets constituting the subject matter of the dispute was in the hands of the executor give the probate court jurisdiction to determine ownership as between the executor and a stranger. *See Ellsworth* v. *Cornes, supra.*

In oral argument, one of the attorneys stated that the trial court had jurisdiction because appellee's rights under the

agreement were in the nature of a "claim" against the estate, over which the probate court does have jurisdiction. The statutes relative to claims against an estate do not refer to claims of title or for recovery of property, for they are in no sense claims against the estate of a deceased. The statutes dealing with probation of claims against the estates of deceased persons include only those claims susceptible to probate and only specific money demands due or to become due. *Evans* v. *Hoyt*, 153 Ark. 334, 240 S.W. 409 (1922); *see Fred* v. *Asbury*, 105 Ark. 494, 152 S.W. 155 (1912).

Although the probate judge in his order recognized limitations on his jurisdiction, he failed to confine his rulings to these limitations. In any event, subject matter jurisdiction is always open, cannot be waived, and can be raised by this court *sua sponte*. It is not only the right but the duty of this court to determine whether there is jurisdiction of the subject matter. *Hilburn* v. *First State Bank, supra; Estate of Puddy* v. *Gillam, supra*. The parties cannot create jurisdiction where none exists.

Rulings in *Hilburn* and *Puddy*, and the cases cited therein, are controlling of the instant case, and it is our duty to follow them. We recognize that the distinction our courts have maintained between the powers of chancery and probate courts often results, as it has here, in a terrific waste of time and effort on the part of both the litigants and the courts. It is regrettable that this result must obtain even though the same person actually presides over both courts. However, the distinction is deeply rooted and of long standing in our jurisprudence. Since the adoption of Amendment 24 in 1938, the legislature has been vested with the power to remedy such results, including even the power to consolidate the two courts. However, it has not seen fit to exercise that power.

Reversed and remanded to the probate court with directions to enter an order not inconsistent with this opinion.

JENNINGS and ROGERS, JJ., agree.

James CARPENTER *v.* STATE of Arkansas

CA CR 90-300 821 S.W.2d 51

Court of Appeals of Arkansas
Division II
Opinion delivered December 26, 1991

William E. Johnson, for appellant.

Winston Bryant, Att'y Gen., by: *Clint Miller*, Senior Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Chief Judge. James Carpenter was charged with possession of a controlled substance with intent to deliver. Prior to trial, his motion to suppress evidence obtained as the result of a search of his home was denied. He then entered a conditional plea of guilty, reserving the right to appeal from that judgment as provided in Ark. R. Crim. P. 24.3(b). On appeal,

appellant advances four points for reversal. We find sufficient merit in one of them to warrant reversal and, therefore, do not address the others.

The record discloses that a police officer met with a municipal judge on the evening of October 25, 1989, and obtained a warrant to search appellant's premises for contraband. The warrant was executed at 2:30 a.m. on October 26, 1989. As a result of the search, a quantity of contraband was discovered and seized from appellant's premises.

Rule 13.2(b) of the Arkansas Rules of Criminal Procedure provides that a search warrant shall state or describe with particularity the identity of the judicial officer, and the date and place where the application was made; the judicial officer's finding of reasonable cause for issuance of the warrant; the identity of the persons to be searched and the location and designation of the places to be searched; the persons and things constituting the objects of the search and authorized to be seized; and the period of time within which the warrant must be returned to the issuing judicial officer.

The right to be safe and secure against searches and seizures during the nighttime has been even more carefully safeguarded throughout history. For this reason, the following additional provisions governing warrants for nighttime searches are contained in Rule 13.2(c):

> (c) Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days. Upon a finding by the issuing judicial officer of reasonable cause to believe that:
>
> (i) the place to be searched is difficult of speedy access; or
>
> (ii) the objects to be seized are in danger of imminent removal; or
>
> (iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy;
>
> the issuing officer *may, by appropriate provision in the*

> *warrant*, authorize its execution at anytime, day or night, and within a reasonable time not to exceed sixty days from the date of issuance.
>
> [Emphasis added.]

The search warrant issued in this case was on a printed form in which the judge inserted the specific language required by Ark. R. Crim. P. 13.2(b). It also contained the following:

> (Choose One)
>
> ( ) This warrant shall be executed between the hours of 6 a.m. and 8 p.m.,
>
> OR
>
> (*x*) I find reasonable cause to believe that:
>
> ( ) the place to be searched is difficult of speedy access.
>
> (*x*) the objects to be seized are in danger of imminent removal.
>
> ( ) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy and authorized [sic] the execution of this warrant at any time, day or night, within 60 days from the date of issuance, or less if indicated above.

The box next to the third possible finding, which on this form was the only one that included an authorization to make a nighttime search, was not checked but was left blank.

Appellant contends that the warrant did not authorize a nighttime search, that the search was therefore illegal, and that all evidence seized as a result of it should have been suppressed. He argues that a search must be restricted to the hours between 6:00 a.m. and 8:00 p.m. unless the issuing judicial officer finds reasonable cause to believe that one of the three situations mentioned in Rule 13.2(c) exist, in which event he *may* authorize a nighttime search by appropriate provision in the warrant. Appellant argues that, even if the municipal judge in this case did

find that one of those situations existed and therefore could have authorized a nighttime search under this rule, he did not authorize it by "appropriate provision in the warrant."

The State argues that the rule does not require that a nighttime search be expressly authorized in the warrant. It argues that the rule authorizes a search on a finding of one of the three grounds for such searches and that the words "appropriate provision in the warrant" make reference to those three situations rather than to a specific authorization for a nighttime search.

We cannot agree with the State's position. The wording of Rule 13.2(c) is clear and need only be applied as written, *i.e.*, the warrant must contain not only a finding of justification for a nighttime search, but also an appropriate order authorizing the same. Therefore, we conclude that this warrant was facially deficient and the nighttime search defective.

In light of our conclusion that the warrant was facially deficient in terms of authorizing a nighttime search, we also cannot agree with the State's argument that, in any event, the good faith of the police officer served to make suppression inappropriate under *Leon* v. *State*, 468 U.S. 897 (1984). The objective standard used to determine good faith requires officers to have a reasonable knowledge of what our rules prohibit. *Hall* v. *State*, 302 Ark. 341, 789 S.W.2d 456 (1990). Any officer with reasonable knowledge of our rules of criminal procedure should know what those rules require with regard to search warrants to be executed at night. *See id.*; *Garner* v. *State*, 307 Ark. 353, 820 S.W.2d 446 (1991). Furthermore, we note that the officer who executed this warrant testified that he was familiar with our rules and was aware that there was no express provision for a nighttime search in the warrant issued to him. He was asked why, notwithstanding that knowledge, he served it at night. He answered, "I was scared that the material would be removed."

The privacy of citizens in their homes, secure from nighttime intrusions, is a right of vast importance which is attested not only by rules but by our state and federal constitutions. *Garner* v. *State, supra.* We must conclude that the violation of our rules of criminal procedure was so substantial that we cannot apply the good-faith exception to the facts of this case.

Reversed and remanded.

JENNINGS and ROGERS, JJ., agree.

FIRST NATIONAL BANK IN STUTTGART *v.* QUALITY CHEMICAL CORPORATION

CA 91-74 821 S.W.2d 53

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

Shults, Ray & Kurrus, by: *H. Baker Kurrus*, for appellant.

Butler, Hickey & Long, by: *Fletcher Long, Jr.*, for appellee.

JAMES R. COOPER, Judge. The appellee chemical company sued the appellant bank, a secured creditor and duly-appointed receiver of Howell Enterprises, Inc., for refusing to pay for a chemical the Bank used to operate Howell's rice milling and grain storage facility under the receivership. The chancellor held that the Bank had been unjustly enriched and ordered it to pay the appellee. On appeal, the appellant contends that the chancellor erred because it was authorized to use the chemical without payment due to its security interest in Howell's inventory and because it was acting pursuant to the court's order appointing it receiver. We affirm.

The appellant brought a foreclosure action against Howell due to its insolvency, pursuant to a first lien security interest in all existing and after-acquired inventory in Howell's business. A court order of August 31, 1987 appointed the appellant as receiver, stating that the Bank was to immediately assume operation of the business to avoid irreparable damage to Howell and its creditors by preserving and protecting the collateral. The order further stated that the Bank, as receiver, was not responsible for payment of any debt or obligation of Howell incurred prior to August 31, 1987, and that Howell was not responsible for payment of expenses or debts the appellant incurred subsequent to that date in operation of the business. No notice of the appellant's appointment was given to creditors.

The appellee previously had sold chemicals to Howell on open account and in July 1987, it delivered phostoxin fumigant to Howell which was necessary to kill parasites in grain. When the appellee's president did not receive a check for the chemical in the following month, as was the normal business practice between Howell and the appellee, he became suspicious of Howell's financial status and spoke to an employee of Howell who referred him to an officer of the appellant Bank. He asked the officer if he could pick up the chemical which, according to Howell's employee, had not been used, and the officer told him that the Bank's

attorneys had said that "nobody [was] to pick up or use anything." The Bank then used the chemical to treat grain, sold the grain, and refused to pay the appellee, relying on its security interest in Howell's inventory and the court's order that it was not responsible for Howell's prior debts. The appellee sued for payment on the account and judgment was entered for it in the amount of $4,420.00 plus prejudgment interest. The chancellor stated that, though the appellant properly took possession of the chemical in accordance with the order, by using it without paying the appellee it had been unjustly enriched.

Courts of equity may appoint receivers for any lawful purpose when such appointment is deemed necessary and proper, Ark. R. Civ. P. 66, and it is only in exceptional cases that a receiver should be appointed where no notice is given to adverse interests. *Davis* v. *Seay*, 247 Ark. 396, 445 S.W.2d 885 (1969). We find no case in which a secured creditor is also the receiver as Ark. Code Ann. § 16-117-207 states that "no party or attorney, or person interested in an action, shall be appointed receiver therein." Neither party raised, either at trial or in this Court, the issues of notice or the propriety of appointing the Bank as receiver; therefore, we will determine only whether the court erred in holding that the appellant, as receiver, was unjustly enriched.

