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Jeffrey David HAWK *v.* STATE of Arkansas

CA CR 91-102 826 S.W.2d 824

Court of Appeals of Arkansas
Division I
Opinion delivered March 25, 1992

Ray Burch and *Jennifer Morris Horan*, for appellant.

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

JAMES R. COOPER, Judge. The issue in this criminal case is whether the affidavit supporting a search warrant complied with the "totality of the circumstances" test of *Illinois* v. *Gates*, 462 U.S. 213 (1983). A jury found the appellant guilty of possession of a controlled substance with intent to deliver, a Class B felony, and possession of drug paraphernalia, a Class C felony. *See* Ark. Code Ann. §§ 5-64-401 and 5-64-403. He was sentenced to 23 years in the Arkansas Department of Correction and a fine of $15,000 on the drug delivery charge, and was sentenced to a five-year concurrent term and a $5,000 fine on the paraphernalia possession charge. For reversal, he contends the trial court erred in denying his motion to suppress evidence seized pursuant to a search warrant. He argues that the supporting affidavit was based on information given by informants and showed neither their knowledge concerning the alleged criminal activity or contraband nor their reliability. He claims the court further erred in failing to suppress his custodial statement taken after the illegal search because it was "fruit of the poisonous tree" and was, therefore, inadmissible. We affirm.

The affidavit supporting the search warrant stated that information was obtained from two confidential informants and an identified informant, Roy McDonald. The first confidential informant identified the appellant "as bringing quantities of methamphetamine to Rogers and delivering it to a Claude Wayne Bickford, a/k/a Jake." The second confidential informant notified the affiant "that she had spoken with Claude Bickford by telephone at the residence of 702 North 22nd Place." Bickford had stated "that a shipment of methamphetamine would be arriving at that residence after dark this date, 5-8/9-89." Roy McDonald was said by the affiant to have been arrested for

possession of methamphetamine with intent to deliver. This informant stated that the appellant "would be coming from Springfield, Missouri, tonight (5-8-89) to meet with Jake Bickford at 702 North 22nd Place to deliver a quantity of methamphetamine." The affiant further stated that his own surveillance of that residence revealed a blue Pontiac Firebird, with a Missouri license; that upon leaving that residence at 12:30 a.m., it proceeded to the Hiway Host Inn; and that a subsequent check of the records at the Hiway Host Inn revealed that the appellant had just registered and was staying in room #138.

To establish the reliability of the informants, the affiant stated that the first confidential informant and Mr. McDonald had previously implicated another person who was subsequently arrested for having sold methamphetamine, and that the second confidential informant identified "Jake" Bickford as being a "major methamphetamine supplier" whose supplier was in Missouri. He also stated that the information was obtained independently from each informant, thereby corroborating each other's information; that both McDonald and the second confidential informant were admitted methamphetamine users; and that the information was corroborated by intelligence reports maintained by the Rogers Police Department. The magistrate found that there was reasonable cause to believe the search would discover the appellant, the controlled substances, and the paraphernalia in question.

The appellant contends that the affidavit inadequately shows the knowledge of each informant, due to their failure to name the appellant or the failure to provide the basis for their knowledge. Nevertheless, in applying the *Gates* test, reviewing the affidavit as a whole, the showing of knowledge is sufficient. The first confidential informant and Roy McDonald do identify the appellant as bringing methamphetamine to Jake Bickford; both McDonald and the second confidential informant identified the residence where the contraband was to be delivered, specified the delivery date, and that the contraband was coming from Missouri; and the second confidential informant stated that she had spoken with Bickford on the telephone that day about the delivery. The information given by the informants was substantially the same though independently given to the affiant, thereby corroborating each other's information.

Rather than relying solely on these tips, the affiant, through independent police work, confirmed the information. *See, Rainwater* v. *State*, 302 Ark. 492, 791 S.W.2d 688 (1990). Surveillance of the residence revealed a vehicle with a Missouri license plate, and a subsequent check of the records at the Hiway Host Inn revealed that the person who drove the car and checked into the motel was the appellant. This affidavit is not unlike the affidavits in *Watson* v. *State*, 291 Ark. 358, 724 S.W.2d 478 (1987), and *Brannon* v. *State*, 26 Ark. App. 149, 761 S.W.2d 947 (1988), in which the information of two confidential informants corroborated each other and was verified by police investigation. Both were found sufficient to comply with the *Gates* "totality of the circumstances" test.

The reliability of these informants was also established by the fact that though obtained independently, the information of each was corroborated by the other two. The affiant stated that the first confidential informant and McDonald previously identified another as selling methamphetamine who was subsequently arrested. The appellant contends this is meritless because the affidavit does not state that that individual was *convicted*; however, none of the cases he cites states that there must be a conviction, rather than a mere arrest or suspicion, to prove the previous reliability of a confidential informant. In *Jackson* v. *State*, 291 Ark. 98, 722 S.W.2d 831 (1987), the affidavit said simply "a reliable informant advised affiant . . .", which was found to be sufficient to establish reliability. Furthermore, in *Watson, supra*, it is stated that the informants' admission of a crime, possibly exposing themselves to prosecution, increased the likelihood of reliability. Here, both McDonald and the second confidential informant admitted to being users of methamphetamine which were statements against their interest and could cause them to be under suspicion.

In support of his argument, the appellant relies on *Aquilar* v. *Texas*, 378 U.S. 108 (1964) and *Spinelli* v. *United States*, 393 U.S. 410 (1969) as well as several cases which were decided before our Supreme Court adopted the "totality of the circumstances" test of *Illinois* v. *Gates, supra*, in *Thompson* v. *State*, 280 Ark. 265, 658 S.W.2d 350 (1983). The *Gates* decision provided a more flexible test to replace the two-pronged test of *Aquilar* and *Spinelli*. A "practical, common sense decision"

should be based on all the circumstances, including the veracity and basis for knowledge of persons supplying information. *Watson* v. *State, supra.*

He also relies on Ark. R. Crim. P. 13.1(b) which codified the stringent *Aquilar-Spinelli* test; however, that rule was amended by per curiam February 5, 1990, effective March 1, 1990, so as to reflect language consistent with *Gates*. Added to the rule is the following:

> An affidavit or testimony is sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place. Failure of the affidavit or testimony to establish the veracity or basis of knowledge of persons providing information to the affiant shall not require that the application be denied, if the affidavit or testimony viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

See Rainwater v. *State, supra.*

It is the duty of the reviewing court to insure that the magistrate had a substantial basis for concluding that probable cause existed to issue the warrant. *Brannon* v. *State, supra.* There is no substantive distinction between the terms "reasonable cause" and "probable cause." *Id*; *see also*, Rule 13.1(d). Probable cause for a search warrant does not require an affiant to assert facts which establish conclusively or beyond a reasonable doubt that a violation of the law exists at the place to be searched. *Vanderkamp* v. *State*, 19 Ark. App. 361, 721 S.W.2d 680 (1986).

We hold that the corroboration of the three independent informants coupled with the confirmation of their information by police investigative work provided reasonable cause to believe that the appellant was involved in criminal activity and that the contraband would be found in his motel room and/or his automobile.

Having found a substantial basis for the magistrate to conclude there was probable cause to issue the search warrant, the appellant's next argument, i.e., that his custodial statement taken seven hours after the illegal search was inadmissible

because it was "fruit of the poisonous tree," is answered. Because the search was not illegal, and the admissibility of the statement was not challenged on any other ground, the trial judge correctly admitted it into evidence.

Affirmed.

DANIELSON and MAYFIELD, JJ., agree.

Melvin JOHNSON *v.* AMERICAN PULPWOOD COMPANY and Cigna Insurance Company

CA 91-159 826 S.W.2d 827

Court of Appeals of Arkansas
Division II
Opinion delivered March 25, 1992

J. G. Molleston, for appellant.

Friday, Eldredge & Clark, by: *James C. Baker, Jr.*, for appellee.

JOHN E. JENNINGS, Judge. In his job as a pulpwood hauler, Melvin Johnson sustained several injuries over roughly a two-year period. After a July 6, 1989, hearing, an administrative law judge found that appellant had permanent partial disability of 26% to his left hand and 15% to his left foot. The ALJ further ordered that appellant "undergo a comprehensive and thorough evaluation under the direction of his principal treating physician, Dr. Clinton G. McAlister," with regard to his back, neck, and head injuries. After his hospitalization and evaluation by Dr. McAlister, appellant was dissatisfied with his lack of progress and went to Dr. Chris Bookout, a chiropractor, for treatment. These chiropractic treatments offered only temporary relief.

At an April 24, 1990, hearing before another ALJ, appellant sought additional benefits, a retroactive change of physicians,

and a penalty for failure to pay benefits previously ordered. The ALJ held that appellant had failed to show entitlement to permanent partial disability for his back injury and denied the retroactive change of physicians. However, the ALJ did find that a penalty was warranted. On appeal, the full Commission affirmed the denial of additional benefits and the denial of retroactive change of physicians, but reversed on the award of penalties.

Appellant first argues that it was error to not allow a retroactive change of physician from Dr. McAlister, an orthopedic surgeon, to Dr. Bookout, a chiropractor. The procedure for obtaining a change of physician is described in Ark. Code Ann. § 11-9-514 (1987). The record shows that appellant received an A-29 form notifying him of this procedure. Dr. McAlister testified that he did not refer appellant to a chiropractor. While the requirements are less strenuous when the desired change is to a chiropractor, advance written notice to the employer or carrier is still required. *See Farmer's Ins. Co.* v. *Buchheit*, 21 Ark. App. 7, 727 S.W.2d 391 (1987); Ark. Code Ann. § 11-9-514(a)(2). The Commission no longer has the broad discretion it once had to retroactively approve a change of physicians. *Wright Contracting Co.* v. *Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984); *American Transportation Co.* v. *Payne*, 10 Ark. App. 56, 661 S.W.2d 418 (1983). While appellant did not comply with the requirements of the statute, he argues that he substantially complied by explaining his non-compliance and by filing a petition for change of physician after the fact. Absent compliance with the statute, the employer is not liable for a new physician's services. *Crosby* v. *Micro Plastics, Inc.*, 30 Ark. App. 225, 785 S.W.2d 56 (1990). The Commission committed no error in denying the change.

Appellant's second argument is that the Commission erred in denying his motion for an interlocutory order or remand for new evidence. The evidence appellant wanted the Commission to consider was a report made by Dr. Warren D. Long, a neurosurgeon. Dr. Bookout had referred appellant to Dr. Long in August of 1990, several months after the hearing before the ALJ. Whether to remand for taking additional evidence is a determination within the Commission's discretion; on appeal an exercise of that discretion will not be lightly disturbed. *Whirlpool Corp.* v.

Kaelin, 19 Ark. App. 331, 720 S.W.2d 722 (1986). A case should only be remanded if the newly discovered evidence is relevant, is not merely cumulative, would change the result, and was diligently discovered and produced by the movant. *Roberts-McNutt, Inc.* v. *Williams*, 15 Ark. App. 240, 691 S.W.2d 887 (1985), citing *Mason* v. *Lauck*, 232 Ark. 891, 340 S.W.2d 575 (1960). In applying these criteria here, the Commission stated that appellant had failed to show why Dr. Long's evaluation report could not have been obtained prior to the ALJ's hearing. The Commission found that appellant had failed to demonstrate due diligence in obtaining the additional evidence. We find no abuse of the Commission's discretion on this point.

Appellant's third argument is that the Commission erred in finding that he had failed to prove by a preponderance of the evidence that he had permanent partial disability of 50% to the body as a whole. Appellant relies upon his own testimony regarding his condition, as well as the opinions of Drs. Bookout and McAlister which note appellant's continuing complaints of pain. However, after examination and treatment, neither doctor was able to assign an impairment rating for appellant. Where the Commission denies a claim because of the claimant's failure to meet his burden of proof, 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. *Shaw* v. *Commercial Refrigeration*, 36 Ark. App. 76, 818 S.W.2d 589 (1991). The Commission's finding here is supported by substantial evidence.

Appellant's fourth argument is that the Commission erred in holding that a late payment penalty should not be assessed until after the expiration of the time for appeal. In the first ALJ's order, dated July 12, 1989, the appellees were ordered to pay $9,140.25 for the injuries to appellant's hand and foot. There was no appeal from these holdings. Partial payment of $4,316.62 was made on August 17, 1989, and the balance of $4,823.67 was not paid until September 22, 1990.

Appellant's argument is based on Ark. Code Ann. § 11-9-802(c):

> If any installment, payable under the terms of an award, is not paid within fifteen (15) days after it becomes

> due, there shall be added to such unpaid installment an amount equal to twenty percent (20%) thereof, which shall be paid at the same time as, but in addition to, the installment unless review of the compensation order making the award is had as provided in §§ 11-9-710 — 11-9-712.

The Commission held that the penalty did not attach until fifteen days after the time for filing an appeal has expired:

> [T]he Administrative Law Judge's order awarding benefits was filed July 12, 1989. Thus, [appellee] had until August 11 to file an appeal of that decision. Once the time for filing an appeal had expired [appellee] had 15 days within which to pay benefits as ordered by the award. Here, the first payment made on August 17, 1989, was within that period and therefore was timely. However, the payment made on September 22nd was not timely and the Administrative Law Judge correctly ordered [appellee] to pay a 20% penalty on those benefits.

Obviously the Commission read Ark. Code Ann. § 11-9-802(c) in conjunction with Ark. Code Ann. § 11-9-711(a)(1), which provides:

> (a) Award or Order of Administrative Law Judge or Single Commissioner - Review.
> (1) A compensation order or award of an administrative law judge or a single commissioner shall become final unless a party to the dispute shall, within thirty (30) days from the receipt by him of the order or award, petition in writing for a review by the full commission of the order or award.

We think the Commission was right to try to reconcile the two statutes and that its interpretation of Ark. Code Ann. § 11-9-802(c) was the correct one.

Finally, appellant argues that the Commission erred in not applying the late payment penalty to medical benefits. However, in *Model Laundry & Dry Cleaning* v. *Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ark. App. 1980), we held that the penalty provision applies only with respect to failure to pay "installments" on time, and that medical expenses are not

included. The Commission's order merely followed our decision in *Simmons*.

Affirmed.

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

TACO BELL, et al. *v.* Teryl FINLEY

CA 91-216 826 S.W.2d 313

Court of Appeals of Arkansas
En Banc
Opinion delivered March 25, 1992

Walter A. Murray, for appellant.

Cheryl K. Maples, for appellee.

JOHN E. JENNINGS, Judge. The claimant in this workers' compensation case, Teryl Finley, suffered an admittedly compensable injury on December 10, 1988, when she slipped and fell in the restaurant of her employer, Taco Bell. Finley slipped on a piece of cardboard and fell backwards, striking her head on the concrete floor. She was paid temporary total disability through December 31, 1988.

Finley was seen by both Dr. Robert White and Dr. Robert Abraham. After a hearing, the administrative law judge found that Finley was entitled to 8 % permanent partial disability and that Taco Bell was responsible for the payment of Dr. Abraham's services. The Commission made the same findings and Taco Bell appeals. We affirm.

Appellant's argument that the award of permanent partial disability is not supported by substantial evidence is based on Ark. Code Ann. § 11-9-704(c) (Supp. 1991) which provides, in part, "Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." The question for decision is whether the Commission's determination of physical impairment in the case at bar is supported by "objective physical findings". In support of its argument, appellant emphasizes a number of facts: Dr. White expressed his opinion that Finley would have no permanent disability; a CT scan showed no abnormality in the lumbar spine; various office examinations by Dr. Abraham showed no limitation of the range of motion in the claimant's low back; and a private investigator retained by the appellant testified that he saw Finley run up and down the steps to her apartment.

In the case at bar, Dr. Abraham's assessment of Finley's permanent disability was based on an American Medical Association publication, "Guides to the Evaluation of Permanent Impairment", and on range of motion tests observed during his examination of the claimant. The tests included the measurement of flexion, extension, and lateral flexion. The word "objective" means "based on observable phenomena". *The American Heritage Dictionary* 857 (2d College ed. 1982). That dictionary also

gives a specific medical definition: "Indicating a symptom or condition perceived as a sign of disease by someone other than the person afflicted." Under either definition, in our view, observations made by a doctor as a result of range of motion tests qualify as "objective physical findings".

It is reasonably clear that in making its determination of physical impairment, the Commission also considered the claimant's testimony about her symptoms, including pain, and the effect of activity on those symptoms. Such consideration in the determination of permanent disability is not prohibited by Ark. Code Ann. § 11-9-704(c), so long as the record contains "objective and measurable" findings to support the Commission's ultimate determination.

Appellant also contends that the Commission erred in not holding that Dr. Abraham's treatment was unauthorized. However, Ark. Code Ann. § 11-9-514 (1987) provides that the change of physician rules do not apply when the employee is not furnished a copy of the notice concerning change of physician. Here the Commission found that the A-29 form was not received by the claimant until after she had begun treatment with Dr. Abraham, and this finding is supported by substantial evidence.