■ It is a basic principle that a receivership is not an end unto itself, but is ancillary to some proceeding over which the court has jurisdiction. *See Chapin* v. *Stuckey*, 286 Ark. 359, 692 S.W.2d 609 (1985). This receivership is ancillary to the foreclosure action by the appellant, which claims that the chemical was inventory of Howell's subject to its security interest, and the appellee does not contest this fact. Nevertheless, we are not addressing the disposal of the chemical in reference to the foreclosure action brought by the appellant as a secured creditor, but rather the appellant's authority to use it as receiver.

■ A receiver is a fiduciary representing the court and all parties in interest. It is an "embodiment of the creditors" standing as agent for them, representing them with power to do acts that a mere agent of the defunct company could not do. *Talbot* v. *Jansen*, 294 Ark. 537, 744 S.W.2d 723 (1988). In *Davis* v. *Seay, supra*, the receiver appointed to take charge of a motel

was also a tenant operating a restaurant in the motel. He used receivership funds to make improvements in the restaurant. The court stated that it was not concerned with whatever rights the receiver had as tenant, but was dealing with him as a receiver, and held that because he was the chief beneficiary of the expenditure, if not the only one, he was responsible for payment. The court cited 75 C.J.S. § 182a, page 828, in stating that the receiver "administers the assets of the estate, not in his own right or for his own benefit, but for the benefit of the creditors and those who own the property or are otherwise interested therein." *Davis*, 247 at 402.

As in *Davis*, we view the appellant's actions in this case as those of a duly appointed receiver without regard to its rights as a secured creditor, and we accordingly hold that the appellant should not personally benefit from its position as receiver to the detriment of other creditors. The chemical was necessary to sell the grain; thus, the appellant would have had to purchase it from the appellee or from some other source. By simply using that which had been delivered to Howell, without payment, the receiver acted for its own personal benefit.

To find unjust enrichment a party must have received something of value to which he was not entitled and which he should restore. There must be some operative act, intent, or situation to make the enrichment unjust and compensable. *Dews* v. *Halliburton Industries, Inc.*, 288 Ark. 532, 708 S.W.2d 67 (1986), citing Brill, *Arkansas Law of Damages*, § 15-3 (1984). The appellant correctly states that for an unjust enrichment action, one must reasonably expect to receive compensation from the party allegedly enriched, *Dews*, *supra*, and concludes that the appellee could not have reasonably expected the appellant to pay due to its security interest in Howell's inventory. But, the appellee chemical company contacted the appellant as receiver, and it was reasonable for it to expect payment from the receiver just as it would have expected payment from Howell.

> The receiver occupies no better position than that which was occupied by the party for whom he acts and takes the property subject to the same claims, liens, and equities that existed before his appointment. *Witherspoon* v. *Choctaw Culvert and Machinery Company*, 56 F.2d 984 (8th Cir.

1932); *Sutton* v. *McClain*, 193 Ark. 49, 99 S.W.2d 236 (1936); *Martin* v. *Blytheville Water Company*, 115 Ark. 230, 170 S.W. 1019 (1914)

The appellant further contends that one cannot be unjustly enriched for exercising its lawful rights and remedies, and the court order stated that it was not responsible for prior debts of Howell. We do not hold appellant liable for Howell's debt, but for the debt it incurred as a receiver which could have been avoided by returning the chemical. Instead, it incurred the debt for operation of the business, subsequent to the date of the court order for which it was liable.

We review chancery cases *de novo* on appeal and will not reverse a chancellor's finding unless clearly erroneous. *Snyder* v. *Martin*, 305 Ark. 128, 806 S.W.2d 358 (1991). Because we agree with the chancellor that the appellant was unjustly enriched by using the chemical without paying for it, we affirm.

DANIELSON and MAYFIELD, JJ., agree.

Ann ELLIS *v.* STATE of Arkansas

CA CR 91-41 821 S.W.2d 56

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

James R. Marschewski, for appellant.

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

JOHN E. JENNINGS, Judge. On May 20, 1987, Ann Ellis pled guilty to a charge of violating the Arkansas Hot Check Law, a class C felony, in Sebastian County Circuit Court. The court suspended imposition of sentence for a period of five years. The judgment of the court states, in part:

> IT IS, THEREFORE, BY THE COURT CONSIDERED, ORDERED, AND ADJUDGED that the Court withholds imposition of sentence for a period of five (5) years on condition of good behavior and other written terms and conditions as set out by the Court, including the following:
>
> That the Defendant is to pay restitution in the amount of $1,333.25, to the Sebastian County Prosecuting Attorney's office, payable at the rate of $100.00 per month beginning July 1, 1987, and on the same day each month thereafter until paid in full.

In August 1989, the State filed a petition to revoke, alleging that the defendant had paid less than $450.00 towards the restitution ordered since the date of the plea and asking that Ellis be directed to show cause why her suspended sentence should not be revoked.

On August 1, 1990, the circuit court held a hearing on the petition to revoke. Ms. Ellis' payment record was introduced without objection. It showed that she had paid, by the time of the hearing, a total of some $950.00 toward the ordered restitution since the date of the plea.

Ms. Ellis testified that she was currently employed and working a forty-hour week at $5.10 per hour. She testified that she had a high school diploma and two semesters of college. She testified that she owned a car which she was living in, and that she could not afford an apartment. She testified that she had had various medical problems and had been unemployed for several weeks before obtaining her current job. She admitted that she had paid very little during the year 1988, although she admitted she was employed during that time. Finally, she admitted that not making the payments was her fault and said that she "did not carry forward on my obligation."

The trial judge declined to revoke the defendant's suspended sentence, but found her in contempt and sentenced her to ten days in the county jail.

Appellant's first point for appeal is that "the trial court imposed an illegal sentence in finding the appellant in contempt." We have very recently decided this issue adversely to appellant in *Finn* v. *State*, 36 Ark. App. 89, 819 S.W.2d 25 (1991). In connection with this argument, the defendant also argues that "there was no notification of the contempt proceeding" and "there was no indication that the judgment . . . would be construed as a process or order under the contempt statute." These arguments were not presented to the trial court and we do not consider issues raised for the first time on appeal. *Williams* v. *State*, 304 Ark. 279, 801 S.W.2d 296 (1990); *Edwards* v. *State*, 300 Ark. 4, 775 S.W.2d 900 (1989); *Yarbrough* v. *Yarbrough*, 295 Ark. 211, 748 S.W.2d 123 (1988). There are sound reasons for the rule. It is unfair to the trial court to reverse on a ground that no one even suggested might be error. It is unfair to the opposing party, who might have met the argument not made below. Finally, it does not comport with the concept of an orderly and efficient method of administration of justice. Even issues of constitutional dimension are waived unless raised in the trial court. *See Finn* v. *State, supra.*

It is not difficult to imagine why these issues were not raised below. The defendant was substantially behind in paying the restitution previously ordered and admitted that it was her fault that it had not been paid. The trial court could have revoked her suspended sentence and sentenced her to a term of years in the Department of Correction. Had the trial court been presented with and agreed with the arguments Ellis now makes, revocation may well have been the outcome.

The appellant also argues that the evidence is insufficient to support the action taken by the trial court. In a revocation proceeding the state has the burden of proving a violation of the court's order by a preponderance of the evidence. *Hoffman* v. *State*, 289 Ark. 184, 711 S.W.2d 151 (1986). If probation is revoked, our standard of review requires that the trial judge's decision be affirmed unless clearly against a preponderance of the evidence. *Standridge* v. *State*, 290 Ark. 150, 717 S.W.2d 795 (1986). Here, however, appellant's suspended sentence was not revoked; rather, she was found in criminal contempt of the court's order. In such a case the burden of proof is beyond a reasonable doubt. *Jolly* v. *Jolly*, 290 Ark. 352, 719 S.W.2d 430 (1986). On appeal, we consider the evidence in the light most favorable to the trial judge's decision to determine whether there is substantial evidence to support his finding. *Arkansas Dept. of Human Services* v. *Clark*, 305 Ark. 561, 810 S.W.2d 331 (1991); *Yarbrough* v. *Yarbrough*, 295 Ark. 211, 748 S.W.2d 123 (1988). In the case at bar we are satisfied that the trial court's finding of contempt is supported by substantial evidence.

Affirmed.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I dissent from the majority opinion in this case for the same reason that I dissented in *Finn* v. *State*, 36 Ark. App. 89, 819 S.W.2d 25 (1991). The appellant in *Finn* did not petition the Arkansas Supreme Court for review as provided in that court's Rule 29(6). Generally, the judges of this court accept the majority decisions of this court and do not continue to dissent. Because our Supreme Court was not asked to review *Finn*, because the decision in *Finn* was handed down only last month, and because the issue has been argued by the appellant in the present case, the judges who dissented in *Finn*

dissent again in the present case.

In *Finn* the majority opinion relied strongly upon the fact that the point raised in the dissent in that case was not raised by the appellant in the trial court nor on appeal to this court. In the present case, however, the point is raised in the appeal to this court. It is my position, of course, that the trial court's order sentencing the appellant to jail for contempt is an illegal sentence. The merits of that position were discussed in the dissent in *Finn* and need not be discussed again in this case.

I would point out, however, that the factors which result in the denial of due process and fundamental fairness when a defendant appears in court on a petition to revoke a suspended sentence but is held in contempt are more clearly set out in the appellant's brief in this case than they were in the dissent in *Finn*. They are as follows:

(1) There is no notification of the contempt proceedings.