For the reasons stated the decision of the Commission is affirmed.

Affirmed.

TEC and Commercial Union Insurance Companies *v.* Patsy FALKNER

CA 91-211 827 S.W.2d 661

Court of Appeals of Arkansas
En Banc
Opinion delivered April 1, 1992
[Rehearing denied July 8, 1992.]

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

Bethell, Callaway, Robertson, & Beasley, by: *John R. Beasley*, for appellee.

GEORGE K. CRACRAFT, Judge. TEC appeals from an order of the Arkansas Workers' Compensation Commission and advances several arguments. We dismiss the appeal because we conclude that the order appealed from is not final and appealable.

Arkansas Code Annotated § 11-9-711(b)(2) (1987) provides that appeals from the Commission to this court shall be allowed as in other civil actions. For an order to be appealable, it must be final. To be final, an order must dismiss the parties from the court, discharge them from the action, or conclude their rights as to the subject matter in controversy. *American Mutual Insurance Co.* v. *Argonaut Insurance Co.*, 33 Ark. App. 82, 801 S.W.2d 55 (1991); *Samuels Hide and Metal Company* v. *Griffin*, 23 Ark. App. 3, 739 S.W.2d 698 (1987). Ordinarily an order of the Commission is reviewable only at the point where it awards or denies compensation; interlocutory decisions and decisions on incidental matters are not reviewable for lack of finality. *Stafford* v. *Diamond Construction Co.*, 31 Ark. App. 215, 793 S.W.2d 109 (1990); *Mid-State Construction Company* v. *Sealy*, 26 Ark.

App. 186, 761 S.W.2d 951 (1988); *Hernandez* v. *Simmons Industries*, 25 Ark. App. 25, 752 S.W.2d 45 (1988).

The record before us reflects that appellee sustained a compensable injury in March 1989. Appellee did not select a physician, but was seen by eight physicians in several specialized fields of medicine. According to the Commission's findings, the treatment had not appeared to resolve appellee's difficulties, and the medical providers were not able to agree upon a diagnosis of the etiology of her difficulties, the need for future medical treatment, the type of treatment needed, if any, or the degree of any permanent partial disability she may have suffered as a result of her injuries.

Appellee filed a petition requesting that she be given an independent medical evaluation, and that her permanent partial disability be determined. At the hearing, she withdrew the request for an independent evaluation and substituted a petition in which she requested a change of physicians to Dr. Douglas Parker. By agreement of the parties, the issues to be litigated were limited to (1) the extent of any permanent disability that appellee may have suffered, (2) appellee's entitlement to a change of physicians to Dr. Parker, and (3) attorneys' fees.

Arkansas Statutes Annotated § 11-9-514(a)(1) (1987) provides in pertinent part as follows:

> If the employer selects a physician, the claimant may petition the commission one (1) time only for a change of physician, and if the commission approves the change, with or without a hearing, the commission shall determine the second physician and shall not be found by recommendations of claimant or respondent. However, if the change desired by the claimant is to a chiropractic physician, the claimant may make the change by giving advance written notification to the employer or carrier.

In his opinion, which the Commission adopted as its own, the administrative law judge stated:

> After considering all of the evidence presented, it is my opinion that the [appellee] is entitled to a change of physicians under A.C.A. § 11-9-514, *however*, the unusual fact situation in this case makes it difficult for me to

> determine what type of specialist I should select or provide the [appellee] with any future reasonable and necessary treatment for her compensable injury. . . .
>
> Although the [appellee] has withdrawn her request for a medical evaluation, this Commission is vested by statute with discretionary authority to require such an examination or evaluation not only at the request of one or more of the parties, but also on its own motion. It is my opinion that such an evaluation or examination is not only advisable, but is necessary, to determine the area of specialty or expertise of the physician who is *to be* selected by me to provide the [appellee] with further treatment for the compensable injury, *if any such treatment is necessary.* [Emphasis added].

The administrative law judge directed that appellee undergo an evaluation by Dr. Marcia Hixson for her opinion as to (1) the type of medical specialist most likely to be qualified to provide appellee with any further reasonable and necessary medical treatment, if any, and (2) whether appellee had achieved maximum healing and, if so, the extent of her anatomical impairment, if any. *See* Ark. Code Ann. §§ 11-9-207(a)(1) and 11-9-508(a) (1987). The administrative law judge concluded as follows:

> 8. The [appellee] is entitled to a change of physicians pursuant to A.C.A. § 11-9-514, *however, a selection of the appropriate physician* to provide [appellee] with any further reasonable and necessary medical treatment for the compensable injury, *if such is required*, is *reserved* pending receipt of the evaluation of the [appellee] by Dr. Hixson.
>
> 9. The issue of the existence and extent of permanent disability resulting from the compensable injury, attributable to both anatomical impairment and functional disability, is *reserved for further determination* following the ordered evaluation by Dr. Marcia Hixson and pending receipt of her findings. [Emphasis added].

Neither appellee's petition for a change of physicians nor the extent of her permanent disability was finally determined. They were reserved for further action by the Commission upon

the receipt of the report of Dr. Hixson. As such, the Commission's order was interlocutory in nature, and the Commission's directions that appellant pay Dr. Hixson a fee for the evaluation and pay appellee an attorney's fee for the change of physicians yet to be determined were merely incidental thereto.

Dismissed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. This is another chapter in the continuing saga of the search for the appealable order in workers' compensation cases. The need for an agreement upon what constitutes a final, appealable order in these cases becomes clearly evident upon a reading of the majority, concurring, and dissenting opinions in *Hampton and Crain* v. *Black*, 34 Ark. App. 77, 806 S.W.2d 21 (1991). That confusion reigns is demonstrated by the fact that each of those opinions rely, to some extent, on the case of *Gina Marie Farms* v. *Jones*, 28 Ark. App. 90, 770 S.W.2d 680 (1989). However, like the blind men examining the elephant, each opinion exhibits a different concept of the matter examined.

The concept of the majority in the instant case is especially at variance with *Gina Marie Farms* which recognized the appealability of an order which ends a "separable branch" of the litigation. In the instant case, a number of issues were presented to the administrative law judge. One issue was whether the appellee should have a change of physicians. The law judge thought the appellee needed a change and it was the judge's duty to choose a new physician. Since he did not know which one to choose, he thought it "not only advisable but necessary" to have appellee evaluated by a doctor who could tell the law judge the "area of specialty or expertise of the physician" that the law judge should approve for further treatment, if necessary, of the claimant. I cannot understand why the law judge's order, affirmed by the Commission, directing appellee to undergo such an evaluation did not end a separable branch of the litigation and was not appealable. See my dissenting opinion in *Stafford* v. *Diamond Construction Co.*, 31 Ark. App. 215, 793 S.W.2d 109 (1990).

I dissent from the majority decision dismissing this appeal.

Roger Leland BROWN *v.* STATE of Arkansas

CA CR 91-97 827 S.W.2d 174

Court of Appeals of Arkansas
En Banc
Opinion delivered April 1, 1992
[Rehearing denied April 29, 1992.*]

*Cooper and Mayfield, JJ., would grant rehearing.

Adams & Nichols, by: *Johnny L. Nichols*, for appellant.

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

ELIZABETH W. DANIELSON, Judge. Appellant Roger Brown was convicted by a jury of driving while intoxicated, third offense, and of refusal to take a breathalyzer test. He was sentenced to six months in the county jail and fined $5,000. His driver's license was suspended for two years on the DWI charge and for six months on the refusal to take a breathalyzer test. Upon review of the points assigned as error by appellant, we affirm the convictions.

In the course of his patrol duties on April 26, 1990, Officer Mike Edwards of the Harrison police department left the city limits, driving north on Cottonwood Road. His purpose was to patrol two subdivisions of the city, which he testified could only be reached by leaving the city, driving through the county, and then reentering the city at the subdivisions. As he was sitting within the city limits, Officer Edwards observed appellant's vehicle drive by on Cottonwood Road, which was outside the city limits, at an excessive rate of speed. Officer Edwards testified that appellant was clocked on radar as going 55 miles an hour in a 40 mile an hour speed zone and that appellant's vehicle was closing in on the vehicle in front of him at a rate deemed dangerous by the officer.

Officer Edwards immediately pulled out behind appellant and turned on his blue lights. Appellant did not pull over and the officer continued to follow him for about a mile. The officer observed appellant negotiate a sharp curve in a "staging maneuver," which the officer testified indicates the driver has impaired motor skills. Appellant crossed the center line about three times during this process. Appellant then pulled over and stopped on a side street.

As appellant got out of his vehicle, the officer observed him

walking in a halting manner and using the vehicle for support as he walked towards the officer. Officer Edwards met appellant somewhere between the two vehicles and detected a strong odor of alcohol. Based on this and other observations, including appellant's slurred speech, bloodshot eyes, and unsteadiness, the officer believed appellant to be intoxicated. A backup unit arrived and the two officers conducted field sobriety tests, one of which was a gaze nystagmus test. Appellant performed poorly on the tests and was arrested for driving while intoxicated. Appellant was taken to the Harrison police station, where he refused to take a breathalyzer test.

Appellant's first argument on appeal is that the trial court erred in denying appellant's motion to suppress evidence on the grounds that the arresting officer lacked territorial jurisdiction for the arrest. Appellant contends that because his conduct and the arrest occurred outside the city limits, the arrest was illegal and the unlawfully obtained evidence should have been suppressed. In reviewing a trial court's ruling on a motion to suppress, we make an independent determination based on the totality of the circumstances and reverse only if the ruling was clearly against the preponderance of the evidence. *Johnson* v. *State*, 27 Ark. App. 54, 766 S.W.2d 25 (1989).

In support of his argument, appellant relies on *Perry* v. *State*, 303 Ark. 100, 794 S.W.2d 141 (1990), in which the supreme court found that an arrest outside the officer's territorial jurisdiction was illegal and the evidence unlawfully obtained should have been suppressed. In *Perry*, the court noted the well-established rule that a "local police officer acting without a warrant outside the territorial limits of the jurisdiction under which he hold office is without official power to apprehend an offender, unless he is authorized to do so by state statute." 303 Ark. 100 at 102. The court further noted that the State of Arkansas has authorized local police officers to act outside their territorial jurisdiction in four instances: (1) under the "fresh pursuit" doctrine, codified at Ark. Code Ann. § 16-81-301 (1987); (2) when the peace officer has a warrant of arrest, Ark. Code Ann. § 16-81-105 (1987); (3) when a local law enforcement agency requests an outside officer to come within the local jurisdiction and the agency the outside officer is from has a written policy regulating its officers when they act outside their

jurisdiction, Ark. Code Ann. § 16-81-106 (Supp. 1991); and (4) a county sheriff may request that a peace officer from a contiguous county come into the requesting sheriff's county under Ark. Code Ann. § 5-64-705 (1987) in connection with violations of drug laws. *See Perry*, 303 Ark. at 102-103.

In *Perry*, a Searcy police officer arrived at a lodge and parking lot area, which was located outside the city limits but surrounded on three sides by the city. As the officer was driving across the lot to get to another part of his route inside the city, he saw a car parked with its lights on and motor running, and a man slumped over the steering wheel. Upon discovering that the man was drunk, the officer detained him and called for the county sheriff.

We believe *Perry* is distinguishable from the case at bar and that Officer Edward's actions were justified under the fresh pursuit doctrine. *See* Ark. Code Ann. § 16-81-301 (1987). Unlike Officer Edwards, the officer in *Perry* was not within his territorial jurisdiction when he first observed the defendant. His detention of the defendant could not be justified under any of the four situations in which a local police officer is authorized to act outside his territorial jurisdiction.

In *Smith* v. *City of Little Rock*, 305 Ark. 168, 806 S.W.2d 371 (1991), a UALR campus patrolman was within his territorial jurisdiction when he observed the defendant driving in an erratic manner on an adjacent street, which was also within the officer's jurisdiction. The patrolman pursued the vehicle to an area that was off campus and not adjacent to the campus, where the defendant was arrested for DWI. Although the patrolman was outside his territorial jurisdiction when he made the arrest, the supreme court held that given his firsthand information of the defendant's conduct and because he began pursuit within his jurisdiction, the patrolman was well within the bounds of his authority when he pursued the defendant for four blocks and made the arrest. *Smith*, 305 Ark. at 172.

Because Officer Edwards was within his territorial jurisdiction when he first observed appellant driving in a dangerous manner, and began his pursuit of appellant from this point, the subsequent arrest was authorized under Ark. Code Ann. § 16-81-301 (1987), the "fresh pursuit" doctrine. The trial court

properly denied appellant's motion to suppress.

Appellant's second contention is that the trial court erred in allowing testimony concerning the details and results of a field sobriety test known as the "horizontal gaze nystagmus" test. Appellant objected to this testimony on the basis that there was no foundation laid for the witness to testify as to how the biological effects of alcohol could be gauged by the gaze nystagmus test. Following this objection, the officer testified as to the training he had received at the University of Arkansas's DWI school, including a course that dealt in depth with the horizontal gaze nystagmus test.

Appellant relies on *Middleton* v. *State*, 29 Ark. App. 83, 780 S.W.2d 581 (1989), in which we held that the arresting officer's testimony was insufficient to provide an evidentiary foundation for admission of the test results. The appellant in *Middleton* did not argue that the arresting officer had insufficient training or experience to administer the test, but instead contended only that the test itself was invalid. This court stated that we need not decide whether or not gaze nystagmus tests are per se inadmissible because the proper foundation had not been laid to establish the reliability, accuracy, and validity of the test.

Again, we need not decide whether the horizontal gaze nystagmus test is per se inadmissible because the appellant did not object to the validity of the test, but objected only that there had been "no foundation laid to *qualify this witness* to testify about the biological effects of alcohol and how those effects can be gauged by the horizontal gaze nystagmus test." (Emphasis added.) Appellant later requested a continuing objection "based on this witness's qualifications to testify about matters in biology." We believe the officer's testimony regarding his training that dealt in depth with the horizontal gaze nystagmus test was sufficient to establish him as an expert witness qualified to discuss the details and results of the test. We are not required to discuss whether a proper foundation was laid to establish the validity of the test because this point was not raised below; the appellate court will not address matters raised for the first time on appeal. *Chadwell* v. *State*, 37 Ark. App. 9, 822 S.W.2d 402 (1992).

Another factor in the reversal of *Middleton* was the allowance of testimony by the officer that based on the results of

the gaze nystagmus test, the defendant had a blood alcohol level of .15 of .16. In the case at bar, appellant objected to testimony that the test results indicated a particular blood alcohol content, and this objection was sustained. The officer was allowed only to testify that the test results indicated that the driver had ingested substances that would make him an unsatisfactory driver. No error occurred in the admission of this testimony.

Appellant's final argument is that the trial court erred in denying his motion for mistrial. During the course of his testimony regarding his observation of appellant at the police station, Officer Gilliam was asked how appellant appeared to him. He responded, "very intoxicated." When asked what did he mean by "very intoxicated," the officer replied, ".15, .14, .15." Appellant moved for a mistrial, which was denied. The court admonished the jury to disregard that portion of the officer's testimony.

Mistrial is an extreme remedy that should only be resorted to when there has been an error so prejudicial that justice could not be served by continuing the trial. *Crossley* v. *State*, 304 Ark. 378, 802 S.W.2d 459 (1991). The trial judge is vested with considerable discretion in acting on motions for mistrial because of his superior position to determine the possibility of prejudice, and the trial judge's decision will not be reversed absent an abuse of that discretion. *Muhammed* v. *State*, 27 Ark. App. 188, 769 S.W.2d 33 (1989).

Appellant's reliance on *Middleton*, 29 Ark. App. 83, is misplaced. There the officer testified that the defendant's performance on the horizontal gaze nystagmus test showed that he had a blood alcohol content of .15 or .16. The court found that the test was not a chemical test of a bodily substance and could not be used to establish a specific blood alcohol level.

Here, there was no reference to blood alcohol content, only a bare reference to numbers, and there was no attempt to bolster the officer's conclusion by linking it to the results of a field sobriety test. When the testimony is read in context, it is apparent that the officer's conclusions were based only on his own observations and impressions. The admonition to the jury was sufficient to cure whatever effect the statement may have had. *See Burnett* v. *State*, 299 Ark. 553, 776 S.W.2d 327 (1989). We cannot say the trial court abused its discretion in refusing to grant appellant's

motion for mistrial.

Affirmed.