(2) There is no indication in the order suspending sentence that a violation of the conditions of the suspended sentence may be construed as contempt.

(3) There is no finding of the willful disobedience which must be shown in a contempt proceeding.

Finally, I note the statement in the majority opinion that suggests the defendant here did not object to the contempt order in the trial court because she would be better off not to raise the issue there but to wait and raise it on appeal. The answer is that, if the contempt order is set aside, the trial court can still proceed on a petition for revocation unless something else will prevent it. And that, I suggest, may be the very reason the trial court would go the contempt route. However, if revocation is barred, I think it is wrong to proceed in contempt without meeting the due process and fundamental fairness requirements which were ignored here and in *Finn*.

COOPER, J., joins in this dissent.

FIRST NATIONAL BANK of DeWitt *v.* Stacia YANCEY

CA 91-82 826 S.W.2d 287

Court of Appeals of Arkansas
Division II
Opinion delivered December 26, 1991

John Joplin, for appellant.

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

JOHN E. JENNINGS, Judge. Godfrey Thomas died in 1982. His will provided that one-sixth of a farm which he owned in Arkansas County would be held in trust for the benefit of his daughter, Elizabeth Ann Yancey. The appellant, First National Bank of Dewitt, was named as trustee. Mr.Thomas' will provided that the net income from the trust was to be paid at least annually to his daughter and, at her death, to his granddaughter, Stacia LeNeau Yancey.

The trustee leased out the land on a sharecrop basis and, as a matter of practice, paid the net income to Elizabeth Yancey as soon as it could be calculated after the calendar year.

Elizabeth Yancey died on August 6, 1989. On the date of her death there were crops growing in the field and the net income for the year 1989 had been neither calculated nor paid.

This action was brought by Stacia Yancey, through her guardian, to determine the extent of her interest in the net income from the trust for the year 1989. The trial court held that Stacia Yancey was entitled to receive all of the net income from the trust for that year. The bank has appealed contending that the probate court should have apportioned the annual income between the successor beneficiary and the deceased beneficiary's estate, citing, along with other authority, *Wineland* v. *Security Bank & Trust Co.*, 238 Ark. 625, 383 S.W.2d 669 (1964). Stacia Yancey notes that the estate of Elizabeth Yancey has not appealed and argues, in substance, that the bank lacks standing to do so. Because we agree with the appellee, we do not reach the merits of the issue raised by the bank.

It is the general rule that a trustee, acting in its representative capacity, cannot by an appeal litigate the conflicting claims of beneficiaries. *See In re Ferrall's Estate*, 33 Cal.2d 202, 200 P.2d 1 (1948). He lacks standing to do so. IIA Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 183 (4th ed. 1987); *Bryant* v. *Thompson*, 128 N.Y. 426, 28 N.E. 522 (1891). Our courts have recognized the concept of "standing to appeal." *See Arkansas State Highway Comm'n* v. *Perrin*, 240 Ark. 302, 399 S.W.2d 287 (1966). Only a party aggrieved by the court's order can appeal that order. *Beard* v. *Beard*, 207 Ark. 863, 183 S.W.2d 44 (1944); *Marsh* v. *Hoff*, 15 Ark. App. 272, 692 S.W.2d 270 (1985). When the decision in the trial court concerns the respective interests of two beneficiaries, the trustee is not an aggrieved party. *Castle* v. *Irwin*, 25 Haw. 807 (1921); Scott, *supra*, § 183. *See also In re Campbells's Estate*, 6 Haw. 475, 382 P.2d 920 (Haw. 1963); *In re Musser's Estate*, 341 Pa. 1, 17 A.2d 411 (1941). The underlying basis for the rule is the trustee's duty to deal impartially with beneficiaries. *In re Ferrall's Estate, supra*; *Hardy* v. *Hardy*, 222 Ark. 932, 263 S.W.2d 690 (1954); *Restatement (Second) of Trusts* § 183 (1959).

It is suggested that because the bank has filed a claim against the estate of Elizabeth Yancey it may have standing as a creditor of that estate to pursue the appeal. We must reject the suggestion. To take such a position would put the bank in the position of violating its fiduciary duty to deal impartially with multiple beneficiaries. Indeed, such a position would be inconsistent with that which the trustee took at trial, when it expressly recognized

that duty and stated it was merely "attempting to avoid making distribution to the incorrect beneficiary." Finally, the trial judge appointed a special administrator in this proceeding for the specific purpose of representing the creditors of the estate of Elizabeth Yancey, and the special administrator has not appealed.

For the reasons stated we are persuaded that the appellant lacks standing to appeal and therefore the appeal must be dismissed.

Dismissed.

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

Billy MOORE and Joy Hively *v.* COLUMBIA MUTUAL CASUALTY INSURANCE COMPANY

CA 91-36 821 S.W.2d 59

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

Ponder & Jarboe, by: *Dick Jarboe*, for appellants.

Snellgrove, Laser & Langley, by: *Glenn Lovett, Jr.* for appellee.

JOHN E. JENNINGS, Judge. Bill Moore is an owner of a

business known as Moore Brothers Feed and Seed, in Black Rock, Arkansas. In February 1989, Moore sold a four-wheeler to Joy Hively. The vehicle was financed through First National Bank of Lawrence County and Moore retained a lien on the vehicle.

At the time of sale, Moore also sold Hively an insurance policy issued by Columbia Mutual Casualty Insurance Company. Moore told Hively that the policy was a theft policy and that for the four-wheeler to be covered it would have to be chained to a tree or something that would hold it.

In May of 1989, the four-wheeler was stolen. Hively had chained it to her mobile home and thieves had cut the chain.

Moore paid the balance of the note to the bank and he and Hively then sued Columbia Mutual on the policy. The policy provided coverage for: "Burglary from within a building or room. There must be evidence of visible entry." The trial judge granted Columbia Mutual's motion for summary judgment and Moore and Hively have now appealed.

The sole contention on appeal is that the policy provision was ambiguous and therefore it was error for the trial court to grant summary judgment. We affirm.

On deposition Moore testified that he had been told by Paul Morefield, an employee of Columbia Mutual, that for the vehicle to be covered, it would have to be "inside a shed or chained to a tree or chained to something that showed forcible entry." In his deposition, Paul Morefield testified that he was a territory manager for Columbia Mutual. Morefield testified that the policy covers "theft." His opinion was based on conversations with someone in the company's research and development department who had told him that burglary and theft were synonymous.

Summary judgment is an extreme remedy which should only be granted when it is clear that there is no genuine issue of material fact to be litigated. *See Ferguson* v. *Order of United Travelers*, 35 Ark. App. 100, 811 S.W.2d 768 (1991) (supplemental opinion on denial of rehearing). 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. *Walker* v. *Stephens*, 3 Ark. App. 205, 626 S.W.2d 200

(1981). 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.*, 243 Ark. 226, 419 S.W.2d 305 (1967); *Ferguson*, cited above. Furthermore, 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. *Home Indem. Co.* v. *City of Marianna*, 297 Ark. 268, 761 S.W.2d 171 (1988).

On the other hand, summary judgment should be granted when the moving party is entitled to judgment as a matter of law. Ark. R. Civ. P. 56(c). When a contract is unambiguous, its construction is a question of law for the court. *Floyd* v. *Otter Creek Homeowners Ass'n*, 23 Ark. App. 31, 742 S.W.2d 120 (1988). The initial determination of whether or not a contract is ambiguous rests with the court. *C. & A. Constr. Co.* v. *Benning Constr. Co.*, 256 Ark. 621, 509 S.W.2d 302 (1974).

■ Appellants contend, and we agree for the sake of argument, that the term "burglary" as used in the policy is ambiguous. It may well be that under the circumstances of this case the policy could be construed to cover "theft." There is, however, no ambiguity in the policy language requiring that the property be taken "from within a building or room." Because that prerequisite for coverage was not met, the trial court was right in granting summary judgment. The situation is similar to that presented in *Ray* v. *Shelby Mutual Ins. Co.*, 14 Ark. App. 265, 687 S.W.2d 526 (1985). In *Ray* we said:

> The appellant argues that the agent who sold him the policy represented to him that the policy in question would cover such a loss as occurred here. Even if that allegation is true, at most it would give rise to a cause of action against the agent, but would not serve to provide coverage for losses which were specifically excluded by the unambiguous language of the policy.

Ray, 14 Ark. App. at 267; *see also Batesville Ins. & Fin. Co.* v. *Butler*, 248 Ark. 776, 453 S.W.2d 709 (1970). For the reasons

stated, the judgment of the trial court is affirmed.

Affirmed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. Except for one point, I think the trial court erred in granting the motion for summary judgment filed by the appellee insurance company. I do agree that summary judgment should have been entered against appellant Bill Moore. He had no cause of action against appellee because the policy sued on was issued to the appellant Joy Hively. Bill Moore is not named therein as an insured under any situation. However, as to Joy Hively it was error, in my opinion, to grant a summary judgment against her.

The policy provides for coverage against ten different perils designated by the letters "A" through "J." The ninth peril insured against is stated as follows:

> Burglary from within a room. There must be evidence of visible entry.

The majority opinion states that "we agree for the sake of argument that the term 'burglary' as used in the policy is ambiguous." Moreover, the majority opinion states: "It may well be that under the circumstances of this case the policy could be construed to cover 'theft.' " But the opinion adds: "There is, however, no ambiguity in the policy language requiring that the property be *taken* 'from within a building or room.' " It should be noted that I have supplied the emphasis on the word "taken" but that the majority opinion has supplied the word "taken" as the word does not appear in the language describing the ninth peril insured against. It should also be noted that the policy does not define the word "burglary."