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

JAMES R. COOPER, Judge, dissenting. I dissent because I disagree with the majority's conclusion that Officer Edward's actions were justified by the "fresh pursuit" doctrine. Officer Edwards was within the city limits when he observed the appellant speeding on a county road outside Office Edwards' territorial jurisdiction. As the majority notes, a local police officer acting without a warrant outside territorial jurisdiction lacks the official power to apprehend offenders in the absence of a state statute authorizing him to do so. *Perry* v. *State*, 303 Ark. 100, 794 S.W.2d 141 (1990). The *Perry* Court also noted that:

> The State of Arkansas has authorized local police officers to act outside their territorial jurisdiction in four instances: (1) the well known "fresh pursuit doctrine" which is codified as Ark. Code Ann. § 16-81-301 (1987); (2) when the peace officer has a warrant of arrest, Ark. Code Ann. § 16-81-105 (1987); (3) when a local law enforcement agency requests an outside officer to come within the local jurisdiction, and the outside officer is from an agency which has a written policy regulating its officers when they act outside its jurisdiction, Ark. Code Ann. § 16-81-106 (1989); and (4) a county sheriff may request that a peace officer from a contiguous county come into the requesting sheriff's county. The visiting officer may then come into that county and investigate and make arrests for violations of drug laws. Ark. Code Ann. § 5-64-705 (1987).

Perry, *supra*, at 102-103.

The majority attempts to distinguish *Perry*, *supra*, from the facts of the case at bar by noting that, in *Perry*, the police officer was not within his territorial jurisdiction when he first observed the defendant. However, this is a distinction without a difference because the crucial question with respect to the hot pursuit doctrine is not where the police officer is situated, but is instead where the offense is committed.

In *Perry* v. *State*, *supra*, the Arkansas Supreme Court held

that an officer seeking to make an arrest outside his territory must be treated as a private citizen. The *Perry* court further noted that, under Arkansas law, a private citizen may arrest upon reasonable cause to believe a felony has been committed, but may not arrest for a misdemeanor. Applying these rules to the facts of the case, the Supreme Court concluded that a Searcy policeman did not have the authority to arrest a driver for DWI when he saw the vehicle parked with the motor running in an unincorporated area outside the city limits.

Perry stands for the proposition that the commission of a misdemeanor in an officer's presence, without more, is not a sufficient basis to authorize an extraterritorial arrest. The *Perry* court noted that local police are authorized to act outside their territorial jurisdiction in cases of fresh pursuit, but did not answer the question presented in the case at bar, i.e., whether a police officer, who, while within his jurisdiction, observes a misdemeanor being committed outside his jurisdiction, has the authority to arrest under Ark. Code Ann. § 16-81-301 (1987).

There are no Arkansas cases which so define the extent of the "fresh pursuit" doctrine, but Ark. Code Ann. § 16-81-303 (1987) permits resort to the common law. The majority cites no authority for the proposition that the "fresh pursuit" doctrine applies when a police officer, from within his territorial jurisdiction, observes a misdemeanor being committed outside his territorial jurisdiction, but cases from other jurisdictions state the rule as follows: "The fresh pursuit exception allows officers, *who attempt to detain or arrest within their territorial jurisdiction*, to continue to pursue a fleeing suspect even though the suspect crosses jurisdictional lines." *State* v. *Phoenix*, 428 So.2d 262 (Fla.App. 1982) (emphasis supplied). Clearly, no attempt was made in the case at bar to effect an arrest within the officer's territorial jurisdiction. In Pennsylvania, it has been held that "the pursuit must begin both in the jurisdiction where the police are authorized to act and in that jurisdiction where the crime is committed." *Commonwealth* v. *Fiume*, 436 A.2d 1001 (Pa. Super. 1981). Certainly, this is the most reasonable result if peace officers are to be regarded as guardians of the territorial jurisdiction which employs them, and whose authority is derived from their territorial jurisdiction for its protection. The Arkansas Supreme Court in *Perry*, *supra*, endorsed this traditional idea of territorial jurisdiction for peace

officers, stating that it was a sound concept because a local community is best served when arrests are made by local officers. *Id.*, 303 Ark. at 103.

Finally, *Smith* v. *City of Little Rock*, 305 Ark. 168, 806 S.W.2d 371 (1991), does not support the proposition that an officer within his jurisdiction may, under the fresh pursuit doctrine, make an arrest for an offense he observed outside his jurisdiction. In *Smith*, *supra*, the campus officer's jurisdiction included streets "contiguous or adjacent to" the campus:

> A security officer appointed pursuant to the authority of 25-17-304, except to the extent otherwise limited by the executive head of the state institution or department appointing him, shall protect property, preserve and maintain proper order and decorum, prevent unlawful assemblies and disorderly conduct, exclude and eject persons detrimental to the well-being of the institution, prevent trespass, and regulate the operation and parking of motor vehicles upon and in all of the grounds, buildings, improvements, streets, alleys, and sidewalks under the control of the institution employing him.

Ark. Code Ann. § 25-17-305(a) (1987). Under Ark. Code Ann. § 25-17-301(1) (1987), " 'property' means both real and personal property owned by or under the control of the institution and shall include all highways, streets, alleys, and rights-of-way that are contiguous or adjacent to property owned or controlled by the institution." Clearly, the arrestee was on Fair Park, adjacent to the campus, when his erratic driving was noted by the campus officer, and there was no issue presented in *Smith*, *supra*, concerning the arresting officer's whereabouts. In my view, because the offense at issue in *Smith* was committed within the territorial jurisdiction of the arresting officer, *Smith* does not support the result reached by the majority in the case at bar.

I respectfully dissent.

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

Stacy HOWARD *v.* Clewester WISEMON, Jr.

CA 91-131 826 S.W.2d 314

Court of Appeals of Arkansas
En Banc
Opinion delivered April 1, 1992

Baim, Gunti, Mouser, DeSimone, & Robinson, by: *Judith A. DeSimone*, for appellant.

William McNova Howard, Jr., for appellee.

MELVIN MAYFIELD, Judge. The issue in this case is the amount the appellee should be required to pay for the support of his minor daughter.

The appellant is the mother of the child who was 13 years old at the time of the hearing. The appellant contends that the chancellor clearly abused his discretion in failing to apply the rebuttable presumption that the amount of child support con-

tained in the family support chart is the correct amount. The brief makes it clear that the appellant is referring to the chart found in the Arkansas Supreme Court's per curiam of February 5, 1990. *See In Re: Guidelines for Child Support Enforcement*, 301 Ark. 627, 784 S.W.2d 589 (1990).

The appellee father was directed by a court order entered on December 19, 1979, to pay $50.00 per month for support of the child whose support is the subject of this appeal. The appellant started the instant case by filing a petition on July 23, 1990, asking that the child support be increased. The first thing to be noticed is the provision of the Supreme Court's per curiam which states:

> In determining requested modifications of child support orders entered prior to the effective date hereof, the trial court should consider the totality of the present circumstances of the parties and avoid modifications that would work undue hardship on the parties or any persons presently dependent thereon.

301 Ark. at 630. It is clear that the above provision applies to the instant case.

The record shows that the appellee was found to be the father of the child here involved after a hearing on a complaint filed in December of 1979. The complaint stated that the child was born out of wedlock, and the appellee was ordered to pay $50.00 per month support. According to the mother, this amount was paid fairly regularly from 1979 up to the date the petition to modify was filed in July of 1990. That petition asked for an arrearage of $90.00; however, the court determined from the evidence that the proper arrearage was $910.00 and ordered that amount to be paid at the rate of $15.00 per month. This is in addition to the increase from $50.00 per month to $30.00 per week ordered by the court, plus the provision that the appellee father should pay one-half of the child's "medical, dental, orthodontic, optometric, and prescription expenses."

At the hearing on November 14, 1990, the appellee introduced a pay stub into evidence showing that his pay for a week in September of 1990 was $273.00. This included two hours overtime, and the stub showed deductions for taxes and social

security in the amount of $62.81, leaving his net pay at $210.63 for the week. He testified that he was married and living with his wife and three children, two of which were his. He said his monthly expenses were $1,461.83. Included in this amount was $511.83 for mortgage payments on the house in which appellee and his wife lived. The house, however, belonged to the wife. She had a gross income of about $14,500.00 per year.

The appellant testified that her child is older now and needs more money for support. The appellant makes $186.00 per week gross. Deductions are $64.41 leaving a net weekly income of $121.59. She listed monthly living expenses of $395.83, and said she is in bankruptcy.

The chancellor found that appellee had a weekly income in the amount of $210.00, and the chart called for $51.00 per week child support. He stated the statutes and supreme court rules required support in the amount set out in the chart unless there was some reason to alter that amount. He stated the chart would quadruple appellee's payments and, considering his expenses, it would be devastating to increase by four times the amount of his support payments. Therefore, the chancellor said he was going to increase the weekly payment to $30.00 instead of $51.00. The court's written order also contained essentially the same findings.

■ We affirm the trial court. Its order followed the requirements and applied the rules set out in the supreme court's per curiam of February 5, 1990. That per curiam states, as to modification of orders entered prior to the per curiam, that the court "should consider the totality of the present circumstances of the parties and avoid modifications that would work undue hardship on the parties or any persons presently dependent thereon." 301 Ark. at 630.

The appellant's net income of $121.00 per week (about $484.00 per month) is a little more than her monthly expenses of $395.83. She will get an additional $120.00 per month from the increased child support payments, plus $15.00 per month until the $910.00 arrearage is paid. Appellee's expenses of $1,461.83, when reduced by his $511.83 house mortgage (for which he is liable but which makes payments on the house owned by his wife), leaves his monthly expenses at $950.00. Added to that will be an increase in support payment to appellant. His net income is only

$840.00 per month and this will not meet his expenses. His wife will obviously have to pay part of these expenses to help support him, their two children, and the one child of her own.

In *Stewart* v. *Winfrey*, 308 Ark. 277, 824 S.W.2d 373 (1992), the Arkansas Supreme Court said:

> After figuring the child support amount under the chart, a chancellor has the discretion to adjust the amount if equitable and if written findings are made to that effect. In making the decision, the chancellor can consider a parent's ability to pay. This would necessarily include a consideration of other children the parent is legally obligated to support.

308 Ark. at 284.

Under the law and the evidence, we cannot say the findings of the chancellor are clearly erroneous.

Affirmed.

ROGERS, J., dissents.

JUDITH ROGERS, Judge, dissenting. I do not agree with the majority's statement of the law that a chancellor may consider the non-custodial parent's ability to pay in setting the amount of child support. In a similar vein, I also cannot disagree with the majority's reference that courts should avoid modifications that work undue hardship. However, I do not agree that these principles apply under the facts of this case. To the contrary, this case is illustrative of the problems that the federal legislation, our legislation, and the *per curiam* decisions of our supreme court were designed to redress. The law has always recognized that a non-custodial parent has an obligation and a duty to support his or her children. The most recent legislation on this issue was enacted to gain a degree of uniformity and to ensure that the amount of support ordered is at least adequate to provide for the needs of the child. The legislation also has an eye towards enforcement. To these ends, Ark. Code Ann. § 9-12-312(a)(2) (Supp. 1991) provides that the court *shall* refer to the most recent revision of the family support chart, and that there is a rebuttable presumption that the amount reflected on the chart is the correct amount. This statute does allow deviations from the chart

amount, but only if the amount so reflected is deemed unjust or inappropriate. My departure from the majority's decision in this case is that I firmly believe that the reasons announced by the chancellor provide an unsatisfactory basis upon which to alter the chart amount.

Here, we are presented with a custodial mother who has been receiving $50 a month since the thirteen-year-old child was an infant. She has supported herself and the child by sometimes working at two or three jobs. She now has another six-month-old child to support and, understandably, she has sought relief in our courts. Appellant testified:

> With regard to her personal needs, I have not yet bought a winter coat. He shoes run anywhere from $12-$13.00 a pair, to a pair that will last her (at size nine) for a decent amount of time, running from $30.00 to $40.00. That is including tennis, regular school shoes, which would normally be boots, and a pair of shoes for church. Regarding dresses, I have yet to find one under $25.00 to $32.00, which is the cheapest I have found lately. I have worked all of her life, two to three jobs to buy these things for her. At this point, I cannot work two full time jobs. I have worked from eight to four and four to twelve in the past. As far as necessities, her appetite is bigger now than when she was an infant, and it costs more to feed a thirteen year old. Again, I work only one job, and I am in a personal bankruptcy. These debts are included on my Affidavit of Financial Means, and these amounts are being covered by my own Chapter 13 plan. Because of the personal time just to physically watch and take care of my thirteen year old, I don't think that I would do anything else other than my full-time job of which I have worked for the last three years at this point, and I need help from Mr. Wisemon.

On the other hand, appellee has remarried and voluntarily lists the first and second mortgage of the home owned by his present wife as a reason for not following the chart amount. Appellee also includes other debts, but he refuses to provide the latest income tax figures and excuses this by stating that "my present wife refused to allow me to reveal these." When pressed, he guessed that his wife earns "somewhere to the nearest $1,000,

$13,000 to $15,000."

In setting the amount of support, the chancellor stated:

> The Court is looking at the chart. It has been established that this gentleman has income in the amount of $210.00 per week. The chart shows that amount would call for $51.00 per week in child support. The Court is required under the statutes and the rules set out by the Supreme Court to set the child support at that amount unless there is some reason to alter that amount. As I have indicated in the past, the Court does have a problem with, essentially, quadrupling anyone's child support at any given time. That is not to say there are not some other reasons that apply that obviously making any person pay four times in child support what he has been paying all along is going to have some kind of devastation on him. In addition, the bills outweigh what he has income. Now, I want to state for the benefit of Mrs. Howard, she is not responsible for that, but it is a situation that exists. I am going to increase the child support. I am going to reduce it from the $51.00 per week down to $30.00 per week in child support.

To summarize, the chancellor deviated from the chart amount because appellee, like most people, including appellant, has expenses to pay and because of his reluctance to quadruple the amount of past support. However, the chart amount is presumed to be correct amount of support, and I can hardly believe that the refusal to apply the chart amount can be justified on the ground that the non-custodial parent has been paying a minimal amount of support over the years. The bottom line in this case is that this court is allowing this faulty reason and the appellee's voluntarily assumed expenses to come before the interests of the child. I submit that these are neither cogent nor appropriate grounds to alter the chart amount. By sanctioning this departure from the support chart, this court is not applying the support chart as intended, and I fear that in time the chart's rebuttable presumption will become meaningless.

Wayne MIKKELSON *v.* Thomas WILLIS d/b/a Leisure Time RV Sales

CA 91-297 826 S.W.2d 830

Court of Appeals of Arkansas
Division II
Opinion delivered April 1, 1992

David H. McCormick, for appellant.

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

MELVIN MAYFIELD, Judge. Appellant, Wayne Mikkelson, brings this appeal from the trial court's order granting appellee's motion for a new trial.

Appellant originally brought suit against the appellee, seeking recovery of certain sales commissions. Appellee, Thomas Willis d/b/a Leisure Time RV Sales, counterclaimed, and the case proceeded to trial in municipal court. Following an adverse ruling, the appellant perfected an appeal to circuit court, and trial was set for December 10, 1990. On the day of the trial, appellee and his attorney, whose partner had been present earlier at docket call and had announced appellee was ready for trial, were absent from the courtroom when the time came for the trial to begin. Appellant presented his testimony, and the circuit judge granted him judgment for the relief prayed for in his complaint.

The judgment for the appellee was filed on January 2, 1991, and on January 11, 1991, appellee filed a motion to set aside the judgement and asked for a new trial. Appellee explained that his absence at the time his case was called was a result of the cases ahead of his either being settled or otherwise dispensed with more quickly than expected. The circuit judge denied appellee's motion by order dated January 24, 1991, but on February 1, 1991, entered another order, which set aside the earlier denial and granted appellee a new trial. The new trial was held on April 1, 1991, and the appellant's claim for payment of sales commissions was denied.

Appellant's sole point on appeal is that the trial court erred in vacating its judgment of January 2, 1991, and granting a new trial. The appellant contends that the only basis for the setting aside of a judgment are found in Arkansas Rules of Civil Procedure 59 and 60 and that the grounds set out therein for granting a new trial were not present in the case at bar.

The case of *Phillips* v. *Jacobs*, 305 Ark. 365, 807 S.W.2d 923 (1991), is cited in support of appellant's argument. Without discussing that opinion in detail, we simply note that the *Phillips* v. *Jacobs* case seems to have drastically limited the trial court's authority to grant a motion for new trial. However, for another reason, we cannot reverse the trial judge's order granting a new trial in the case before us.

We first point out that the judgment rendered at trial on December 10, 1990, is inaccurately termed a default judgment. The judgement was not rendered on the basis of appellee's failure to respond to the appellant's complaint but was based upon the appellant's presentation of evidence to the court on the day of trial and was therefore a judgment on the merits. See *Farmers Union Mut. Ins. Co.* v. *Mockbee*, 21 Ark. App. 252, 254-255, 731 S.W.2d 239, 240 (1987).

We next point out that Arkansas Rule of Appellate Procedure 2(a)(3) provides that an order which grants or refuses a new trial is an appealable order. Rule 4(a) states that a notice of appeal shall be filed within thirty days from the entry of the judgment, decree, or order appealed from. In the present case, the appellant chose not to appeal the order dated February 1, 1991, which granted a new trial, but instead submitted his case again to the jurisdiction of the circuit judge on April 1, 1991, for another trial on the issues. Appellant is now bound by that election and is limited on this appeal to a consideration of the issues decided at the subsequent trial. See *Day* v. *Day*, 20 Ark. App. 48, 50, 723 S.W.2d 378, 380 (1987).

At one time, an order which granted or denied a motion for new trial was not an appealable order unless the notice of appeal contained an assent by the appellant that, if the order granting new trial was affirmed, judgment absolute would be rendered against appellant. *See* Ark. Stat. Ann. § 27-2101 (Repl. 1962). At that time, it was held that the failure to comply with the provisions which would make the order granting a new trial a final and appealable order constituted an election to try the case again and prevented a review of the court's action in granting a new trial. *See Etcherson* v. *Hamil*, 131 Ark. 87, 198 S.W. 520 (1917). Act 547 of 1963 changed the law and made an order granting or refusing a new trial appealable without the assent that judgment absolute could be rendered if the order granting new trial was not reversed. *See* Ark. Stat. Ann. § 27-2101 (Supp. 1965). That same situation has been authorized by Rule 2 of the Arkansas Rules of Appellate Procedure. *See* Court's Notes to Appellate Rule 2.

Although Appellate Rule 2(b) provides that an appeal from a final order brings up for review any intermediate order involving the merits and necessarily affecting the judgment

appealed from, this does not bring up for review an order granting or denying a motion for new trial since that is now a final, appealable order and not an "intermediate" order. Examples of intermediate orders are found in *Celotex Corp.* v. *Little Rock School District*, 276 Ark. 481, 637 S.W.2d 566 (1982) (denial of motion to strike a pleading); and *Jones* v. *Goodson*, 298 Ark. 434, 768 S.W.2d 33 (1989) (order dismissing one of the garnishees).

The only issue presented in the instant case is whether the trial court erred in granting appellee's motion for new trial. That was an appealable order, and the failure to appeal until after the case was tried a second time precludes our considering the merits of the court's action in granting the new trial. Therefore, we affirm the judgement appealed from.

Affirmed.

JENNINGS and ROGERS, JJ., agree.

James BATES *v.* FROST LOGGING CO., et al.

CA 91-299 827 S.W.2d 664

Court of Appeals of Arkansas
Division I
Opinion delivered April 8, 1992
[Rehearing denied May 6, 1992.]

Winfred A. Trafford and *G. Ray Howard*, for appellant.

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

JAMES R. COOPER, Judge. This appeal is from a decision of the Workers' Compensation Commission. The full Commission reversed the decision of the administrative law judge and denied the appellant benefits on a finding that he failed to prove by a preponderance of the evidence that his back injury was caused by a work-related accident.

For reversal, the appellant contends that this finding was not supported by substantial evidence, and that the facts found by the

Commission do not support its opinion and order. We agree, and reverse the decision of the full Commission.

The appellant was employed by the appellee, Frost Logging Company in April 1988, when he fell off a log truck while marking footage on loaded logs. He testified before the administrative law judge that his employer was about to drop a log on his hand and he stepped back to avoid it. When he did, the loader swung around, jerking and vibrating the truck and he fell, unable to hold onto the slick logs. He immediately felt tingling in his back, left hip and left leg but returned to work the following day. Bobby Jones, the appellant's co-employee, testified that after the fall, the appellant "was kind of stove up like arthritis" for the next day or two; that later he "was slow about moving and he had trouble throwing his chains (to bind the logs), and Joe (the employer) had to throw his chains for him every once in a while... He didn't trim limbs or run the chain saw after that either." Mr. Jones further stated that the appellant was able to perform all of his duties before the fall, describing him as "gung-ho... working hard", and that after the fall he noticed the appellant having periodic back problems.

The appellant continued in his employment until July 1988, when he was forced to quit due to respiratory problems attributed to carbon monoxide poisoning. He met with an attorney at that time to seek assistance in obtaining financial assistance from his employer for the medical bills associated with his respiratory problems. He did not discuss the work-related fall or back injury with his attorney at that time.

In September 1988, the appellant was hospitalized primarily for the respiratory problems but complaints of lumbar pain and back pain were noted in the narrative reports. A CAT scan conducted in November showed that the appellant had a herniated disc, and he subsequently underwent surgery for his back. He was assigned a permanent partial disability rating of 10 percent to the body as a whole after the surgery, and was awarded temporary total disability benefits by the administrative law judge. It was this award which the Commission reversed.

When reviewing decisions from the Arkansas Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most

favorable to the findings of the Commission, and we must uphold those findings unless there is no substantial evidence to support them. *Scarbrough* v. *Cherokee Enterprises*, 33 Ark. App. 139, 803 S.W.2d 561 (1991). In cases where a claim is denied because a claimant fails to show entitlement to compensation by a preponderance of the evidence, the substantial evidence standard of review requires that we affirm if a substantial basis for the denial of relief is displayed by the Commission's opinion. *Williams* v. *Arkansas Oak Flooring Co.*, 267 Ark. 810, 590 S.W.2d 328 (Ark. App. 1979); *Linthicum* v. *Mar-Box Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987).

In a workers' compensation case, the claimant has the burden of proving by a preponderance of the evidence that his claim is compensable, i.e., that his injury was a result of an accident that arose in the course of his employment, and that it grew out of, or resulted from the employment. *Wolfe* v. *City of El Dorado*, 33 Ark. App. 25, 799 S.W.2d 812 (1990). He must prove a causal connection between the work-related accident and the later disabling injury. *Lybrand* v. *Arkansas Oak Flooring Company*, 266 Ark. 946, 588 S.W.2d 449 (1979). It is not, however, essential that the causal relationship between the accident and disability be established by medical evidence, *Crain Burton Ford Company* v. *Rogers*, 12 Ark. App. 246, 674 S.W.2d 944 (1984), nor is it necessary that employment activities be the *sole* cause of a workers' injury in order to receive compensation benefits. It is enough if there is "a substantially contributory causal connection between the injury and the business in which the employer employs the claimant." *Lockeby* v. *Massey Pulpwood*, 35 Ark. App. 108, 812 S.W.2d 700 (1991).

The Commission conducted a *de novo* review of all the evidence in the record which included testimony of the appellant, his wife, and a former co-employee. The opinion stated:

> Undisputed and uncontradicted testimony indicates that the Claimant did fall off a logging truck in late April of 1988 while performing employment-related duties for the Respondent employer. The testimony also indicates that the Claimant immediately began to experience back problems. The Claimant and a former co-employee both testified with regard to the fall, and they both testified that

> the Claimant was not able to perform his employment duties as well after the fall as before. In addition, his wife testifed that she and a son had to assist the Claimant in getting out of his truck on the day that the fall occurred, and both the Claimant and his spouse testified that he immediately began to experience problems with his lower back and left leg and that these problems progressed to the point where he experienced numbness in his left leg and could not control the leg, causing him to lose his balance at times. However, the claimant returned to work immediately after the fall and he worked continuously until he terminated his employment with the Respondent employer in July of 1988 for medical reasons unrelated to his back condition.

The Commission noted that the appellant testified that he complained to his doctor about his back pain prior to September, but the Commission found no other evidence to support this testimony. The appellant explained that his doctor considered his respiratory problems serious, requiring urgent care, and planned to treat his back afterward. There was no testimony which disputed his explanation.

The Commission also noted that the doctor's report from the visit in which the appellant complained of his back pain stated that he was "having lumbar pain from a fall that happened over the weekend." The opinion then refers to a letter written by the doctor in 1990 stating that the appellant was first treated in September 1988 for "an old back injury which had become aggravated over the weekend." The appellant explained that he fell due to the loss of control of his left leg which he attributed to the work-related fall. Again, no evidence contradicted his explanation.

Finally, the Commission found significance in the fact that the appellant had filed a previous workers' compensation case in Louisiana while working for another employer, and that, in this case, the appellant met with an attorney about aid for his respiratory problems but failed to mention the back injury. The Commission concluded that this proved that the appellant was aware of his possible claim and his employer's responsibility. Nevertheless, the appellant's previous claim was totally unre-

lated and he testified that he had no part in its filing and that he was unaware that his current employer carried workers' compensation insurance. This testimony was corroborated by his co-employee's testimony that the employer did not post any notices as to workers' compensation claims. The appellant said that he did not mention his back injury to the attorney because he was trying to pay doctors' bills which were attributed only to the respiratory problems.

The Commission concluded that he was diagnosed with a herniated disc five months after the fall but the pain he experienced had not been severe enough for him to seek treatment before that time. Furthermore, his effort to obtain treatment even then was secondary to obtaining treatment for his respiratory problem and that none of the medical records attributed his back pain to a work-related fall. It concluded that it could "not say there is no other logical explanation for the [appellant's] back problems."

The progression of the appellant's injury is almost identical to that as found in *Chambers* v. *Jerry's Department Store, Inc.*, 269 Ark. 592, 599 S.W.2d 448 (Ark. App. 1980), where the appellant admittedly suffered a compensable injury which caused her to have pain intermittently over a period of 19 months. The appellant's doctor testified that he was unable to say what caused the injury, but that, in reference to her work-related accident, "there [was] an excellent possibility" that it was the cause. "He further stated that assuming she had an injury in December 1976, the back or disc injury could get progressively worse without trauma and this is not unusual." *Id.* at 597. The Court, in reviewing the issue of causal connection between the injury and the herniated disc, reversed the decision of the Commission which denied benefits, and stated:

> The decision of the administrative law judge, affirmed by the Commission, stated the issue to be decided was 'necessarily a medical question.' This erroneous conclusion resulted in inadequate consideration of other facts in the record showing claimant's back problems originated with the injury, and while at times in partial remission, were continuous from the time of the injury.

We stated that unquestionably the medical evidence was

important, but that the language of the Commission and the record as a whole indicated that too little importance was given to other evidence relevant to causation, i.e., immediate onset of pain and continued physical problems after the appellant's work-related fall. We believe the same error has been committed here.

The testimony before the administrative law judge in the case at bar was that the appellant had never had problems with his back until the fall in April 1988; that he experienced severe pain immediately after the accident; that he continued to work, though with much difficulty which was noticeable to his co-employee; and that the pain and loss of control he was having progressed to a point where medical attention was necessary.

Based on these facts, we find that the opinion of the Commission fails to display a substantial basis for denial of relief. Therefore, we reverse the decision of the full Commission and remand to the Commission to award appropriate benefits.

Reversed and remanded.

DANIELSON and MAYFIELD, JJ., agree.

Robert DUNCAN *v.* STATE of Arkansas

CA CR 91-125 828 S.W.2d 847

Court of Appeals of Arkansas
Division II
Opinion delivered April 15, 1992

Wallace & Hamner, by: *Dale E. Adams*, for appellant.

Winston Bryant, Att'y Gen., by: *Melissa K. Rust*, Asst. Att'y Gen., for appellee.

GEORGE K. CRACRAFT, Chief Judge. Robert Duncan appeals from his conviction of the crime of theft by receiving property valued in excess of $2,500.00, for which he was fined $10,000.00. Appellant contends that the trial court erred in denying his motion for a directed verdict; in allowing the introduction of expert testimony concerning the mathematical probabilities of two keys fitting the same car; and in permitting Ricky Bauer to testify as an expert. We find no error and affirm.

A motion for directed verdict is a challenge to the sufficiency of the evidence. In addressing such challenges this court will

affirm the trial court's denial if there is substantial evidence to support the jury's verdict. Substantial evidence is evidence of such sufficient force that it will compel a conclusion one way or another, inducing the mind to pass beyond suspicion or conjecture. In our review of such cases, we view the evidence in the light most favorable to the appellee, considering only that tending to support the guilty verdict. *Tarentino* v. *State*, 302 Ark. 55, 786 S.W.2d 584 (1990).

Our law makes no distinction between direct evidence and circumstantial evidence. The fact that evidence is circumstantial does not render it insubstantial. *Small* v. *State*, 5 Ark. App. 87, 632 S.W.2d 448 (1982). When circumstantial evidence alone is relied upon, it must indicate the accused's guilt and exclude every other reasonable hypothesis. Whether circumstantial evidence excludes every other reasonable hypothesis is usually a question for the jury, and it is only when the evidence leaves the jury solely to speculation or conjecture that it is insufficient as a matter of law. *Cristee* v. *State*, 25 Ark. App. 303, 757 S.W.2d 565 (1988); *Deviney* v. *State*, 14 Ark. App. 70, 685 S.W.2d 179 (1985). Jurors are not required to set aside their common knowledge but may consider evidence in the light of their observations and experiences in the ordinary affairs of life and draw reasonable inferences from circumstantial evidence to the same extent that they could from direct evidence. *Payne* v. *State*, 21 Ark. App. 243, 731 S.W.2d 235 (1987).

Arkansas Code Annotated § 5-36-106(a) (1987) provides that a person commits the offense of theft by receiving if he receives, retains, or disposes of stolen property of another person, knowing it was stolen or having good reason to believe it was stolen. Subsection (e)(1) provides that theft by receiving is a class "B" felony if the value of the property is $2,500.00 or more.

Danny Kimbrell, general manager of North Point Mazda, testified that in November 1989 his dealership received a 1989 Mazda RX7 Turbo (Turbo), equipped with power windows, power locks, radio stereo-compact disc player, plush floor mats, black leather seats, and an interior safety lock box. Several days later, the interior of this vehicle had been completely stripped and all of the removable parts on the inside of the car had been taken. He also testified that in 1988 his agency sold appellant a black

Mazda RX7 Sports Coupe (Coupe), which was equipped with a cloth interior and none of the extras such as those on the Turbo.

An official from Twin City Bank testified that appellant had financed his vehicle through the bank. In October of the following year, appellant's payments were in default and the vehicle was repossessed by the bank. The official stated that the bank delivered the vehicle to North Point Mazda for appraisal.

Kimbrell testified that he examined the repossessed vehicle and found that it now contained, with the exception of the stereo system, the same type of extra equipment as had been stripped from the more expensive Turbo. These parts contained only model numbers and could not be identified by serial number as being the stolen ones.

The vehicle had originally been black, but by the time it was repossessed it had been repainted white. Kimbrell testified that at the time the replacement parts were put on appellant's vehicle, they were not available at the dealership, junkyards, or any other place in the Little Rock area because they were from a new model. Only two Turbos had been sold in Little Rock and none had been wrecked. He testified that all of the parts not originally on the repossessed car were the same type as those missing from the stripped vehicle.

Rebecca Ford testified that she was married to appellant when he purchased the vehicle, and that she had subsequently seen the vehicle on several occasions in a body shop where appellant was temporarily employed. At one time, she saw it there being painted white. She said she subsequently saw a black hood with a scoop being painted white and placed on the vehicle. She testified that she also saw appellant switching the interior of the vehicle by installing leather seats and door panels, a new gear shift, carpets, and portions of a dashboard.

Ricky Bauer testified that he had been in the automobile business for eighteen years. During that period of time, he had been a mechanic and worked in parts departments, and he was presently the parts manager for North Point Mazda. He testified that he was familiar with the manner in which Mazda keys were made, and that on each RX7 model, one key fit all of the locks. On

the stripped vehicle, the key that fit the ignition would also open all of the other locks, including the safety lockbox in the rear seat. He tried to open the lockbox on the repossessed vehicle with the ignition key of the repossessed vehicle. It did not fit. He then obtained from company records the key codes to the stripped vehicle and, according to those codes, cut a key which did not fit the ignition of the repossessed car, but which did open the lockbox that had been placed in it. The vehicle sold to appellant originally contained no such lockbox. He testified that because of the way Mazda keys were designed and made, the probability of one key fitting two cars was 1 in 7500.

He stated that many of the interior accessories on the repossessed car were not original equipment. All of the added features were the same type as those items listed as stolen from the Turbo, with the exception of the Turbo's stereo system and two doors. Based on his experience in dealing with both new and used parts for Mazda cars, he opined that the value of the parts stolen from the Turbo was in excess of $7,000.00.

While there was no direct evidence that the parts added to the repossessed vehicle were those taken from the stripped one, we cannot conclude that the inferences arising from the proven facts foreclose such a conclusion. The fact that parts were stolen from the stripped vehicle was clearly established, as was their value. There was evidence that the parts installed on appellant's vehicle after its purchase had similar model numbers to the model numbers of the parts from the stripped vehicle. There was also evidence that those replacement parts found on the repossessed vehicle were not available at that time either in Mazda parts departments or junkyards. In addition, there was evidence that on each RX7 model, one key fit all of the locks. Here, the ignition key of the repossessed vehicle could not open the lockbox on the repossessed vehicle; yet, a key cut from the code to the stripped vehicle did open the lockbox. From our examination of the record, we cannot conclude that the jury's determination that the finding of guilt of theft by receiving of a value in excess of $2,500.00 is not supported by substantial evidence.