In *Thomas Jefferson Ins. Co.* v. *Stuttgart Home Center*, 4 Ark. App. 75, 627 S.W.2d 571 (1982), the word "burglary" was not defined and the court looked to our criminal code for the following definition: "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." *See* Ark. Code Ann. § 5-39-201 (1987). This accords with the usual dictionary definition. *See Webster's New*

Collegiate Dictionary (1979) which states that burglary is "the act of breaking into a building especially with intent to steal." With that general definition of burglary in mind, it is difficult to understand what peril the policy in the instant case is insuring against when it states that it covers "Burglary from within a room." Obviously, the use of the word "burglary" which generally means to break into a building with the intent to commit a crime is not compatible with the use of the word in the phrase "burglary from within a building or room." It is understandable, therefore, why the majority opinion adds the word "taken" to the policy language which describes the ninth peril insured against. Otherwise, the policy language has very little meaning.

It is equally understandable why Paul Morefield testified in his deposition that this policy covered theft. He was a territory manager for the appellee at the time of his deposition and testified that the appellee's Research and Development Department told him that the word "burglary" meant "theft" — that the terms were "interchangeable and synonymous." Mr. Morefield also testified that, in his opinion, the language used in stating the ninth peril insured against meant there was coverage for an item "stolen from inside a locked room [if] there is visible proof of entry." Of course, the attempt of this witness to define the meaning of the term "burglary" is simply an attempt to do what the policy failed to do. The *Thomas Jefferson Ins. Co.* case, *supra*, dealt with a similar attempt in the following language:

> Appellant did not choose to define burglary in its insurance policy with appellees and we believe it would be unconscionable to allow appellant to now define the coverage after the loss has occurred. The trial court's finding that the Motens sustained their loss as a direct result of the burglary is not clearly erroneous (clearly against the preponderance of the evidence). Rule 52, Arkansas Rules of Civil Procedure.

4 Ark. App. at 79.

In the instant case, the language used to state the ninth peril insured against is plainly ambiguous. What did this policy provision really insure against? It is perfectly obvious that a four-wheeler is not likely to be in a room in a house unless the room is the garage. Joy Hively lived in a house trailer and there is nothing

in the record to indicate that she even had a garage. Why would she want "burglary" insurance as that term is generally used? The answer is that Bill Moore testified in a deposition that he was told by the appellee's Paul Morefield that the four-wheeler which was stolen in this case would be covered for theft if it was "inside of a building or chained to a tree or chained to something to show physical entry." Bill Moore also said he told this to Joy Hively. The loss sought to be recovered in this case is for a four-wheeler that was stolen by cutting the chain by which it was chained to a tree outside of the house trailer in which Joy Hively, the insured, lived. While Paul Morefield denies that he said what Bill Moore testified to in regard to coverage of the four-wheeler, this presented an issue of fact. Since the coverage as stated in the policy is ambiguous, evidence of the construction placed upon it by the appellee's employee, Paul Morefield, should be sufficient to show that there is a genuine issue of fact. In considering a motion for summary judgment "all proof submitted is viewed in the light most favorable to the party resisting the motion," and "any doubts and inferences are resolved against the moving party." *Cross* v. *Coffman*, 304 Ark. 666, 671, 805 S.W.2d 44 (1991).

The majority opinion cites *Ray* v. *Shelby Mutual Ins. Co.*, 14 Ark. App. 265, 687 S.W.2d 526 (1985), as support for the majority decision in the present case. I would note that the case cited was a three to three decision. I wrote the dissent in which Judges Cloninger and Corbin joined. My dissent cited the case of *King* v. *Travelers Insurance Company*, 84 N.M. 550, 505 P.2d 1226 (1973), and it quoted from that case the following:

> Finally, in addition to a question of ambiguity resulting from a mere reading of the policy, Appellants point out, and the record supports, the logical inference that the insurer's agents were also in doubt as to the applicability of the pertinent provisions of the policy in question. Although Appellants do not argue that theories of waiver and estoppel are applicable here, Appellants' argument is persuasive evidence of the policy's ambiguity.

505 P.2d at 1232.

I have not changed my views as expressed in the *Ray* v. *Shelby Mutual* dissent. In the instant case, the majority really concedes that the language used in stating the ninth peril insured

against is ambiguous. It also admits that the deposition of Bill Moore contains testimony that the appellee's employee Paul Morefield told Moore that the four-wheeler sold by Moore to appellant Joy Hively would be insured if it were "inside a shed or chained to a tree or chained to something that showed forcible entry." But instead of holding that the coverage in this case is a fact issue, the majority opinion adopts a construction of the coverage language which it finds resolves the ambiguity as to the loss involved in this case. I submit the issue is one of fact and that the majority has simply rewritten the policy provision.

I dissent.

Elmira BRITTON, Larry Nunn, et al. *v.* CITY OF CONWAY, Arkansas, Buy Murphy and Earl Rogers, et al.

CA 91-13 821 S.W.2d 65

Court of Appeals of Arkansas
Division II
Opinion delivered December 26, 1991
[Rehearing denied January 29, 1992.]

John I. Purtle, P.A., for appellant.

Clark & Adkisson, and *Michael L. Murphy*, by: *Michael L. Murphy*, for appellees.

MELVIN MAYFIELD, Judge. This is an appeal from an order dismissing a complaint which sought to prevent the annexation of territory to the City of Conway, Arkansas.

The record shows that on October 3, 1989, a petition was filed in the Faulkner County Court by "Earl Rogers and Guy Murphy, et al. through their attorneys, Clark & Adkisson" seeking the annexation of certain described land to the City of Conway. Although the petition does not so state, the parties to this appeal agree that the petition was brought under the authority of Ark. Code Ann. §§ 14-40-601 through 14-40-607 (1987).

After two amendments to the petition were filed, and after a *pro se* "petition for denial" was filed, the county court entered an order granting the petition for annexation. This order was entered on January 16, 1990. Thereafter, pursuant to Ark. Code Ann. § 14-40-604 (1987), a complaint was filed on February 12, 1990, in the Circuit Court of Faulkner County seeking to prevent the annexation as ordered by the county court.

Motions to dismiss the circuit court complaint were filed by

the City of Conway and by "Earl Rogers and Guy Murphy, et al." After a hearing held on August 31, 1990, the circuit judge granted the motions. The pertinent part of that order provides as follows:

> 4. That the defendants' motion to dismiss should be granted based upon the plaintiffs' lack of standing, inasmuch as none of them resides in the area to be annexed pursuant to the County Court order, and there was incomplete service, since neither Guy Murphy, Earl Rogers, nor their attorney, William C. Adkisson, was properly served with notice of this proceeding, as required by Ark. Code Ann. Section 14-40-601, et seq.

The parties bringing the petition to prevent the annexation are not named in the petition. The petition simply states:

> Come the Remonstrants and for their cause of action state:
>
> 1. That they are landowners, residents and citizens of Faulkner County, Arkansas and have an interest in preventing the annexation of certain lands to the City of Conway.

The complaint then makes 16 numbered allegations contesting the validity of the attempted annexation and concludes by praying that the annexation order entered by the county court be declared null and void. The complaint is signed only by an attorney as "Attorney for Remonstrants," but at the hearing in circuit court the judge named certain persons and indicated that he thought they were some of the parties bringing the petition. During a discussion between the attorneys and the judge an ownership map of the territory sought to be annexed was introduced into evidence, and eventually, the attorney who filed the complaint called Mr. Larry Nunn to testify. This is the person who signed the *pro se* "petition for denial" filed in the county court.

Mr. Nunn testified that he was a property owner in the City of Conway, that he owned a single family residence at 2001 Tyler in Conway, that he was one of the "named remonstrants in this case," and that he was opposed to the annexation. He was not cross-examined and no testimony was offered contrary to his

testimony.

The parties have made several arguments in the briefs filed in this court; however, we discuss only those which we find controlling in our disposition of this appeal. In the first place, we find that Larry Nunn, under the evidence in the record, was an "interested person" and authorized under the law to bring the complaint filed in circuit court seeking to prevent the annexation. In *Turner* v. *Wiederkehr Village*, 261 Ark. 72, 546 S.W.2d 717 (1977), the Arkansas Supreme Court considered the question of whether the appellant in that case was "any person interested" who had standing to contest the county court's order granting a petition for the creation of an incorporated town. The court said in construing that phrase "we held in an annexation case that it means a person who resides or owns property in the annexing city or in the area to be annexed." The case the court referred to was *City of Crossett* v. *Anthony*, 250 Ark. 660, 466 S.W.2d 481 (1971), and the language in that case, which was quoted in *Turner* and is pertinent in the present case, is:

> We hold, therefore, that "any person interested" as referred to in the statute, means any person who actually has some interest in the city or in the area to be annexed, and that at least some such interest must be shown on trial de novo in the circuit court in the face of a motion to dismiss for lack of interest.

250 Ark. at 665. *See* also *Palmer* v. *City of Conway*, 271 Ark. 127, 607 S.W.2d 87 (Ark. App. 1980).

One of the statutes under which the annexation in the present case was sought, Ark. Code Ann. § 14-40-604 (1987), provides that within a period of 30 days after entry of the county court order "any person interested" may institute a proceeding in circuit court to have the annexation prevented. Larry Nunn testified that he owned land in the city to which the land was to be annexed, he filed a *pro se* petition in county court opposing annexation, he said he was one of the "named remonstrants" in circuit court, and he testified in that court that he was opposed to the annexation. We think the circuit court erred in finding that there was no plaintiff in that court who had standing to contest the annexation.

This leaves the issue of service of notice by the parties seeking to prevent annexation. Ark. Code Ann. § 14-40-604 (1987) provides that when "any person interested" files a complaint in circuit court to have the annexation prevented "notices shall be given to the city or incorporated town authorities and the agent of the petitioners." In the case of *Proposed Annexation to the Town of Beaver* v. *Ratliff*, 282 Ark. 516, 669 S.W.2d 467 (1984), the court held that a complaint filed in circuit court under the provisions of Ark. Stat. Ann. § 19-303 (Repl. 1980), which is now Ark. Code Ann. § 14-40-604 (1987), is not an appeal but is an independent attack on the annexation and the notice required by the statute means service of process pursuant to Ark. R. Civ. P. 4.

In the instant case service of process was made upon the City of Conway. However, no such service was had on Earl Rogers or Guy Murphy or their attorney. We think the petition for annexation filed in county court clearly indicated that "Clark & Adkisson" was an agent for the petitioners, and we think Ark. Code Ann. § 14-40-601 requires that summons be served on them. We do not believe, however, that the failure to serve the petitioners' agent meant that the complaint to prevent annexation should have been dismissed.

Arkansas Rule of Civil Procedure 19(a) provides that a person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) disposition of the action in his absence would impair or impede his ability to protect his interest. Although the statute required notice to the petitioners and the city, Rule 19(b) provides that if a person described in 19(a) "cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." The Reporter's Notes to Rule 19 points out that the rule follows the federal rule and that the policy behind the federal rule "is to avoid dismissal of actions where possible, and when it is possible to join an absent party, dismissal is not proper as such party will be ordered to enter the action as a defendant or plaintiff."

Here, there is no question that the petitioners for

annexation could have been made a party. All that was necessary to make them a party was to serve a summons on their agent "Clark & Adkisson" who was also the petitioners' attorney, and whose address in Conway, Arkansas, was listed on the petition for annexation. In fact, the only real reason to make the petitioners a party is because the statute requires it. The petitioners and the city are really on the "same side." Both of them filed motions to dismiss the complaint which was filed to prevent the annexation and both of them joined in the brief filed in this court seeking to uphold the trial court's order which dismissed that complaint. We agree that Ark. Code Ann. § 14-40-601 requires service of summons on the agent of the petitioners, but we hold the trial court should have directed that the petitioners be made a party by service of summons on their agent rather than dismissing the complaint filed in circuit court.

We reverse and remand with directions that the trial court require that the petitioners be made party to this case and for further proceedings in keeping with this opinion.

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

Carl RABUN *v.* STATE of Arkansas

CA CR 91-106 821 S.W.2d 62

Court of Appeals of Arkansas
Division II
Opinion delivered December 26, 1991

William R. Simpson, Jr., Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. Appellant, Carl Rabun, was charged with possession of a controlled substance (cocaine) with intent to deliver, but was convicted in a bench trial of the lesser included offense of possession of a controlled substance, for which he was sentenced to three years in prison. As his only point of error, appellant contends that the trial court erred in denying his motion to dismiss based on the lack of reasonable cause for the police officers involved to have stopped and detained him. We affirm.

Since this case was tried before the court, the trial judge took up the matter of appellant's motion to dismiss, which we take as a motion to suppress, at the same time he heard the evidence at trial. The record reflects that Little Rock Police Officers Roger Cox and John Merritt came into contact with appellant while on patrol at around 4:20 in the afternoon on May 9, 1990. At roll call earlier that day, the officers had been informed that drug trafficking was taking place on the corner of Wolfe and Wright Streets. Driving through this area, they noticed appellant and two

others congregated on this street corner. Officer Cox testified that as he and Officer Merritt were pulling up to the curb in the patrol car, he observed appellant crush a cigarette package in his hand and throw the package onto the ground. Upon exiting the patrol car, the officers asked the appellant and the others for identification and they conducted a pat-down search of each of them. Officer Merritt picked up the cigarette package discarded by appellant, and it was found to contain what appeared to be cocaine. Appellant was then arrested. Based on this evidence, the trial court denied appellant's motion to suppress.

Relying primarily on Ark. R. Crim. P. 3.1, appellant argues that the officers lacked reasonable suspicion to stop and detain him and that the fruits thereof should have been suppressed. We need not decide that question, however, because we conclude that the discovery of the contraband was a product of neither a "seizure" nor a "search" within the meaning of the fourth amendment.

Not all personal intercourse between policemen and citizens involve "seizures" of persons under the fourth amendment. *Thompson* v. *State*, 303 Ark. 407, 797 S.W.2d 450 (1990) [(*citing Terry* v. *Ohio*, 392 U.S. 1 (1967)]. A person has been seized within the meaning of the fourth amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *United States* v. *Mendenhall*, 446 U.S. 544 (1980). If there is no detention — no seizure within the meaning of the fourth amendment — then no constitutional rights have been infringed. *Florida* v. *Royer*, 460 U.S. 491 (1983). In our view, the issue here is whether appellant was "seized" when he discarded the package containing the contraband.

The facts in the case at bar are similar in certain respects to those found in the Supreme Court's decision in *Michigan* v. *Chesternut*, 486 U.S. 567 (1988), where the question before the Court was whether an "investigatory pursuit" of a person undertaken by the police amounted to a seizure under the fourth amendment. There, police officers riding in a marked police cruiser were on routine patrol when they saw a man get out of a car, which had pulled up at an intersection, and approach Chesternut, who was standing alone on the corner. When

Chesternut saw the patrol car nearing the corner where he stood, he began to run. The officers followed him around the corner and drove along side him for a short distance. As they drove beside him, Chesternut discarded a number of packets that he pulled from his pocket. One of the officers got out of the car to examine the packets, and he determined that the packets held pills that the officer believed to contain codeine, based on his experience as a paramedic. Chesternut, who had stopped a few feet away, was then arrested.

With reference to the test set out in *United States* v. *Mendenhall, supra*, the Court concluded that the conduct of the police, although admittedly intimidating, did not constitute a seizure, as it would not have communicated to a reasonable person that he was not at liberty to ignore the presence of the police. Because Chesternut had not been seized during the initial pursuit, the suppression of evidence was not warranted.

We think the same is true in this case. The officers here were merely approaching the curb in the patrol car when appellant discarded the contraband. There is no indication from the record that the officers had activated the siren or had turned on the flashing lights, or had engaged in any other activity which would lead a reasonable person to believe that he was not free to leave. Since appellant disposed of the package containing the contraband prior to his being detained by the police, it cannot be said that the discovery of the contraband was the fruit of detention, legal or otherwise.

Moreover, a defendant's right to challenge a search and seizure as being violative of the fourth amendment is based upon the existence of a legitimate expectation of privacy. *Wilson* v. *State*, 297 Ark. 568, 765 S.W.2d 1 (1989). When appellant discarded the package, he abandoned any rights he possessed under the fourth amendment. *See Edwards* v. *State*, 300 Ark. 4, 775 S.W.2d 900 (1989). The seizure of abandoned items, as in cases where police have conducted an inventory, is said to be a seizure "without a search." *See Webb* v. *State*, 269 Ark. 415, 601 S.W.2d 848 (1980). In sum, we hold that the seizure of the contraband was not a product of an unlawful search, or seizure.

In reviewing a trial judge's decision on a motion to suppress, this court makes an independent determination based

upon the totality of the circumstances, but will reverse the trial court's ruling only if that ruling was clearly against the preponderance of the evidence. *Jackson* v. *State*, 34 Ark. App. 4, 804 S.W.2d 735 (1991). We cannot say that the trial court's denial of appellant's motion to suppress was clearly against the preponderance of the evidence, and we affirm.

Affirmed.

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

ARKANSAS DEPARTMENT OF HUMAN SERVICES
v. Jim COUCH and Lana Couch

CA 91-436 821 S.W.2d 67

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

David Overton, for appellant.

Terry Jensen, for appellee.

PER CURIAM. Lowell D. Fonken and Cynthia A. Fonken have moved for permission to file an *amici curiae* brief in the

above-styled case, which arises from a lower court decision granting the adoption of one of two sisters to the appellees, Jim and Lana Couch. The movants assert that the lower court decision separates two sisters, ages two and three, who have been together all of their lives, and that the appellees do not wish to adopt both children because one of the sisters has cerebral palsy. The movants further assert that they have filed a petition seeking to adopt both children; that they did have custody of both children for approximately two months; and that they continue to have custody of the sister who suffers from cerebral palsy. The movants seek to file an *amici* brief in order to support the appellant's position that an adoption should not be granted which separates the two sisters.[1]

Amici curiae attorneys may file briefs with the permission of the court. Ark. R. Sup. Ct. 20. Whether or not to allow the *amici* brief is a matter within the appellate court's discretion. *See Holiday Inn* v. *Coleman*, 29 Ark. App. 157, 778 S.W.2d 649 (1989) (Mayfield, J., concurring). In *Ferguson* v. *Brick*, 279 Ark. 168, 649 S.W.2d 397 (1983), the Arkansas Supreme Court noted that the undertaking of the *amicus* has changed from that of an impartial friend of the court to that of an acknowledged advocate. However, the cases discussed by the *Ferguson* court involve questions of public interest. Even though there may be a question of public interest involved in this case, the movants' interest is limited to the result in this particular suit because of their personal stake in the outcome.

Amici curiae attorneys must take the case as they find it and cannot introduce new issues not raised at the trial level. *Curry* v. *Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990). Moreover, although consent to file an *amici curiae* brief will be given:

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[1] We note that the Arkansas Department of Human Services (ADHS) filed its motion for supersedeas and stay of the trial court's order granting a temporary decree of adoption to the appellees with the Arkansas Court of Appeals on October 21, 1991. The motion was certified to the Arkansas Supreme Court on October 23, 1991, and was denied on October 28, 1991. ADHS filed a petition for rehearing with the Supreme Court which was denied on December 9, 1991, without written opinion. The motion for permission to file an *amici curiae* brief is being considered here for the first time and has never been before the Supreme Court.

> when the filing is justified by the circumstances, yet leave to file will be denied where it does not appear that the applicant is interested in any other case which will be effected by the decision and the parties are represented by competent counsel. Under such circumstances, the need of assistance will not be assumed.