Appellant next contends that the trial court erred in permitting Bauer to testify about the mathematical probability of two keys fitting the same vehicle. We agree with appellant that

the interjection of sophisticated mathematical probabilities into a criminal trial raises a number of concerns. However, our courts have permitted in many instances similar expert testimony after analyzing human hair, blood, tire tracks, and other physical evidence where there is a reasonable basis for the opinion stated by the expert. In *Miller* v. *State*, 240 Ark. 340, 399 S.W.2d 268 (1966), the supreme court ruled that admission of unsubstantiated, speculative testimony, based on probabilities, was erroneous. Such opinions may not be predicated on estimates and assumptions, without a reasonable foundation or basis for the opinion. However, in *Miller* the court quoted with approval from 20 Am. Jur. *Evidence* § 795:

> [A]n expert witness' view as to probabilities is often helpful in the determination of questions involving matters of science or technical or skilled knowledge. . . . It is necessary, however, that the facts upon which the expert bases his opinion or conclusions permit reasonably accurate conclusions as distinguished from mere guess or conjecture.

See 31A Am. Jur. 2d *Expert and Opinion Evidence* § 86 (1989).

Here, the witness's testimony as to the probability of one key fitting two vehicles was not based upon estimates or assumptions. He reasonably based his opinion on his experience and personal knowledge of the manner in which keys were made and the key-code books of the Mazda manufacturer.

■ Appellant relies heavily on the decision in *United States* v. *Massey*, 594 F.2d 676 (8th Cir. 1979). In *Massey*, the court held that the admission of such evidence constituted reversible error under the circumstances of that case. There, the judge injected himself into the interrogation of the expert. The judge's comments construing the expert's testimony with respect to the mathematical probabilities, coupled with the prosecutor's emphasis on the mathematical probabilities in his closing argument, were found to constitute "plain error" under Rule 52(b) of the Federal Rules of Criminal Procedure, and required reversal of the defendant's robbery conviction. Here, the trial judge did

not inject himself into the interrogation nor comment upon the probabilities. Although the prosecuting attorney did allude to those probabilities in her closing argument, no objection was made to her argument on any basis. Our courts, unlike the federal courts, do not recognize the "plain error rule" but require a specific and timely objection in order to preserve an issue for appeal. *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

Also, the case of *People* v. *Collins*, 68 Cal.2d 319, 438 P.2d 33, 66 Cal. Rept. 497 (1968), is not applicable here. There, instead of relying on data accepted in the field, the expert estimated the frequency of the occurrence of certain characteristics and based his probability projections on those estimates. The California Supreme Court found the same lack of demonstrable foundation that our supreme court found objectionable in *Miller* v. *State, supra*. We have reviewed a number of cases involving this situation, including *State* v. *Carlson*, 267 N.W.2d 170 (Minn. 1978), which holds that the psychological impact of mathematical probabilities upon the jury makes it inadmissible in every case. However, we believe that the better-reasoned cases hold to the contrary, *i.e.*, where the proper foundation has been laid and undue prejudice does not result, expert testimony of this nature may be admitted. Here, we cannot conclude that a proper foundation was not laid or that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

Appellant next contends that the trial court abused its discretion in holding that Bauer was qualified to testify as an expert witness. We do not agree.

Rule 702 of the Arkansas Rules of Evidence provides:

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

Whether a witness may give expert testimony rests largely within the sound discretion of the trial court, and its determination will

not be reversed unless that discretion is abused. There is a decided tendency to permit the finder-of-fact to hear testimony of persons having superior knowledge in a given field, unless clearly lacking in training or experience. *Dildine* v. *Clark Equipment Company*, 282 Ark. 130, 666 S.W.2d 692 (1984); *Killian* v. *Hill*, 32 Ark. App. 25, 795 S.W.2d 369 (1990). If there is a reasonable basis for saying a person knows more about the subject at hand than a person of ordinary knowledge, his evidence is admissible. *Killian* v. *Hill*, *supra.*

Here, Bauer testified that he had been engaged in the automotive industry for over eighteen years. During that period, he had worked as both a mechanic and parts manager. He was a high school graduate and had attended five schools dealing with Mazda parts and over twenty schools for mechanics. While a mechanic, he had worked on several thousand automobiles, using both new and used parts. During the past year, he had purchased parts for Mazda automobiles over one hundred times.

Bauer stated that he was familiar with the keys for Mazda cars and how they were made, and that he had experience in duplicating them. He testified that Curtis Industries made key-cutters for most of the after-market keys for all major automobile manufacturers, including Mazda. A security code book is used in connection with the key-cutter, in which the manufacturer includes a code for its keys. He stated that Mazda utilized only 7500 different "cuts" in its 1988-1989 cars, and used a code of "00 to 7500" in order to determine which keys might fit which automobiles. He testified that some of his knowledge came from trade journals, some from the Curtis Industries code books, and some from his own experience at the Mazda agency in Little Rock.

We cannot conclude that this witness lacked the training, skill, and experience that would give him a superior knowledge of matters about which he testified, or that he did not know more about the subject than persons of ordinary knowledge. *See Courteau* v. *Dodd*, 299 Ark. 380, 773 S.W.2d 436 (1989). The trial court did not abuse its discretion in permitting Bauer to testify as an expert.

Nor do we find merit in the argument that his statements were inadmissible as based on hearsay because he had read similar information in trade magazines. An expert may base an opinion on what he learns from others, despite it being hearsay, so long as the sources are of a type reasonably relied on by experts in a particular field. *See Killian* v. *Hill, supra*; Ark. R. Evid. 703. The Curtis key codes were said to be relied upon by persons skilled or having responsibility for duplicating keys for many different makes of cars, and there is no indication that trade magazines subscribed to by persons in a particular trade are less than reliable. In addition, it is to be noted that Bauer relied upon his own calculations in confirming the figures about which he had testified. The relative strength or weakness of the factual underpinnings of opinions of experts goes to the weight and credibility of the evidence and not to its admissibility. *Killian* v. *Hill, supra*; *Arkansas State Highway Commission* v. *Schell*, 13 Ark. App. 293, 683 S.W.2d 618 (1985).

Affirmed.

JENNINGS and ROGERS, JJ., agree.

LEVI STRAUSS & COMPANY *v.* Ramona LAYMANCE

CA 91-222 828 S.W.2d 356

Court of Appeals
Division I
Opinion delivered April 15, 1992

Bassett Law Firm, by: *Woody Bassett*, for appellant.

Law Offices of Laura A. McKinnon, by: *Harry E. Dermott*, for appellee.

ELIZABETH W. DANIELSON, Judge. In this workers' compensation case, appellant Levi Strauss & Company appeals the decision of the full commission, which found that appellee Ramona Laymance was entitled to temporary partial disability

during her healing period, when she was also drawing unemployment benefits. The commission also found that appellee was entitled to permanent partial disability equal to 3% to the hand. We affirm.

Appellee began working for appellant on February 22, 1986, and her duties involved "stitching vents." Later that year, appellee was assigned a different duty, "hanging collars," which caused swelling and pain in the middle finger of appellee's left hand. Appellee was diagnosed by Dr. McCollum as having tendonitis and was later released to return to work. Upon her return, appellee went back to "stitching vents," but in September of 1987, was again assigned to "hanging collars." On December 24, 1987, appellee again complained of pain in her finger and returned to Dr. McCollum for treatment.

Following Christmas vacation, appellee returned to work on January 4, 1988. She continued to work for appellant until January 15, 1988, when she was terminated for failure to meet her production quotas. Appellee applied for unemployment insurance benefits, which commenced on January 30, 1988, at a rate of $114.00 per week.

On February 9, 1988, appellee returned to Dr. McCollum and was referred to Dr. Garbutt, who diagnosed appellee as having "stenosing tenosynovitis" of the left long finger. Outpatient surgery was performed on May 26, 1988. As of the date of her hearing, appellee had not been released by Dr. Garbutt.

Appellee filed for workers' compensation benefits, contending that she was entitled to temporary total disability benefits from January 15, 1988, to a date yet to be determined, or at least to temporary partial disability benefits during the period in which she was drawing unemployment benefits. Appellant contended Dr. Garbutt's treatment was unreasonable and unnecessary. Appellant also contended that appellee was not temporarily totally disabled, but that if she were found to be temporarily totally or partially disabled, she was disqualified from receiving workers' compensation benefits because she had been drawing unemployment benefits during that time. Appellant bases this argument on Ark. Code Ann. § 11-9-506 (1987), which deals with limitations on compensation for recipients of unemployment benefits.

The administrative law judge found that Dr. Garbutt's medical treatment was reasonable and necessary and that, although appellant was temporarily totally disabled from January 15, 1988, to a date yet to be determined, she was disqualified from receiving any benefits subsequent to January 30, 1988, because she was drawing unemployment benefits during this time.

On appeal, the full commission reversed the decision of the administrative law judge on the issue of the denial of temporary total disability benefits. The commission found that Ark. Code Ann. § 11-9-506 does not preclude temporary *partial* disability benefits when a claimant is also receiving unemployment benefits during the same time. The commission reasoned that appellee's disability was not total during that time period and that she did have some physical capacity for work, as evidenced by her work for respondent in January 1988 and her receipt of unemployment benefits. Therefore, the commission determined, appellee was entitled to compensation for temporary partial disability during that time. Upon remand, the administrative law judge offset the amount of appellee's weekly unemployment benefits ($114.00) against the amount of workers' compensation benefits for the temporary partial disability that she would have been entitled to ($147.39) and awarded appellee the difference ($33.39) for the period from January 30, 1988, through June 28, 1988. The administrative law judge also determined that appellee was entitled to permanent partial disability benefits equal to 3% to the left hand as a whole. The full commission incorporated its previous decision and affirmed the decision of the administrative law judge.

Appellant's first contention is that the award of temporary partial disability is not supported by substantial evidence and is contrary to the provisions of Ark. Code Ann. § 11-9-506 (1987). This statute provides that "no compensation in any amount for temporary total or permanent total disability shall be payable to an injured employee with respect to any week for which the injured employee receives unemployment insurance benefits. . . ." The issue before us is whether § 11-9-506 precludes compensation for temporary partial disability during the same time period unemployment benefits are received.

The first rule in interpreting a statute is to construe it just as it reads by giving words their ordinary and usually accepted meaning. *Arkansas Vinegar Co.* v. *Ashby*, 294 Ark. 412, 743 S.W.2d 798 (1988). Provisions of the Arkansas Workers' Compensation Act are construed liberally in favor of the claimant. *Id.* The commission found, and we agree, that the statute by its language is limited to temporary *total* disability and permanent *total* disability. If the legislature had intended to preclude receipt of temporary or permanent *partial* disability benefits, the statute could have easily been so worded.

Appellant argues that this award allows a claimant to represent himself to one administrative body as "ready, willing, and able to work" in order to draw unemployment benefits, and then present himself to another administrative body as "unable to work" in order to draw workers' compensation benefits. In the following excerpt, Larson explains why the two positions are not necessarily inconsistent:

> At first glance the two positions may appear mutually exclusive; but the inconsistency disappears when the special meaning of disability in workmen's compensation is remembered, involving . . . the possibility of some physical capacity for work which is thwarted by the inability to get a job for physical reasons. Thus, the injured claimant may honestly represent to the Employment Security Office that he is able to do some work, and with equal honesty tell the Compensation Board later that he was totally disabled during the same period since, although he could have done some kinds of work, no one would give him a job because of physical handicaps.

2 Arthur Larson, *The Law of Workmen's Compensation* § 57.65 (1992). We affirm the finding of the commission that Ark. Code Ann. § 11-9-506 does not preclude receipt of temporary partial disability benefits. We recognize that there appears to be a discrepancy in the offset formula set out by the commission and that which was actually employed by the administrative law judge, but we do not address this issue as it was not raised by the parties.

Appellant's second contention is that the commission erred in finding appellee is entitled to permanent partial disability

benefits in the amount of 3% to the hand instead of 3% to the left long finger. Although the injury was to appellee's left long finger in particular, Dr. Garbutt's medical report found that appellee had a 3% permanent partial impairment to her left hand. Appellee testified that her disability includes her entire left hand. When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the commission's findings and affirm if those findings are supported by substantial evidence. *Shaw* v. *Commercial Refrigeration*, 36 Ark. App. 76, 818 S.W.2d 589 (1991). Dr. Garbutt's findings and appellee's testimony regarding her disability constitute substantial evidence to support the findings of the commission.

Affirmed.

JENNINGS, J., agrees.

ROGERS, J., concurs.

JUDITH ROGERS, Judge, concurring. In this case, the Commission allowed the award of weekly compensation to be reduced by the amount appellee received in unemployment benefits. Although I question the propriety of such an offset, this has not been raised as an issue on appeal. Therefore, I concur in the decision in this case, but I write separately to point out that this opinion should not be construed as an endorsement of the offset.

TRANSPORTATION PROPERTIES, INC., et al. *v.* CENTRAL GLASS & MIRROR OF NORTHWEST ARKANSAS, INC.

CA 91-227 827 S.W.2d 667

Court of Appeals of Arkansas
En Banc
Opinion delivered April 15, 1992

Howard L. Slinkard, P.A., by: *Howard L. Slinkard*, for appellant.

Williams & Schrantz, by: *R. Douglas Schrantz*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a judgment holding that appellee is entitled to a lien for materials and labor supplied to repair a motel located upon certain described real property. The repair work was performed at the request of the owners of the property; however, before this suit was filed, the property had been purchased by the appellants. The previous owners, who had contracted for the repairs, were not made parties to the present suit, and the judgment in this case is in rem against the property.

The first issue on appeal is whether the lien was timely perfected. Ark. Code Ann. § 18-44-101 (1987) provides that any person who furnishes material or labor for a building shall have a lien upon the building, or improvement, and the land upon which it is located, to secure payment for the work or labor furnished. Ark. Code Ann. § 18-44-117 (1987) provides that a person "who wishes to avail himself" of the right to this lien must file, in the office of the circuit clerk of the county where the land is located, a verified account of the material or work furnished and a description of the land upon which the building is located. This account must be filed within 120 days after the material or work is furnished. Ark. Code Ann. § 18-44-119 (1987) provides that an action to enforce the lien must be filed within 15 months after the lien is filed. However, a suit filed within the 120 days will also perfect the lien. *See National Lumber Company* v. *Advance Development Corp.*, 293 Ark. 1, 12, 732 S.W.2d 840, 846, (1987).

In the instant case it is admitted that the complaint was filed on the 122nd day after the last material or work was furnished. The parties also agree that the 120th day fell on a Saturday and that the suit was filed the next Monday. The trial court held that the suit was filed within the time in which the lien could be perfected. To sustain that holding, the appellee argues that the issue is controlled by Rule 6(a) of the Rules of Civil Procedure which states, in part, as follows:

> (a) Computation: In computing any period of time prescribed or allowed by these rules, by order of the Court *or by any applicable statute*, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays, or legal holidays shall be excluded in the computation. [Emphasis added.]

The appellants do not agree. They argue that the lien statute is plainly written and means what it says. They argue that Ark. R.

Civ. P. 6(2) does not apply because of Ark. R. Civ. P. 81(a) which provides as follows:

> (a) Applicability in General. These rules shall apply to all civil proceedings cognizable in the circuit, chancery, and probate courts of this State except in those instances where a statute which creates a right, remedy or proceeding specifically provides a different procedure in which event the procedure so specified shall apply.

We agree with the appellee. Although the Arkansas Supreme Court held in *Union National Bank* v. *Nichols*, 305 Ark. 274, 807 S.W.2d 36 (1991), that Ark. R. Civ. P. 6(a) did not apply in that case, we think the situation there was different from the situation in the instant case. *Nichols* involved Act 53 of 1987 which provided a method for "the liquidation of defaulted mortgage loans" without the necessity of filing a suit for foreclosure. That procedure is codified by Ark. Code Ann. §§ 18-50-101 to -116 (Supp. 1989). It allows a sale of the mortgaged property (without filing suit) under certain conditions. Included are (1) that notice of default and intention to sell has been filed with the recorder of the county in which the property is situated, and (2) that the notice has been mailed by certified mail, within 10 days of the recording, to the mortgagee. *See* Ark. Code Ann. §§ 18-50-103(3) and -104(b) (Supp. 1991). Our supreme court held that under the provisions of Ark. R. Civ. P. 81(a) the Arkansas Rules of Civil Procedure did not apply to the method to be used in computing the time within which the notice had to be mailed. Thus the method set out in Ark. R. Civ. P. 6(a) did not apply in that case.

■ However, in the instant case we are concerned with the time within which a suit in a civil proceeding had to be filed in order to perfect and enforce a lien. The lien was created by a statute which required that a verified account or a suit be filed within 120 days after the last material or labor was furnished, but the statute did not provide that a certain method or procedure be used in computing the 120 days. Thus, Ark. R. Civ. P. 81(a) does not exclude the use of Ark. R. Civ. P. 6(a) in computing the statutory 120-day period within which the complaint in this civil proceeding had to be filed in order to perfect and enforce the statutory lien involved in this case.

Under Ark. R. Civ. P. 6(a), the day of the act or event (here, the last day that material or labor was furnished) shall not be included in computing the time period involved, but the last day of the time period shall be included *unless* it is a Saturday, Sunday, or legal holiday. Therefore, since the 120th day fell on Saturday, the complaint filed on the next Monday was within the 120-day period when computed under the provisions of rule 6(a).

The appellants also argue that the trial court erred in allowing attorney's fees to the appellee. The parties agree that the fees were allowed under the authority of Ark. Code Ann. § 16-22-308 (Supp. 1991), which provides as follows:

> In any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, or merchandise, or for labor or services, or breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney fee to be assessed by the court and collected as costs.

The appellants are correct in their contention that the general rule in this state is well established that attorney's fees are not allowed except when expressly provided for by statute. *Barnett* v. *Arkansas Transportation Company*, 303 Ark. 491, 798 S.W.2d 79 (1990). But the appellee argues that the above statute does expressly provide for the attorney's fee allowed in this case. Another consideration, pointed out by the appellants, is that they did not make a contract with the appellee for the work or material furnished for the motel; that the contract or purchase was made by the previous owners and this suit is a suit in rem against the property. The appellee contends, however, that the above statute provides for attorney's fees in suits "to recover on" contracts and this is a suit to recover on a contract for goods or services.

We think the issue turns on the fact that the only recovery that can be made in this case is under the statute that grants a lien against the property for the materials and labor furnished. That statute, Ark. Code Ann. § 18-44-101 (1987), simply does not provide that the supplier of the materials or labor shall have a lien for attorney's fees. Since the general rule in

Arkansas requires specific statutory authorization before attorney's fees are recoverable, *cf. Bryant & Sons Lumber Co.* v. *Moore*, 264 Ark. 666, 573 S.W.2d 632 (1978) (statute allows contractor a lien for materials and labor furnished but not for his profit), we believe the trial court erred in allowing those fees in this case.

Finally, the appellants contend that the trial court erred in allowing prejudgment interest at the rate of 10%. The appellee concedes that the rate should have been 6%. Therefore, the prejudgment interest is reduced to 6%.

Affirmed as modified, and remanded for further proceedings as needed to enforce the lien involved in this case.

BANK OF CAVE CITY *v.* The ABSTRACT AND TITLE CO., d/b/a Heber Springs Abstract and Title

CA 91-424 828 S.W.2d 852

Court of Appeals of Arkansas
Division I
Opinion delivered April 22, 1992

Samuel F. Beller, for appellant.

Barrett, Wheatley, Smith & Deacon, by: *Ralph W. Waddell*, for appellees.

MELVIN MAYFIELD, Judge. Bank of Cave City appeals from a summary judgment of the Cleburne County Circuit Court dismissing its complaint which sought damages for an alleged omission in an abstract of real property on which appellant later took a mortgage. Appellant urges this court to hold that, as a matter of law, complaints for money damages, not yet reduced to judgment, must be included in abstracts of title. We decline to so hold and affirm.

On April 30, 1987, appellant requested that appellees update an abstract on real property. Appellees did so and returned the update to appellant's attorney. On October 22, 1987, appellant's attorney requested that appellee update the same abstract again. On October 26, 1987, appellees certified the updated abstract. This Continuation Certificate of Abstract No. 1929 provided as follows:

> WE HEREBY CERTIFY that we have carefully examined the records in the County and Circuit Clerks and Recorder of Cleburne County, from the 18th day of May, 1987, at 10:00 o'clock A.M., and the foregoing 7 sheets numbered 62 to 68, inclusive of this certificate, contain, as we believe, a correct abstract of all the conveyances or other instruments of record affecting the title to the land or lot described in the caption hereof.

A complaint filed by Farm Bureau Mutual Insurance Company of Arkansas, Inc., and Southern Farm Bureau Casualty Insurance Company against the owner of the property on December 10, 1986, did not appear in the abstract when it was updated by appellee on October 26, 1987. This complaint was reduced to judgment on November 25, 1987, and was recorded before appellant took a mortgage on the property dated November 30, 1987, and filed December 2, 1987.

In order for its mortgage to be entitled to a first lien status,

appellant paid off the judgment. Then, alleging that it had been damaged in the sum of $6,000.00 and that appellees' failure to include the complaint in the abstract constituted negligence, appellant sued appellees on September 18, 1990. Appellees denied that they were required to include the complaint in the abstract update of October 26, 1987, and affirmatively pled that appellant was guilty of contributory negligence in failing to search or request a search of the real estate records from the date of the last continuation of the abstract to the date of the closing of the loan.

Appellees and appellant agreed upon the facts and both moved for summary judgment. In making its decision, the circuit court had before it the abstract, appellees' admissions, and the affidavits of three abstracters. One abstracter stated that it was the policy of her abstract company to include all complaints requesting monetary judgments against title holders of real property in the abstract. On the other hand, two other abstracters stated in their affidavits that it was not their practice to do so unless a *lis pendens* had been filed in conjunction with the complaint.

The circuit judge, in dismissing appellant's complaint, found as a matter of law that the complaint was not a matter of record required to be included in the abstract. From this judgment, comes this appeal.

Appellant acknowledges that abstracters are divided as to the necessity for including complaints for money damages in abstracts. Nevertheless, citing *Stephenson* v. *Cone*, 24 S.D. 460, 124 N.W. 439 (1910), appellant argues that an abstracter must furnish to an intended purchaser or mortgagee, by means of the abstract, everything *pertaining to the names* and to the property in question that *might reasonably affect* the title. In *Stephenson* v. *Cone*, *supra*, the continuation of an abstract had omitted two judgments against the property owner. The judgments were rendered against an Ed. J. Borstad and the abstract was made on lots deeded by Edward J. Borstad. That case, therefore, does *not* hold that a complaint not reduced to judgment must be included in an abstract. The court stated:

> It has been the universal custom and practice in this state to sue and maintain actions against defendants by the

> initial letters of their Christian names, and to so enter and docket the judgment, and which custom and practice the defendant Cone was bound to know as a part of his business as abstractor. To now hold that all judgments are invalid as notice, excepting only where the full Christian name of defendant is indexed or docketed, would be to practically render void and ineffectual a majority of the judgments of this state. While it is not generally a part of the duty of an abstractor to go outside the record to search for facts affecting the title to real estate, still he must furnish to an intended purchaser, by means of the abstract, everything pertaining to the names and to the property in question, so far as appears from the record, that reasonably might affect such title, and thus put the purchaser on inquiry, in order that such purchaser may himself make the proper investigations as to the outside facts. In searching the records for judgments against Edward J. Borstad, the defendant Cone was charged with the knowledge and bound to know the different forms in which the name Edward J. Borstad might be used in entering judgment against him, and to make his search accordingly.

124 N.W. at 440. Clearly, this case does not support appellant's argument.

The term "abstract of title" is defined in Ark. Code Ann. § 17-11-102(1) (1987) as "a compilation in orderly arrangement of the materials and facts of record affecting the title to a specific piece of land, issued under a certificate certifying to the matters therein contained." In 1 C.J.S. *Abstracts of Title* § 10 (1985), it is stated: "Ordinarily, an abstractor has no duty in his investigation, to go outside the records, and, in the absence of special agreement, it is not his duty to investigate and determine whether there is any lien or incumbrance on the property which is not shown upon the records." *See also* George W. Thompson, *A Practical Treatise on Abstracts and Titles* § 16 (2d ed. 1930). It is stated in 1 C.J.S. *Abstracts of Title* § 5 (1985) that an abstract should contain a statement of all conveyances, wills, "other instruments or matters of record relied on as evidence of title, and of all instruments, judicial proceedings, and other records which in any way affect the title. . . ."

The types of instruments required to be recorded in Arkansas are set forth in Ark. Code Ann. § 14-15-402(a) (1987):

> It shall be the duty of each recorder to record, in the books provided for his office, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing of or concerning any lands and tenements or goods and chattels, which shall be proved or acknowledged according to law, that are authorized to be recorded in his office.

Under Arkansas law, a complaint does not constitute a lien on land until it is reduced to judgment. Arkansas Code Annotated § 16-65-117 (Supp. 1991) states in part:

> (a)(1)(A) A judgment in the Supreme Court or chancery or circuit courts or municipal courts of this state and in the United States district courts within this state shall be a lien on the real estate owned by the defendant in the county in which the judgment was rendered from the date of its rendition only if the clerk of the court which rendered the judgment maintains a permanent office within the county, at which office permanent records of the judgments of the court are continuously kept and maintained and the judgment has been filed with the circuit clerk.
>
> (B) As to any person who does not have actual notice of the rendition of the judgment, the judgment shall be a lien from the date the judgment is recorded and indexed by the court clerk in a manner that provides reasonable notice to the public.
>
> (2)(A) If a judgment is rendered by one (1) of the courts in a county where the clerk of the court does not maintain a permanent office at which permanent records of the judgments of the court are continuously kept and maintained, the judgment shall not be a lien on the land of the defendant in that county until a certified copy of the judgment is filed in the office of the clerk of the circuit court of that county.
>
> (B) As to any person who does not have actual notice of the rendition of the judgment, the judgment shall be a lien from the date the judgment is recorded and indexed by the

court clerk in a manner that provides reasonable notice to the public.

Here, only the filing of a *lis pendens* against the property could have rendered the complaint a matter of record before it was reduced to judgment. Because the complaint, however, was merely for a money judgment and did not directly affect the title to the real estate, a *lis pendens* could not be filed. *See* Ark. Code Ann. § 16-59-101 (1987). This section applies only to actions affecting titles and liens on real estate or personal property and does not apply to actions seeking a money judgment. *Health Betterment Found.* v. *Thomas*, 225 Ark. 529, 534, 283 S.W.2d 863, 866 (1955); *Tolley* v. *Wilson*, 212 Ark. 163, 165, 205 S.W.2d 177, 178 (1947).

The appellant did not specifically request that appellees research anything more than instruments of record or conveyances affecting the title to the property. Appellant could have requested that such a search be made but did not do so. Since the complaint was not a matter of record under Arkansas law, it was not required to be included in the abstract. Further, we note that the complaint was not reduced to judgment until November 25, 1987, almost a month after appellees certified the continuation of the abstract, and the judgment was rendered a few days before appellant took the mortgage on the property. If appellant had requested an up-to-date continuation of the abstract before taking the mortgage, it would have been aware of the judgment. We cannot say that the circuit judge erred in holding that the complaint was not a matter of record affecting title to the property and that it was not required to be included in the continuation of the abstract.

Affirmed.

COOPER and DANIELSON, JJ., agree.

Charles L. BRIGHT *v.* Luthur D. GASS and Josephine Gass

CA 91-337 831 S.W.2d 149

Court of Appeals of Arkansas
Division I
Opinion delivered April 29, 1992

[redacted]

[redacted]

Peter DeStefano, for appellant.

Davis & Goldie, by: *Steven B. Davis*, for appellee.

ELIZABETH W. DANIELSON, Judge. Charles Bright appeals from a decree of the Boone County Chancery Court denying his petition to quiet title to a parcel of real property. The decree also awarded compensatory and punitive damages for slander of title to appellees, Luther Gass and Josephine Gass, quieted title to the property in appellees, and awarded attorney's fees to appellees. We affirm.

This lawsuit originated from a real property transaction involving appellees and Bobby Tollerson and Betty Tollerson. The Tollersons entered into an oral agreement with appellees for the purchase of a tract of land which was reduced to writing on June 30, 1988. This document, which is titled "Option Deed," states:

> FOR AND IN CONSIDERATION of the sum of One Dollar, to me in hand paid, the receipt of which is hereby acknowledged, and the undertaking of *Bobby J. Tollerson & Betty S. Tollerson* to pay *Luther D. Gass & Josephine Gass* the sum of *Two Thousand eight Hundred Sixty Six* and *92/100 Dollars*, on or before the *30* day of *June*, 1*989*, *Luther D. Gass & Josephine Gass* hereby grant, bargain, sell and convey unto the said *Bobby & Betty Tollerson* and to his heirs, successors and assigns, upon the conditions hereinafter written, the following described land, situate in *Boone* County, State of Arkansas, to-wit: . . . If said *Bobby J. Tollerson & Betty S. Tollerson* shall fail to pay the sum hereinbefore named within the times above set forth, this conveyance shall be void, and all rights and liabilities of either party thereunder shall cease, and said land shall revert to *Luther D. Gass &*

> *Josephine Gass* without any conveyance from the said *Bobby & Betty Tollerson.*
>
> And I, *Betty S. Tollerson* wife of said *Bobby J. Tollerson* hereby release and relinquish unto the said grantee all my right of dower in said land.

As discussed below, Luther Gass characterized this written document as an option to purchase the property. Bobby Tollerson, however, claimed that it had the effect of a deed and carried with it an equity of redemption.

Bobby Tollerson was late in making the payments several times between July 1988 and July 1989, but Luther Gass accepted them. Mr. Tollerson did not make any payments in September, October, November, or December of 1989; however, Mr. Tollerson found a renter for the property, who made two $200.00 payments in January and February 1990. No payment was made in March of 1990, and a final payment of $238.91 was made in April of 1990. In March 1990, Mr. Gass asked Mr. Tollerson to vacate the premises by the end of April. On May 3, 1990, the Tollersons executed a quitclaim deed of their interest in the property to appellant.

On May 4, 1990, appellant filed a petition for injunction and for an order quieting title to the property. Appellant asserted that the Option Deed from appellee to the Tollersons had conveyed legal title to the property to them and that appellant had acquired this interest. A temporary injunction was entered on May 4, 1990.

In their answer, appellees asserted that the Tollersons had not acquired any interest in the property because they had failed to satisfy the conditions set forth in the Option Deed. Appellees also filed a counterclaim against appellant. They asserted that appellant knew that the Option Deed was subject to a conditional limitation and that the filing of the quitclaim deed and this lawsuit constituted an intentional and malicious slander of title to the property for which they were entitled to recover compensatory and punitive damages. Appellees also requested that the option and quitclaim deeds be cancelled as clouds on their title. They also requested that the matter be transferred to circuit court and that a writ of ejectment be issued. The case was not transferred, however.

In an amended answer and counterclaim and third-party complaint, appellees added the Tollersons and the Internal Revenue Service as third-party defendants. Appellees asserted that the IRS had filed a tax lien against the Tollersons, thereby further clouding appellees' title. Appellees also requested that the Option Deed be reformed to reflect the true intent of the parties.

At trial, Luther Gass testified that, when appellees first entered into the agreement with the Tollersons, they gave the Tollersons an amortization schedule and survey, but it was not until July 1988 that appellees gave them the Option Deed. Mr. Gass testified that he never intended to convey title by this document but simply intended to give the Tollersons an option to buy the property. Mr. Gass testified that the total purchase price for the property would be $25,000.00; that the Tollersons were to pay $238.91 per month on or before the tenth day of each month for fifteen years; that the Tollersons would get credit for the principal portion of their payments if they were made on time; and that neither he nor Mr. Tollerson intended that the Option Deed be filed for record. Mr. Gass emphasized that, when he gave Mr. Tollerson the Option Deed, he intended to give him an option to buy the property but not to make a sale at that time. He stated that, although he accepted late payments between July 1988 and July 1989, he made "another deal" with Mr. Tollerson after July 1989. Mr. Gass testified that, after he took the late payment in July 1989, he informed Mr. Tollerson that the Option Deed was no longer valid. He stated that he also told Mr. Tollerson that, "if he kept up and made good that later on after he had proved himself. . .we would do something." Mr. Gass stated that, after July 1989, he allowed Mr. Tollerson to stay in the building because he was afraid of him.

Bobby Tollerson testified that the Option Deed did not reflect the entire agreement with appellees. He stated that the total purchase price of the property was to be $25,000.00, payable in fifteen years, and that the price referred to in the Option Deed was simply the amount of the first twelve payments. Mr. Tollerson stated that the Option Deed was signed simply to show some kind of ownership on his part. Mr. Tollersons stated that Mr. Gass had taken his monthly payments late. He disputed Mr. Gass's statement that the Option Deed had expired in July 1989 and testified that he was under the impression that it was still

valid.

Mr. Tollerson admitted that appellant had paid him $10.00 for the quitclaim deed and had agreed to pay him another $1,000.00 if he won the lawsuit. Mr. Tollerson also admitted that he did not make any payments on the property between August 1989 and January 1990. He further admitted Mr. Gass said that when he got back from vacation, they would draft a contract because the year on the option was over.

Appellant admitted at trial that he had paid Mr. Tollerson $10.00 for the quitclaim deed and had agreed to pay him $1,000.00 if he could get clear title to the property. Mr. Bright also admitted that he is a real estate professional; that he did not have a lien search performed before he purchased the property; that, if he had done so, he would have been aware that Mr. Tollerson's interest was subject to a federal tax lien and that there were two unreleased mortgages on the property; and that he personally intended to own the property. He characterized Mr. Tollerson's interest in the property as a "real good gamble." Appellant admitted that he had never contacted Mr. Gass with regard to this transaction, even though he had a copy of the Option Deed at the time he made the deal with Mr. Tollerson. He also admitted that Mr. Tollerson had informed him that he was about $1,200.00 behind in his payments and that Mr. Gass had rejected offers to bring the debt current.