4 Am. Jur. 2d *Amicus Curiae* § 4 (1962). In the case at bar, the movants do not question the competence of appellant's counsel, and since it appears that the movants are interested only in the outcome of the case at bar, permission to file an *amici curiae* brief is denied.

ARKANSAS GAME & FISH COMMISSION *v.* DIRECTOR OF LABOR

E 90-249 821 S.W.2d 69

Court of Appeals of Arkansas
Division I
Opinion delivered January 8, 1992

P. Douglas Mays, for appellant.

Ronald A. Calkins, for appellee.

ELIZABETH W. DANIELSON, Judge. This is an appeal from a decision of the Board of Review awarding benefits to claimant after finding he was dismissed from his job for reasons other than misconduct connected with the work. Appellant contends on appeal that the Board made an erroneous conclusion of law when it disallowed the taking of additional testimony, because it stated its lack of jurisdiction as the basis for the denial. Our review of the record shows that the Board's reference to its lack of jurisdiction dealt with nonacceptance of information contained in appellant's letter of appeal, not with its authority to order another hearing for the taking of additional evidence. We find no error and affirm.

Claimant had been a twenty-one year employee of appellant and had worked in the law enforcement division during his last year of employment. He testified that while at the firing range, he saw some extra gun belts and asked the range officer if he could have one. The range officer told him he could not because he needed them for the range. Claimant says he then made arrangements with the range officer to trade in a belt he had at home for one of those the range officer had. His understanding was that he was to bring the other gun belt in the next time he was at the firing range, where he went periodically for training. Shortly after claimant took the gun belt from the range, he went on a two week vacation, then a flood occurred which temporarily stopped immediate access to the range. Sometime during this time frame, appellant began its investigation of the incident and subsequently

discharged claimant for misconduct in removing the gun belt from the range.

The agency denied claimant benefits, but this decision was reversed by the Appeal Tribunal, which found that the claimant was discharged from his last work for reasons other than misconduct connected with the work. The hearing before the Appeal Tribunal was a telephone hearing in which the claimant testified in his own behalf and the employer was represented by Bill Howell, assistant chief for appellant. Noting that the range officer did not testify, the Appeals Tribunal found the testimony presented by the claimant to be the most credible. In affirming this decision, the Board of Review said that while the employer might have felt justified in discharging the claimant, a preponderance of the evidence failed to establish anything more than a possible misunderstanding as to the procedure for obtaining the belt and holster from the employer.

In its letter of appeal to the Board, appellant stated it believed the Board should hear the testimony of the range officer and two other witnesses for appellant. Appellant stated the testimony was not offered at the telephone hearing because the notice provided to appellant did not specify that these people should be available. In its standard reply letter, the Board said: "Please be advised that pursuant to the Arkansas Court of Appeals decision in *Mark Smith* v. *Everett*, 6 Ark. App. 337, 642 S.W.2d 320 (1982), the Board of Review is without jurisdiction to accept additional evidence in appeals pending before it. Therefore, no further evidence can be submitted." Appellant then sent another letter, in which it requested an additional hearing to take the testimony of its three witnesses who did not testify at the telephone hearing. This request was not granted.

It is well settled that the Board of Review may order another hearing for the taking of additional evidence in appeals pending before it, but this is discretionary with the Board. *See* Ark. Code Ann. § 11-10-525 (1987); *Jones* v. *Director of Labor*, 8 Ark. App. 234, 650 S.W.2d 601 (1983); *Fry* v. *Director of Labor*, 16 Ark. App. 204, 698 S.W.2d 816 (1985). An order that additional evidence be taken is to be differentiated from acceptance by the Board of new evidence offered in a party's letter of appeal. The Board was correct in informing appellant that it

could not accept additional evidence "in appeals" pending before it; any such evidence would have to be offered in an additional hearing, in which the other party would have a chance to respond to it. *See Fry*, 16 Ark. App. 204, 698 S.W.2d 816; *Smith*, 6 Ark. App. 337, 642 S.W.2d 320. Appellant misunderstood the Board's statement regarding its lack of jurisdiction to mean it had no jurisdiction to order an additional hearing, while in fact the Board was referring to its lack of jurisdiction to accept new evidence offered in the appellant's letter of appeal. The Board did not make an erroneous conclusion of law in its statement concerning its lack of jurisdiction.

Although the Board may order another hearing for the taking of additional evidence, this is discretionary with the Board and a second hearing is not required so long as each side has notice of and a fair opportunity to rebut the evidence of the other party in the first hearing. *See Fry*, 16 Ark. 204, 698 S.W.2d 816; *Maybelline Co.* v. *Stiles*, 10 Ark. App. 169, 661 S.W.2d 462 (1983). Appellant contends that the notice it received did not specify that all witnesses were to be present. The notice received by appellant provided: "If you have witnesses you want to participate in the hearing, it is your responsibility to notify the Tribunal of their names and addresses if they are to be subpoenaed. This information should be supplied immediately upon receipt of this notice, as it may take some time to process the subpoenas." The notice did not imply all witnesses were not necessary; in fact, it also stated: "The Referee cannot accept any evidence after the hearing is closed unless the case has been held open by the Referee." We believe this is sufficient notice that witnesses should be present at the hearing. Appellant states that it felt the one witness would be sufficient since it was a telephone hearing. This was obviously a tactical decision and cannot be blamed on the notice provided. Since appellant was represented at the hearing and had ample opportunity to cross-examine the claimant and rebut his testimony, it was not denied a fair opportunity to present its case and no additional hearing was required.

Affirmed.

COOPER and MAYFIELD, JJ., agree.

WALKER LOGGING and American Interstate Insurance
v. John PASCHAL and The Second Injury Fund

CA 91-17 821 S.W.2d 786

Court of Appeals of Arkansas
Division II
Opinion delivered January 8, 1992

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

Terry Pence, for appellee.

MELVIN MAYFIELD, Judge. The appellant Walker Logging appeals a decision of the Workers' Compensation Commission which held that the claimant, John Paschal, is permanently and totally disabled and that the Second Injury Fund has no liability. We affirm.

At a hearing on Mr. Paschal's claim for additional benefits it was stipulated that he sustained a work related injury on August 13, 1987; that temporary total disability benefits had been paid; and that permanent partial disability payments had been paid on a scheduled injury rating of 30% to the right lower extremity. The claimant contended he was totally and permanently disabled.

The appellant-employer contended that the claimant was not permanently totally disabled; that the Commission should take into account the claimant's refusal to pursue vocational rehabilitation; and, if the claimant was adjudged permanently totally disabled, then any award in excess of the 30% scheduled injury was the liability of the Second Injury Fund.

The Second Injury Fund contended that the claimant was not permanently totally disabled; that there had been no showing of a combination of injuries to invoke Fund exposure; and that the claimant suffered from a scheduled injury for which no further benefits were due.

The administrative law judge held that the claimant's

compensable injury had combined with his prior back condition to result in permanent, total disability; that the appellant was liable for all medical and related expenses and for permanent, partial disability of 30% to the right lower extremity; and that the Second Injury Fund was liable for all excess permanent, total disability benefits. The Second Injury Fund appealed to the Commission which affirmed the law judge's finding that the claimant was totally and permanently disabled but reversed the liability of the Second Injury Fund.

The claimant-appellee is a man in his late forties who left school at age 17 after being promoted to the eighth grade. He testified he cannot read or write; he has worked at many jobs during his lifetime, all of which involved heavy manual labor; and he was refused employment, or fired from, several jobs because of a back problem. The claimant said he was working for appellant as a timber cutter when he was injured on August 13, 1987, when a tree fell on him and he suffered an injury to his right knee. Dr. Robert S. Bell, orthopedic surgeon, repaired the knee surgically and reported in a letter dated September 11, 1987, that the claimant was found to have a torn medial collateral ligament, torn anterior cruciate, torn posterior cruciate, torn lateral meniscus and torn patella tendon, as well as, torn lateral capsular ligament. The claimant testified that his knee swells when he is on it for more than a few minutes at a time; he walks with a cane; he sleeps poorly because his back and knee hurt; he has to have regular injections in the knee; he can do nothing to help around the house, cannot mow the lawn, change the oil in his truck or help with the gardening; and he had to purchase a van so he could keep his knee stretched out when he had to ride somewhere.

The record contains a number of letters from Dr. Bell reporting his findings in the months following the claimant's knee reconstruction. They reflect that for several months the claimant appeared to be healing nicely. On January 25, 1988, Dr. Bell stated:

> John is seen in follow-up of cruciate reconstruction. He now has 95 degrees of flexion. He is continuing to improve his strength. He has good stability at this time. I am going to plan to admit John to Union Medical Center for arthroscopy of his knee and removal of staples.

On May 9, 1988, Dr. Bell reported that for the extent of his injury the claimant was doing remarkably well; he said the claimant could not, however, return to activities which required excessive walking and climbing on unlevel ground and he gave the claimant a permanent impairment rating of 20% to the lower extremity. Approximately a month later Dr. Bell reexamined the claimant and repeated his x-rays. In a letter dated June 3, 1988, he stated that the claimant was showing increased swelling in his knee and some early degenerative changes which he had not taken into account in the earlier rating. Dr. Bell said for that reason he felt he had under-rated the claimant and he increased his permanent impairment rating to 30% to the lower extremity.

Dr. W. S. Burdick, an orthopedic surgeon with The Bone & Joint Clinic in Shreveport, Louisiana, examined the claimant on November 8, 1988, on referral from Dr. Bell and reported:

> Impression: Postoperative repair of severe ligamentous injury, right knee; traumatic chondromalacia, right knee, with a definite prognosis of traumatic osteoarthritis developing in the knee. I think that, from the stability standpoint, the patient had an excellent repair of the severe ligament injury, but I think the articular cartilage damage is going to prevent this patient from returning to his previous type of work, which was working in the woods and on uneven ground. I would not think that he could return to any work of this type or work that required repeated squatting, bending or walking any significant distance. I think the patient is going to have to be retrained for some other semi-sedentary or sedentary type of occupation.