The chancellor found that appellant acquired no interest from the Tollersons by way of the quitclaim deed and, therefore, the IRS had no lien against the property. The chancellor cancelled the temporary injunction; quieted title to the property in appellees; and entered judgment for appellees on their counterclaim for slander of title and awarded judgment to appellees against appellant for $2,075.00 in compensatory damages, $1,000.00 in punitive damages, and awarded appellees an attorney's fee of $1,500.00.

In his first point on appeal, appellant asserts that the Option Deed operated as a conveyance and that, even if legal title to the property did not actually pass, equitable title, with an equity of redemption, did pass. Appellant points to the fact that, between July 1988 and July 1989, Mr. Gass routinely accepted late payments from Mr. Tollerson and argues that, because equity

abhors a forfeiture, the chancellor should have held that Mr. Gass waived the right to insist upon a forfeiture. Appellant argues that, by enforcing this private seizure of his property without legal process, the chancellor violated his due process rights. Appellant asserts that appellees' only remedy to terminate his interest in the property was a foreclosure action. We disagree.

Appellees correctly point out that appellant failed to raise the due process argument below. Issues raised for the first time on appeal will not be considered by the appellate court. *Cox* v. *Bishop*, 28 Ark. App. 210, 217, 772 S.W.2d 358, 361 (1989). Even arguments of constitutional dimensions must be argued below if they are to be preserved on appeal. *Chapin* v. *Stuckey*, 286 Ark. 359, 368, 692 S.W.2d 609, 615 (1985).

Due process requires that one be given a meaningful opportunity for a hearing, appropriate to the nature of the case and preceded by notice, before he is deprived of any significant property interest, except where some valid, overriding state interest justifies postponing the hearing until after the event. *Davis* v. *Schimmel*, 252 Ark. 1201, 1207, 482 S.W.2d 785, 789 (1972). Appellant brought this action in chancery court; he was awarded a temporary restraining order and was allowed to present his claims in a full trial on the merits.

Appellant is correct in asserting that forfeiture provisions, although valid and enforceable in contracts for the sale of land, may be waived by the acts and conduct of the parties. *Triplett* v. *Davis*, 238 Ark. 870, 871, 385 S.W.2d 33, 34 (1964). *See also Ashworth* v. *Hankins*, 248 Ark. 567, 572, 452 S.W.2d 838, 841 (1970); *Abshire* v. *Hyde*, 13 Ark. App. 33, 36, 679 S.W.2d 214, 216 (1984). It is also true that equity abhors a forfeiture and will seize upon slight circumstances that indicate a waiver in order to prevent forfeiture. *Triplett* v. *Davis*, 238 Ark. at 872, 385 S.W.2d at 34.

Waiver is the voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intent that he shall forever be deprived of its benefits. *Bethell* v. *Bethell*, 268 Ark. 409, 420, 597 S.W.2d 576, 581-82 (1980). A vendor may, by his acts and conduct, waive his right to forfeiture; such a waiver will be found to exist when the vendor habitually accepts delinquent payments. *Welch* v. *Cooper*, 11 Ark. App.

263, 267, 670 S.W.2d 454, 458 (1984). In most cases, the question of waiver is one of fact. *Id*; *Freeman* v. *King*, 10 Ark. App. 220, 226, 662 S.W.2d 479, 481 (1984). On our review of chancery cases, we will not set aside a chancellor's findings of fact unless they are clearly erroneous or clearly against the preponderance of the evidence. *First Nat'l Bank and Trust Co.* v. *Hummel*, 25 Ark. App. 313, 317, 758 S.W.2d 418, 420 (1988).

In coming to the conclusion that the quitclaim deed to appellant conveyed nothing, the chancellor decided that the Tollersons had forfeited any right they had in the property by failing to comply with the conditions of the new 1989 oral agreement. The evidence shows that the parties entered into a new oral agreement that appellees would *later* enter into an installment land contract with the Tollersons *if* the Tollersons made their payments promptly. The evidence shows that the Tollersons did not make their payments promptly but, in fact, failed to make any payments the last four months of 1989. The evidence also shows that Mr. Gass notified Mr. Tollerson that the 1989 Option Deed was void and he would no longer tolerate late payments in their discussion in the summer of 1989. Therefore, even though Mr. Gass had accepted late payments until July 1989, he placed the Tollersons on notice that, thereafter, late payments would no longer be tolerated. *See Michelsen* v. *Patterson*, 9 Ark. App. 275, 278, 658 S.W.2d 413, 415 (1983).

In attempting to discern the real character of the transaction evidenced by the Option Deed, the chancellor correctly considered all of the written and oral evidence and properly focused on the intent of the parties in the light of all attendant circumstances. *Monaghan* v. *Davis*, 16 Ark. App. 258, 262, 700 S.W.2d 375, 378 (1985). In carrying out the true intent of the parties to the agreement, the chancellor properly looked beyond the mere form in which the transaction was clothed and considered all the facts and circumstances of the transaction, the conduct of the parties, and their relations to one another and to the subject matter. *Williams* v. *Cotten*, 9 Ark. App. 304, 313-14, 658 S.W.2d 421, 425 (1983). Conclusions concerning the true intent of the parties primarily involve issues of fact, and the chancellor's decision on such issues will not be reversed unless the findings are clearly erroneous. *Jones* v. *Jones*, 26 Ark. App. 1, 4-5, 759 S.W.2d 42, 44 (1988). Here, it is clear that, in 1989,

appellees entered into an oral agreement with the Tollersons that, if the Tollersons promptly made their payments, appellees would, at some future date, enter into a written installment contract to sell the property to them. The evidence also supports a finding that the Tollersons breached this condition, thereby forfeiting any rights they had in the property, and that they had no property interest to convey to appellant. Accordingly, we deny appellant's first point on appeal.

In his second point, appellant argues that the evidence does not support the chancellor's award of compensatory damages to appellees for slander of title. Appellant is correct in asserting that, before appellees can prevail on their slander of title argument, they must first establish that appellant acted with malice. *Hicks* v. *Early*, 235 Ark. 251, 253, 357 S.W.2d 647, 649 (1962). Appellant argues that he was "simply trying to help a distressed family, the Tollersons, against what appeared to be unscrupulous strong-arm tactics." However, appellant's own testimony admits that he paid only $10.00 for the quitclaim deed; that he agreed to pay the Tollersons $1,000.00 if he won the lawsuit; and that he intended to own the property himself.

We hold that the record provides more than adequate proof of the requisite malice or wantonness on the part of appellant to support the award for compensatory damages. Appellant is a licensed real estate professional. Nevertheless, when he obtained his quitclaim deed from the Tollersons and filed his petition to quiet title, he had not yet obtained a lien search on the property; failed to consider that the filing of the quitclaim deed and Option Deed would cloud appellees' title with a federal tax lien; did not attempt to follow up on Mr. Tollerson's story with appellees; obtained and *ex parte* temporary retraining order before he even obtained the lien search; paid only $10.00 for the quitclaim deed with a promise to pay $1,000.00 should he prevail at trial; and was aware, when he obtained the quitclaim deed, that the Tollersons were substantially in arrears in their payments. This evidence soundly supports the finding that he acted with malice, and we cannot say that the chancellor's findings in this regard are clearly erroneous.

In his second point, appellant also argues that the chancery court was without subject matter jurisdiction to award punitive

damages. Equity will not ordinarily enforce penalties, and it has been held that one who appeals to a court of equity for relief waives the ward of punitive damages as a matter of right. *Toney* v. *Haskins*, 7 Ark. App. 98, 109, 644 S.W.2d 622, 628 (1983). *See also Stolz* v. *Franklin*, 258 Ark. 999, 1008-09, 531 S.W.2d 1, 7 (1975).

Appellees assert that, under the clean-up doctrine, the chancery court did have jurisdiction to award punitive damages. Generally, the chancery court, having acquired jurisdiction for equitable purposes, may retain all claims in an action and grant all relief, legal or equitable, to which the parties in the lawsuit are entitled. *Fulcher* v. *Dierks Lumber & Coal Co.*, 164 Ark. 261, 277-78, 261 S.W. 645, 650-51 (1924). Unless equity is wholly incompetent to grant the relief sought, objection to its jurisdiction is waived if no motion to transfer to law is made. *Godwin* v. *Hampton*, 11 Ark. App. 205, 210, 669 S.W.2d 12, 16 (1984).

Here, appellant inappropriately characterizes the issue as one of subject matter jurisdiction. In *Liles* v. *Liles*, 289 Ark. 159, 711 S.W.2d 447 (1986), the supreme court stated:

> As we pointed out most recently in *Crittenden County* v. *Williford*, 283 Ark. 289, 675 S.W.2d 631 (1984), when the issue is whether the chancery court has jurisdiction because the plaintiff lacks an adequate remedy at law, we will not allow it to be raised for the first time on appeal. We noted it is only when the court of equity is "wholly incompetent" to consider the matter before it will we permit the issue of competency to be raised for the first time on appeal. *See also Whitten Developments, Inc.* v. *Agee*, 256 Ark. 968, 511 S.W.2d 466 (1974).
>
> Viewed together, these cases demonstrate that we have come to the position that unless the chancery court has no tenable nexus whatever to the claim in question we will consider the matter of whether the claim should have been heard there to be one of propriety rather than one of subject matter jurisdiction. We will not raise the issue ourselves, and we will not permit a party to raise it here unless it was raised in the trial court.
>
> Of course, where the exclusive jurisdiction to adjudi-

> cate a matter has been placed by the constitution or by statute in some other court, such as probate matters in the probate court or bastardy proceedings in the county court, the question of subject matter jurisdiction may not be waived and the chancery court is totally without power.
>
> .... We hold that the question is not one of subject matter jurisdiction, and the failure of [appellant] to move for a transfer of the case or otherwise question the propriety of the chancellor hearing the case waived the issue, and it may not be raised for the first time on appeal.

289 Ark. at 175-76, 711 S.W.2d at 455-56.

Here, appellees did not "waive" their request for punitive damages by asserting it in a compulsory counterclaim in an action brought in equity by appellant. Appellant has made no showing that he objected to the chancery court's consideration of this issue or that he moved to transfer the matter to circuit court. We therefore deny appellant's second point on appeal.

Affirmed.

ROGERS and JENNINGS, JJ., agree.

Charles BELUE *v.* Beverly BELUE (now Cannon)

CA 91-448 828 S.W.2d 855

Court of Appeals of Arkansas
Division II
Opinion delivered April 29, 1992

Ray Hodnett, for appellant.

Davis & Cox, by: *Hal W. Davis*, for appellee.

ELIZABETH W. DANIELSON, Judge. Appellant, Charles Belue, and appellee, Beverly Belue, were divorced in December 1978. At that time, appellee was awarded custody of the parties' minor daughter. Appellant had been injured in Vietnam and was a paraplegic. Because of appellant's injuries, the minor child received monthly benefits from the Veterans' Administration and the Social Security Administration. At the time of the divorce, appellant was ordered to insure that the child continued to receive her direct benefits, but appellant was not ordered to pay separate child support.

In December 1988, appellee agreed to transfer custody of the parties' daughter to appellant. In December 1990, appellant asked for child support from appellee and appellee counterclaimed that custody should be returned to her and that appellant should be ordered to pay child support.

The chancellor entered an order on March 22, 1991, finding that the best interests of the child would be served by returning custody to appellee; that the child's expenses, as well as appellant's income, had substantially increased; and that, based on such a finding of material changes in circumstances, the appellant should pay to appellee $640.00 per month child support.

Subsequently, appellee filed a petition for contempt, citing appellant's failure to pay child support. On July 3, 1991, appellant filed a petition for modification of child support, citing his recent loss of employment and the fact that his only source of income was his medical disability benefits received from the Veterans' Administration.

A hearing was held on July 18, 1991, and the chancellor reduced appellant's child support obligation from $640.00 to $365.00 per month, noting that appellant's only income was disability benefits from the Veterans' Administration in the sum of $2,375.00 per month. The court noted, however, that appellant would be receiving an additional $900.00 per month beginning August 1, 1991, as a result of retirement benefits and that child support would be increased to $430.00 per month at that time. The court pointed out that it did not consider the $900.00 gross amount per month retirement income but the net amount of $675.00 per month that the appellant would actually receive after taxes and other appropriate deductions. The chancellor therefore set the prospective increase in child support based upon appellant's expected net monthly income of $3,025.00 as of August 1, 1991.

On appeal, appellant, Charles Belue, urges us to find that the chancellor erred in considering his Veterans' Administration benefits as income for the purpose of determining his appropriate child support obligation. Appellant argues that the court should have only considered appellant's retirement income.

Appellant points out that this court, in *Waldon* v. *Waldon*, 34 Ark. App. 118, 121, 806 S.W.2d 387, 389 (1991), adopted the position that weekly take-home pay, as it relates to the Family Support Chart, refers to the definition of income in the federal income tax laws. Appellant therefore contends the chancellor erred in considering Veterans' Administration benefits in determining the appropriate amount of child support because such benefits are not considered income pursuant to the federal income tax laws.

In the supreme court's per curiam *In Re: Guidelines for Child Support Enforcement*, 301 Ark. 627, 784 S.W.2d 589 (1990), the court stated that factors which may be considered in determining appropriate amounts of child support shall include,

among other things, clothing, accustomed standard of living, recreation, educational expenses, and "*other income or assets available to support the child from whatever source.*" 301 Ark. at 629, 784 S.W.2d at 591 (emphasis added); *see also Black* v. *Black*, 306 Ark. 209, 213, 812 S.W.2d 480, 482 (1991).

Social Security disability benefits, like Veterans Administration benefits, are not taxed under the Internal Revenue Code as income. However, appellant's benefits in question here serve the same purpose as Social Security disability benefits — to provide a source of income which may have been reduced or lost completely because of an injury or disability. In *Cochran* v. *Cochran*, 7 Ark. App. 146, 147, 644 S.W.2d 635, 636 (1983), we held that it was proper to consider the appellant's disability payments from the United States Army and Social Security in considering the needs of the appellee and the ability of the appellant to pay, and to consider appellant's income from whatever source derived in determining the amount of alimony to be paid.

Ordinarily, the amount of child support lies within the sound discretion of the chancellor. *Ross* v. *Ross*, 29 Ark. App. 64, 67, 776 S.W.2d 834, 835 (1989). The chancellor's findings as to child support will not be disturbed on appeal unless it is shown that the chancellor abused his discretion. *Borden* v. *Borden*, 20 Ark. App. 52, 54, 724 S.W.2d 181, 183 (1987). Although chancery cases are tried *de novo* on appeal, the chancellor's findings of fact will not be reversed unless they are clearly against the preponderance of the evidence. *Roark* v. *Roark*, 34 Ark. App. 250, 252, 809 S.W.2d 822, 823 (1991).

In rendering his order at the conclusion of the hearing, the chancellor stated:

> The Plaintiff's motion to modify child support is granted as the Court finds that at this time his income is two thousand three hundred and seventy-five dollars ($2,375) per month derived from VA benefits and it is anticipated that he will receive Army retirement benefits in the amount of nine hundred dollars ($900) beginning on or about August 1, 1991.
>
> The Court sets child support today based solely on his

> VA benefits and that child support will be three hundred and sixty-five dollars ($365) per month and will increase to four hundred and thirty dollars ($430) per month automatically when the Defendant receives his first retirement check.

In stating his reasons for considering appellant's Veterans' Administration disability benefits, the chancellor went on to state:

> It is this Court's reasoning that under the law in Arkansas, non-custodial parents are obligated under the law to support their children and it is my firm belief that the Supreme Court never intended to exempt income received from VA benefits, certainly when they are in the amounts they are in this case, to be exempt from being calculated in child support payments.
>
> I can see no reason why Mr. Belue should live on a very substantial income and not support his child, even if the technical definition of income does not include that income which he receives.

The language "other income or assets available to support the child from whatever source" contained in the per curiam shows the committee's intent to expand, not restrict, the sources of funds to be considered in setting child support. *See* 301 Ark. at 629, 784 S.W.2d at 588.

We cannot say that it was error for the chancellor to base the amount of child support ordered on a monthly income which included appellant's Veterans' Administration disability benefits.

Affirmed.

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

HALL'S CLEANERS, et al. *v.* Gwendolyn WORTHAM

CA 91-336 829 S.W.2d 424

Court of Appeals of Arkansas
Division I
Opinion delivered April 29, 1992

Bailey, Trimble, Capps, Lowe, Sellars, & Thomas, by: *Chester C. Lowe, Jr.*, for appellant.

Lee A. Biggs III, for appellee.