The claimant testified that he has suffered from back problems since he was 12 years old. On March 6, 1986, Dr. Ernest R. Hartmann, an orthopedic surgeon who performed a pre-employment physical on the claimant for Cooper Industrial, reported that he had a sacralized L5 disc. In a follow up letter Dr. Hartmann explained that "sacralization means that the normal, finger-like transverse process which sticks out from the side of the vertebra is deformed to the extent that it has configuration of the sacrum and will form abnormal joints which can become a source of a back problem." He said this was a congenital abnormality that would not constitute a rateable, residual disability.

Appellant first argues on appeal that the Commission erred in holding that the claimant was permanently and totally disabled. When reviewing a decision of the Workers' Compensation Commission, we must view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *Clark* v. *Peabody Testing Service*, 265 Ark. 489, 579 S.W.2d 360 (1979). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Bearden Lumber Company* v. *Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). We think there is substantial evidence to support the Commission's finding of total and permanent disability.

Appellant also argues that the claimant should be required to have a vocational rehabilitation analysis. It argues that the claimant had agreed to such an analysis then, after he "got on Social Security disability (August 29, 1989) he was no longer interested in vocational rehabilitation." The claimant testified he was unable to work, his wife did not work, he has a 14-year-old child still living at home, and his social security disability check is approximately $89 per month. The record shows that the claimant had agreed at a deposition to vocational rehabilitation testing. However, the appellant failed to arrange for the testing until two weeks before the hearing was scheduled to take place then wanted to get the hearing postponed so it *could arrange* for the claimant to be tested. It was then that the claimant declined — because he did not want the hearing delayed any longer. The statute provides that a claimant must request vocational rehabilitation. *See* Ark. Code Ann. § 11-9-505(c) (1987). Therefore, it was within the claimant's prerogative to refuse to consent to delay the hearing so vocational rehabilitation could be arranged.

The appellant also points out that the Commission found that based upon the claimant's mental capacity, age, education, work experience, and physical impairment and limitations, he had presented a prima facie case that he falls within the odd-lot category, thus shifting to appellant the burden of going forth with evidence that some kind of suitable work is regularly and continuously available to the claimant. Appellant complains that

at no point in the hearing did the claimant contend that he fell into the odd-lot category, that this raised a new issue on appeal and that its only option to rebut the odd-lot doctrine was a vocational rehabilitation evaluation, which was not ordered.

In *M.M. Cohn Co.* v. *Haile*, 267 Ark. 734, 589 S.W.2d 600 (Ark. App. 1979), it was stated:

> 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*, 233 Ark. 786, 346 S.W.2d 685 (1961), 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. See Wright, *Compensation for Loss of Earning Capacity*, 18 ARK.L.REV. 269 (1965), and 2 Larson, *Workmen's Compensation Law*, §§ 57.51 and 57.61 (1976). Professor Larson suggests the principal and the factors as follows:
>
>> If the evidence of degree of obvious physical impairment, coupled with other factors such as 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. [2 Larson, *supra*, § 57.61, pp. 10-136 and 10-137]
>
> The odd lot doctrine refers to employees who are able to work only a small amount. The fact they can work some does not preclude them from being considered totally disabled if their overall job prospects are negligible. 2 Larson, *supra*, § 57.51, pp. 10-107, *et seq.*

267 Ark. at 736. *See also, Lewis* v. *Camelot Hotel*, 35 Ark. App. 212, 816 S.W.2d 632 (1991); *Hyman* v. *Framland Feed Mill*, 24 Ark. App. 63, 748 S.W.2d 151 (1988); *Johnson* v. *Research-Cottrell*, 15 Ark. App. 48, 689 S.W.2d 8 (1985). Therefore, under the circumstances known to appellant prior to the hearing,

and because of the total and permanent disability claim the appellant knew that the appellee was making, the appellant was on notice that the odd-lot doctrine was an issue.

The appellant also argues that the Commission erred in holding that it is solely liable for all benefits for permanent, total disability. In *Mid-State Construction Co.* v. *Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988), the Arkansas Supreme Court set forth a tripartite test for Second Injury Fund liability.

> 1. The employee must have suffered a compensable injury at his present place of employment.
> 2. Prior to that injury the employee must have had a permanent partial disability or impairment.
> 3. The disability or impairment must have combined with the recent compensable injury to produce the current disability status.

295 Ark. at 5. It was stipulated that the claimant suffered a compensable injury while employed by appellant. The Commission found, however, that the second and third prongs of the test had not been met because the claimant did not have any permanent disability or impairment prior to his knee injury and there was no evidence that the conditions combined to create the claimant's permanent total disability.

Appellant contends that it was error for the Commission to rely on Dr. Hartmann's statement that the claimant's congenital back condition "would not constitute a rateable, residual disability" because the Commission ignored Dr. Hartmann's follow-up statement that the claimant would be excluded from any job which required pre-employment back x-rays. The claimant testified that he had been steadily employed since he was seventeen, although he had been troubled by his back throughout his life and had frequently missed work days because of his back. He also testified he had been denied employment by Cooper Industrial because he couldn't pass the physical and he was fired after working a week for Georgia-Pacific because he couldn't pass the physical. However, as the Commission found, there is no medical evidence in the record showing that the claimant was ever given a permanent disability rating on his back or placed on any physical restriction because of his back. Furthermore, the Commission found that the claimant's "permanent disability

results solely from the effects of the compensable knee injury." There is ample evidence in the record to support that finding.

Affirmed.

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

Herbert Hoover MALONE, et al. *v.* Hugh A. HINES, Sr.

CA 91-24 822 S.W.2d 394

Court of Appeals of Arkansas
Division I
Opinion delivered January 8, 1992

William David Mullen, for appellant Ray Dickson.

Melinda French, for appellants.

Harry L. Ponder, for appellee.

JUDITH ROGERS, Judge. This is the second appeal of this lawsuit, which grew out of a dispute between appellee, Hugh A. Hines, and appellant, Herbert Hoover Malone, who had entered into a contract together concerning the operation of a cattle farm. On April 12, 1989, the chancellor entered a decree finding that a constructive trust for the benefit of Hines had arisen in certain cattle, and the proceeds from the sale of that cattle, as against appellants Malone, Ray Dickson, Teresa French, Steven French and Lisa Malone. An appeal was taken from this decree, but in a unpublished opinion, *Malone* v. *Hines*, CA89-315 (op. delivered March 21, 1990), we dismissed the appeal for the lack of an appealable order pursuant to Ark. R. App. P. 2 and Ark. R. Civ. P. 54(b), as the chancellor had not disposed of all of the claims between the parties. In the decree, the chancellor had held in abeyance for the appointment of a special master the settling of accounts between Hines and Malone, as to whether Hines owed money to Malone upon the termination of their contractual relationship.

In the subsequent proceedings below, rather than appointing a master, the chancellor held a hearing on the issue of accounting. By order of October 12, 1990, the chancellor ruled that Hines was not indebted to Malone. This appeal followed, and all issues are now before this court for decision.

In this appeal, appellant Ray Dickson has filed a separate brief, while appellants Malone, Teresa French, Steven French and Lisa Malone have joined together in the filing of a brief. For reversal, Dickson argues that the chancellor erred in his application of a constructive trust against him absent a finding of unjust enrichment; that the chancellor erred in denying him the protection of an innocent purchaser; and that the chancellor erred in his

interpretation of the law concerning constructive trusts. With respect to the order of October 12, 1990, Malone argues that the chancellor erred in finding that Hines was not indebted to him. Appellants Teresa French, Steven French and Lisa Malone contend that the chancellor erred in applying a constructive trust to monies paid to them by Malone. After due consideration of the various issues raised, we affirm the decisions of the chancellor.

The following facts are not in dispute. In 1974, Hugh A. Hines, a resident of Memphis, Tennessee, purchased a ninety-acre farm in Lawrence County. In June of 1987, Hines entered into a contract with Malone for the purpose of raising cattle and other farm products on this farm. According to the contract, Malone was to manage the farm and was to be paid $100 a week for his services. In addition, Malone was to receive one-half of the net proceeds generated from the sale of livestock. In September of 1987, Malone sold half of the herd of cattle for $18,094.50, and a dispute between them arose over Malone's share of the proceeds. On September 23rd, Malone sold the remaining fifty head of cattle to appellant Ray Dickson for $16,500.

When Hines learned of the sale a few days later, he immediately filed suit in the chancery court against Malone, praying for the imposition of a constructive trust upon the proceeds of the sale. In his complaint, Hines alleged that he was the owner of the cattle, and that by contract Malone was hired by him as an employee to manage his farm. The recent dispute between them was acknowledged in the complaint, and it was alleged that the parties had reached an agreement with the aid of legal counsel that neither party would sell the remaining herd pending the resolution of the disagreement. It was also alleged that Malone was authorized, however, to sell as many as fifteen head of cattle, provided the proceeds be placed in escrow with their attorneys. Hines further alleged in the complaint that Malone was insolvent and that, if Malone were to dispose of the proceeds from the sale, he would be irreparably harmed and left without an adequate remedy at law; therefore, Hines requested that Malone be restrained from disposing of the proceeds and asked that the funds be placed into the registry of the court.

On October 5, 1987, a hearing was held on Hines' request for a restraining order. The hearing was apparently discontinued

without the issuance of an injunction upon Malone's testimony that the proceeds had been dispersed to other persons. Thereafter, Hines amended his complaint to include Dickson as a defendant, as well as the other appellants, who were alleged to have received from Malone the proceeds from the sale of the cattle to Dickson.

In his decree of April 12, 1989, the chancellor found that Malone was Hines' employee, who was hired to manage the farm under the direction and orders of Hines, and that Malone's relationship to Hines was that of fiduciary. The chancellor also found that, after the initial dispute over Hines' sale of cattle, they had agreed not to sell the remaining cattle, and that Malone breached this agreement when he sold the cattle to Dickson, who was found not to be an innocent purchaser. Additionally, the chancellor found that on September 24, 1987, Malone had converted the $16,500 check from Dickson into a $15,500 cashier's check and $1,000 in cash, and that the cashier's check had not been cashed as of the time of the October 5th hearing, and was thus available for distribution, contrary to Malone's testimony at that hearing. Upon these findings, the chancellor ruled that the cattle and proceeds were impressed with a constructive trust in favor of Hines. The chancellor also determined that Malone had transferred the proceeds from the Dickson sale in varying amounts to appellants Teresa French, Steven French and Lisa Malone. He thus imposed joint and several liability against Malone and Dickson in the sum of $16,500, as well as the other appellants in the following amounts: Teresa French, $5,000; Steven French, $8,000; and Lisa Malone, $3,500.

We first address an issue which appellants Dickson, Teresa French, Steven French and Lisa Malone have raised in common. These parties contend that the chancellor misapplied the law of constructive trusts with regard to the tracing of the proceeds. Specifically, it is their contention that Hines failed to sufficiently identify the proceeds as found in their hands. We cannot agree.

A constructive trust is an implied trust and unlike an express trust it is not created but arises by the operation of law when equity so demands. *Hall* v. *Superior Federal Bank*, 303 Ark. 125, 794 S.W.2d 611 (1990). We have described the constructive trust as an equitable tool which may be utilized to prevent unjust enrichment. *Horton* v. *Koner*, 12 Ark. App. 38,

671 S.W.2d 235 (1984). It has also been said that wherever the circumstances of a transaction are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest without necessarily violating some established principle of equity, the court will immediately raise a constructive trust, and fashion it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who in equity are entitled to the beneficial enjoyment. *Davidson* v. *Sanders*, 235 Ark. 161, 357 S.W.2d 510 (1962). Moreover, a constructive trust will follow property through all changes in its state or form, so long as such property, its product, or its proceeds are capable of identification. 76 Am. Jur. 2d *Trusts* § 251 (1975). And, a court in equity has jurisdiction to reach the property, either in the hands of the original wrongdoer or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice, acquires a higher right, and takes the property relieved from the trust. *Grissom* v. *Bunch*, 227 Ark. 696, 301 S.W.2d 462 (1957).

At trial, the disposition of the proceeds was established through the testimony of Malone and Teresa French. Malone testified that he exchanged the $16,500 check from Dickson for a cashier's check of $15,500. He said that he retained $1,000 in cash and gave the cashier's check to his niece, appellant Teresa French, who is a lawyer. Teresa testified that she gave appellant Steven French, her brother, $8,000 in cash from a money box in her office in order to satisfy a debt she said Malone owed Steven. She stated, however, that Malone had failed to endorse the cashier's check. Malone retrieved the check and exchanged it at a different bank for a $10,000 cashier's check and the remainder in cash. Malone testified that he gave Teresa the cashier's check and $3,000 in cash, which left him with a total of $3,500 in cash. He said that he gave this amount to his daughter, appellant Lisa Malone, as a gift. Teresa did not cash the $10,000 cashier's check until January 25, 1988, and she testified that she put the money in her savings account. She further testified that Malone owed her mother, Nadine French, $5,000, and that she allowed her mother to charge $5,000 on her Visa credit card to extinguish that debt. Neither Lisa Malone nor Steven French appeared at trial to testify.

Dickson testified that, as of the time of trial, he still had ten head of the cattle sold to him by Malone. He said that he sold the

rest for $12,868.

We think appellants are mistaken in their view of the law with respect to the imposition of a constructive trust. The degree of identification of trust funds depends on the circumstances of each case, and is far less in actions between the *cestui* and trustee than what is required where the rights of third parties are involved. *See Boroughs* v. *Whitley*, 363 P.2d 150 (Okla. 1961); *Rivero* v. *Thomas*, 194 P.2d 533 (Dist. Ct. App. 1948). We agree with the court's statement in *Rivero v. Thomas, supra*, that "No equitable rule approves of a trustee's admission of the receipt of money and denial of liability because the trustor does not know where each penny was placed." *Rivero* v. *Thomas*, 194 P.2d at 541. *See also* 90 C.J.S. *Trusts* § 346 (1955). We find no error in the chancellor's use of his considerable equitable powers to hold these appellants accountable for the receipt of trust property to prevent them from being unjustly enriched at the expense of Hines.

We now turn to the remaining two issues raised by Dickson. In his brief, Dickson first contends that the chancellor erred in applying a constructive trust as to him absent a finding of unjust enrichment. We take his argument to mean that he was not *unjustly* enriched because it was not shown that he was involved in any wrongdoing in purchasing the cattle. This assertion, however, ignores the principle that where a sale of trust property is unauthorized and a breach of trust, the trust follows such property into the hands of a transferee, unless the transferee is protected as a *bona fide* purchaser. 76 Am. Jur. 2d *Trusts* § 255 (1975). *See also Grissom* v. *Bunch, supra.* Furthermore, we have recognized that unjust enrichment does not require the performance of any wrongful act by the one enriched. *Orsini* v. *Commercial Nat'l Bank*, 6 Ark. App. 166, 639 S.W.2d 516 (1982). We find no merit in this argument.

Dickson next argues that the chancellor erred in not finding that he was an innocent purchaser for value. On this issue, Dickson testified that when he purchased the cattle, Malone told him that he and Hines were involved in a dispute. Dickson said that this information made him "uneasy," and caused him to consult an attorney before making the purchase. He also stated that he had never before sought legal advice prior to purchasing

cattle.

The supreme court in *Gentry* v. *Alley*, 228 Ark. 236, 306 S.W.2d 691 (1957), held that one is not an innocent purchaser if he fails to inquire when he had notice of circumstances that ought to have put a prudent business man upon inquiry. The question of whether or not Dickson was an innocent purchaser for value was essentially one of fact, *Hollis* v. *Chamberlin*, 243 Ark. 201, 419 S.W.2d 116 (1967), and we do not reverse a chancellor's findings of fact unless the findings are clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a). All Dickson need have done was to contact Hines about his concerns. He did not do so, and we cannot say that the chancellor's finding on this point is clearly erroneous.

Proceeding to the remaining appellants' arguments, Malone contends that the chancellor erred in not finding that Hines was indebted to him. As part of this argument, he also contends that he and Hines were engaged in a partnership. We will address the latter issue first.

A partnership has been defined as a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a proportional sharing of the profits and losses between them. *Wymer* v. *Dedman*, 233 Ark. 854, 350 S.W.2d 169 (1961). Whether, in fact a partnership exists depends on the intention of the parties, which is to be discovered from the contract into which they enter, construed in the light of all the surrounding facts and circumstances. *See Morrow* v. *McCaa Chevrolet Co.*, 231 Ark. 497, 330 S.W.2d 722 (1960). In determining whether the parties were engaged in a partnership, in a case closely resembling the one at bar, the court in *Kent* v. *State*, 143 Ark. 439, 220 S.W. 814 (1920), said:

> If it was the understanding between Jones and appellant that Jones was to contribute his money and appellant his services as capital in a joint enterprise where both were to share in the profits and losses, then this contract would constitute a partnership. But, on the contrary, if the contract was that Jones should furnish the capital and pay all the expenses and appellant was employed to work for

> Jones with the understanding that he was to receive as compensation for his services one-half the net profits, having no community interest, then appellant would be an employee for hire and not a partner.

Id. at 443-44, 220 S.W. at 815. (Citation omitted.)

Here, it is not disputed that Hines owned the land, that he purchased the cattle, or that he paid the expenses of the farming operation. According to the contract, Malone was charged with the day to day running of the farm, for which he was to be paid a weekly sum and was entitled to half of the net proceeds from the sale of cattle. Based on the above-cited principles and the record before us, we cannot say that the chancellor's finding that Malone was Hines' employee is clearly erroneous.

In his order of October 12, 1990, the chancellor found that the farm operated at a loss, and thus concluded that Malone was not owed any monies under the contract. On appeal, Malone argues that the chancellor erred in giving credence to certain expenses claimed by Hines, arguing that Hines' calculations were filled with errors, and that some of the expenses were not properly attributable to the farming operation. He also argues that the chancellor erred in considering the cost of acquiring the permanent stock as an expense, and that the chancellor should have considered evidence only from 1987 in arriving at his decision.

Cases on appeal from the chancery court are tried *de novo* on the record, but this court will not reverse the findings of the chancellor unless his findings are clearly erroneous, giving due deference to the chancellor's superior position to determine the credibility of the witnesses and the weight to be given their testimony. *Jones* v. *Jones*, 29 Ark. App. 133, 777 S.W.2d 873 (1989).

In making his ruling, the chancellor commented that, even if he withdrew from his calculations the expenses challenged by Malone, the result would still be that the farm operated at a loss. The chancellor also credited the testimony of Hines' accountant, who stated that the cost of permanent stock is treated as an expense according to accepted accounting procedures. Giving due regard to the chancellor in these matters, we cannot say that

the chancellor's finding is in error.

We note that appellants, Teresa and Steven French, and Lisa Malone, have raised additional issues in which they argue that Hines should have been denied relief based on the equitable doctrine of unclean hands, and that they were innocent purchasers. Our examination of the record reveals, however, that these parties did not raise these issues below; therefore, we will not address them. *Helm* v. *Mid-America Industries, Inc.*, 305 Ark. 12, 804 S.W.2d 727 (1991).

For the reasons discussed herein, we affirm.

Affirmed.

COOPER and JENNINGS, JJ., agree.