JUDITH ROGERS, Judge. Appellants, appellee's employer and its insurance carrier, appeal from a decision of the Arkansas Workers' Compensation Commission in which appellee was awarded medical expenses, temporary total benefits and permanent partial benefits of twenty-five percent to the left hand. The only issue before the Commission and before this court on appeal is the appellants' contention that appellee's claim for benefits was barred by the two-year statute of limitations found in Ark. Code

Ann. § 11-9-702(a)(1) (1987). We agree with the Commission that appellee's claim was timely, and affirm

There is no dispute that appellee, Gwendolyn Wortham, sustained a gradual onset injury in the form of a swan neck deformity of her left thumb as a result of operating a pressing machine over the course of twelve years while in the employ of appellant, Hall's Cleaners. In September of 1987, appellee began working at the front counter of the business due to her complaints of pain associated with the condition. Prior to that time, she had sought and personally paid for treatment from her family physician, Dr. Jim C. Citty, who occasionally prescribed mild anti-inflammatory drugs to relieve her symptoms. After her move to the front counter, she continued, however, to work periodically at a pressing machine in the absence of a regularly assigned operator. On August 31, 1989, appellee underwent surgery to correct the swan neck deformity. She was released to return to work on October 9, 1989, and she filed a claim for benefits with the Commission three days later. In a report dated October 29, 1989, Dr. Citty related that, although he had been treating appellee for this problem for roughly five years, "[s]he had continued to work through the present year at which time her disability has progressed to a point where surgical intervention became medially necessary."

Based on this stipulated record, the Commission determined that, even though appellee had known of her condition for a period of years, the condition did not cause an incapacity to earn wages until August 21, 1989, the day of her surgery. The Commission then concluded that her claim for benefits filed in October of 1989 for an injury occurring the previous August was well within the limitations period. It is from this decision that appellants bring this appeal.

The issue then in this case is whether there is substantial evidence to support the Commission's decision that appellee's claim for benefits was not barred by the statute of limitations. On appeal, we must review the evidence in the light most favorable to the Commission's decision and uphold that decision if it is supported by substantial evidence. *See St. John* v. *Arkansas Lime Co.*, 8 Ark. App. 278, 651 S.W.2d 104 (1983).

The statute under consideration is Ark. Code Ann. § 11-9-

702(a)(1) (1987), which provides in part as follows:

> A claim for compensation for disability on account of injury, other than an occupational disease and occupational infection, shall be barred unless filed with the commission within two (2) years from the date of the injury.

In determining that appellee's claim was timely, the Commission relied on the supreme court's decision in *Donaldson* v. *Calvert-McBride Printing Co.*, 217 Ark. 625, 232 S.W.2d 651 (1950), and our decision in *Shepherd* v. *Easterling Construction Co.*, 7 Ark. App. 192, 646 S.W.2d 37 (1983). We agree with the Commission that these cases are controlling here.

Citing *Donaldson* v. *Calvert-McBride Printing Co.*, *supra*, the supreme court in *Cornish Welding Shop* v. *Galbraith*, 278 Ark. 185, 644 S.W.2d 926 (1983), again observed that Arkansas is an "injury state," as we recognize that the date of the accident and the date of the injury are not necessarily the same. With this principle in mind, the *Donaldson* court had held that the time of the injury means a compensable injury, and that an injury does not become compensable until the claimant suffers a loss in earnings. We applied this rule in *Shepherd* v. *Easterling Construction Co.*, *supra*, in holding a claim was not barred by the statute of limitations. Later, we explained in *Arkansas Louisiana Gas Co.* v. *Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983), that the "clear holding in *Donaldson* and *Shepherd* is that the Statute of Limitations provided in § 81-1318(a) [now codified as Ark. Code Ann. § 11-9-702(a)(1)] does not begin to run until the true extent of the injury manifests *and* causes an incapacity to earn the wages which the employee was receiving at the time of the accident, which wage loss continued long enough to entitle him to benefits under § 81-1310 [now codified under Ark. Code Ann. § 11-9-501]." (Emphasis in original.) As applied to the facts of this case, while appellee may have known of her swan neck deformity, the condition did not cause her to miss work or suffer a loss in earnings until the time surgical intervention became necessary. We hold that it was then that the injury became compensable and began the running of the statute of limitations.

Appellants argue that the Commission erred in not finding that appellee's claim was barred since it found that she knew of

her malady several years before filing a claim. In support of this position, appellants rely on the cases of *Cornish Welding* v. *Galbraith*, *supra*; *McDonald Equipment Co.* v. *Turner*, 26 Ark. App. 264, 766 S.W.2d 936 (1989); *Arkansas Louisiana Gas Co.* v. *Grooms*, *supra*; and *St. John* v. *Arkansas Lime Co.*, *supra*, for the proposition that once the substantial character of the injury becomes known a claimant must file a claim for benefits within the specified period of time or else be barred by the statute of limitations. Appellant's reliance on these decisions and that proposition is misplaced under the facts of this case.

Generally stated, under consideration in those cases was the applicability of the "latent injury" exception, and of significance here, those decisions involved claims for benefits following previous periods of disability where the claimants had initially suffered an incapacity to earn wages. By contrast, in both *Donaldson* and *Shepherd*, the claimants had each sustained some form of injury, but the injuries did not presently result in an incapacity to earn wages. In *Grooms*, *supra*, we noted that *Donaldson* and *Woodard* v. *ITT Higbie Mfg. Co.*, 271 Ark. 498, 609 S.W.2d 115 (Ark. App. 1980), a latent injury case, differed in both their facts and the principles applied. We further made the distinction that *Donaldson* deals with the question of when an injury becomes compensable, which is the issue in the case at bar, while the latent injury exception is concerned with the tolling of limitations once it has begun to run. The argument advanced by appellants is addressed to the latent injury exception and simply has no application here. This case squarely fits into the *Donaldson* and *Shepherd* rule that the statute of limitations commences to run when the true extent of the injury manifests and causes an incapacity to earn wages for the period long enough to qualify a claimant to receive benefits. Appellee's knowledge of her condition is not controlling in this instance since her injury did not become compensable until such time as the injury caused an incapacity to earn wages. The Commission's decision is affirmed.

Affirmed.

COOPER and JENNINGS, JJ., agree.

Sherrie ROBINSON *v.* ED WILLIAMS CONSTRUCTION CO.

CA 91-281 828 S.W.2d 860

Court of Appeals of Arkansas
Division I
Opinion delivered April 29, 1992

Joseph C. Self, for appellant.

Shock & Whitmire, by: *J. Randolph Shock*, for appellee.

JUDITH ROGERS, Judge. In this workers' compensation case, appellant, Sherrie Robinson, appeals from the Commission's decision in which it determines that she was not entitled to receive death benefits as a beneficiary of the deceased employee. Appellant raises two issues on appeal. She first contests the Commission's exercise of jurisdiction, and secondly she argues that the Commission's finding that she had failed to meet the dependency requirement is not supported by substantial evidence. We affirm.

On January 3, 1990, Lee Robinson, a truck driver, was killed in an accident in Oklahoma during the course and scope of his employment with appellee, Ed Williams Construction Company. The employer accepted the death as compensable and requested a hearing to determine the deceased's statutory beneficiaries.

The deceased had married Marva Jo Robinson on April 14, 1963, and they had two children, who are now adults. The deceased and Marva Jo separated in 1977, but there is no evidence that they were ever divorced. After his separation from Marva Jo, the deceased lived with Mary Louise Willis, and a child, Katrina, an appellee herein, was born of this relationship. In 1984, the deceased began living with appellant, and they were married on December 22, 1987. Appellant and the deceased separated in February of 1989. There is no record that this

marriage ended in divorce or that divorce proceedings were instituted prior to the deceased's death. From April to September of 1989, the deceased lived with a woman by the name of Veronica Hall.

The only potential beneficiaries at issue before the Commission were appellant, Marva Jo and Katrina. The Commission found in favor of Katrina, but held that appellant and Marva Jo were not entitled to benefits based on findings that neither of them had shown that they were dependent on the deceased within the meaning of Ark. Code Ann. § 11-9-527(c) (1987). Only appellant brings this appeal from the Commission's decision.

As her first issue on appeal, appellant contends that the Commission erred in not sustaining her objection to its exercise of jurisdiction. Appellant does not challenge the Commission's jurisdiction in the traditional sense, as it appears that all the parties involved were residents of Arkansas. Instead, appellant argues that the Commission did not acquire jurisdiction because the proceedings were initiated at the behest of the employer, when none of the potential beneficiaries had filed a claim. We find no merit in this argument.

Upon receiving notice, the employer accepted Mr. Robinson's death as compensable, and by statute the company was obligated to begin the payment of benefits in fifteen days from the receipt of notice, or else risk the imposition of a penalty upon unpaid installments. Ark. Code Ann. § 11-9-802 (1987). Under the circumstances of this case, the employer was faced with the obvious dilemma as to whom it should pay; therefore, it requested a hearing for the resolution of this issue. Without question, it is within the province of the Commission to determine who are the statutory beneficiaries of a deceased employee. We perceive no jurisdictional defect simply because it was the employer who submitted the issue for the Commission's determination.

Under this first point, appellant also asserts that she had filed a claim for compensation benefits in Oklahoma, where the deceased met his death, and she argues that, because she preferred to litigate her claim there, the Commission erred in rendering a decision as to her status as a beneficiary. We disagree.

Appellant's argument is based on the misconception that the proceedings before the Arkansas Commission and her claim in Oklahoma were mutually exclusive. To the contrary, all states having a legitimate interest in the injury have the right to apply their own diverse rules and standards, either separately, simultaneously or successively. *Missouri City Stone, Inc.* v. *Peters*, 257 Ark. 917, 521 S.W.2d 58 (1975). Thus, claims for compensation benefits may be instituted in both states having jurisdiction over the claim. *See Industrial Commission of Wisconsin* v. *McCartin*, 330 U.S. 622 (1946); *Missouri City Stone, Inc.* v. *Peters*, *supra*; *McGehee Hatchery Co.* v. *Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961). As discussed above, the question of determining the deceased's beneficiaries, under Arkansas law, was one that was properly before the Commission. That was the only determination to be made. Those proceedings provided no obstacle to appellant's pursuing her claim in Oklahoma.

Appellant next argues that the Commission's finding that she was not dependent on the deceased employee is not supported by substantial evidence. It was the appellant's testimony at the hearing that after their separation the deceased gave her $100 in cash every two weeks to help her pay bills. Although she provided no deposit records, she said that she deposited this money into her bank account. She also testified that he continued to give her money until the time of his death, and that she depended on him to help her make ends meet. She also said that she and the deceased were attempting to reconcile their differences after he separated from Veronica Hall.

In addressing this issue, we first point out that the Commission made no determination as to whether either appellant or Marva Jo was the deceased's widow as that term is defined at Ark. Code Ann. § 11-9-102(12) (1987). Instead, the Commission found that appellant had not shown that she was dependent on the deceased employee, by stating:

> Just as (Marva Jo) never made an effort to enforce whatever legal right to support she may have had from the decedent, [appellant] also following her separation from the decedent never made any attempt to enforce whatever legal right to support she may have had. Given this fact, as well as the lack of other sufficient evidence proving that

> [appellant] had a reasonable expectation of support from the decedent, we find that [appellant] has failed to prove by a preponderance of the evidence that she is a beneficiary entitled to compensation benefits.

Dependency is a fact question to be determined in the light of the surrounding circumstances. *Doyle's Concrete Finishers* v. *Moppin*, 268 Ark. 167, 594 S.W.2d 243 (1980). The findings of the Workers' Compensation Commission must be upheld on review if there is substantial evidence to support them. *Public Employee Claims Division* v. *Tiner*, 37 Ark. App. 23, 822 S.W.2d 400 (1992). The issue on appeal is not whether this court would have reached the same results as the Commission on this record or whether the testimony would have supported a finding contrary to the one made; the question here is whether the evidence supports the findings which the Commission made. *Bankston* v. *Prime West Corp.*, 271 Ark. 727, 601 S.W.2d 586 (Ark. App. 1981). Before we can reverse a decision of the Commission, we must be convinced that fair-minded persons with the same facts before them could not have reached the same conclusion reached by the Commission. *Public Employee Claims Division* v. *Tiner*, *supra*.

The applicable statute is Ark. Code Ann. § 11-9-527(c) (1987), which provides in part that compensation for the death of an employee shall be paid to those persons who were "wholly and actually" dependent upon the deceased employee. In *Roach Mfg.* v. *Cole*, 265 Ark. 908, 582 S.W.2d 268 (1979), the court held that when the widow was not living with the employee at the time of his death, there must be some showing of actual dependency. However, the test of "actual dependency" does not require a showing of total dependence. A finding of some measure of actual support or a reasonable expectation of it will suffice. *Pinecrest Memorial Park, Inc.* v. *Miller*, 7 Ark. App. 185, 646 S.W.2d 33 (1983). Here, it was shown that the deceased and appellant had been separated for eleven months prior to his death. He had not returned to her even after his separation from Ms. Hall. Appellant was employed and, as noted by the commission, she had taken no action to seek whatever legal right to support she may have had. With regard to appellant's testimony that she was receiving support from the deceased, questions concerning the

credibility of witnesses and the weight to be given their testimony are exclusively within the province of the Commission. *Shaw* v. *Commercial Refrigeration*, 36 Ark. App. 76, 818 S.W.2d 589 (1991). In light of all the attendant circumstances, we cannot say that fair-minded persons with the same facts before them could not have reached the decision made by the Commission.

Affirmed.

COOPER and JENNINGS, JJ., agree.

Connie WELLER *v.* DARLING STORE FIXTURES

CA 91-315 828 S.W.2d 858

Court of Appeals of Arkansas
Division I
Opinion delivered April 29, 1992

Branch, Thompson & Philhours, A Professional Association, by: *Robert F. Thompson*, for appellant.

Penix, Penix & Lusby, for appellee.

JAMES R. COOPER, Judge. The appellant in this workers' compensation case sustained a back injury arising out of and in the course of her employment with the appellee, Darling Store Fixtures, on February 26, 1987. She was treated by back surgery on April 28, 1987, but with poor results. Subsequently, the appellant filed a claim for benefits asserting that she was totally disabled. After a hearing, the administrative law judge found that the appellant was totally disabled, but nevertheless awarded the appellant only a sum equal to 65% loss of use of the body as a whole after concluding that a portion of the appellant's total disability should be apportioned to her preexisting conditions of diabetes and obesity. On *de novo* review, the Workers' Compensation Commission conceded that the law judge had erroneously applied apportionment to this case, but arrived at the same result reached by the law judge by finding that the appellant had failed to prove by a preponderance of the evidence that she was permanently and totally disabled. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission's decision was contrary to the evidence and erroneously employed a theory of apportionment. We agree, and we reverse.

Only a brief recitation of the facts is necessary for an understanding of the issue presented by the appellant. Prior to her injury, the appellant was obese and had been diagnosed as a diabetic. Neither condition required treatment or caused any disability until after the appellant injured her back at work on February 26, 1987. The appellant submitted to back surgery approximately two months later, but poor results were obtained.

Following surgery, the appellant's diabetes worsened. Further back surgery was suggested, but the surgeon was unwilling to attempt the procedure unless the appellant lost a significant amount of weight. Twice, the appellant attempted liquid diets under medical supervision, but those diets exacerbated her diabetic condition and were discontinued. Subsequently, she attempted a more conventional diet but met with little success.

In cases such as the case at bar, where the Commission's denial of relief is based on the claimant's failure to prove entitlement by a preponderance of the evidence, the substantial evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Williams* v. *Arkansas Oak Flooring Co.*, 267 Ark. 810, 590 S.W.2d 328 (Ark. App. 1979). However, no substantial basis for denial of permanent total disability benefits is based on the finding that the appellant's disability has been worsened by her diabetes and obesity, which in turn have been exacerbated by the appellant's failure to follow the various diets prescribed for her. The commission concluded that the appellant's diabetic problems were not casually related to her injury, and that the appellee was not responsible for that portion of the claimant's permanent disability which is casually related to her diabetic condition.

Clearly, there was evidence at the hearing to show that the appellant's diabetic condition had become severe and disabling since her compensable injury. She testified that she experiences dizziness and blackouts, and that she would be unable to hold down a job because of those symptoms.

Apparently, the Commission reasoned that the appellant's work-related injury could not be totally disabling because her diabetic condition would prevent her from performing any job regardless of her back problem. We find this reasoning to be fallacious. All of the medical evidence is in agreement in concluding that the appellant is permanently and totally disabled following her back injury, and we find nothing in the record to support the Commission's conclusions that the appellant's disability would be less than total were it not for the flare up of her diabetic condition. On this record, we find no substantial basis for the Commission's conclusion that the appellant failed to prove entitlement, and we reverse.

Additionally, we note that the Commission considered the appellant's "lack of motivation to lose weight" as a factor in determining the extent of her disability. Apparently, this is in reference to the appellee's contention at the hearing, based on Ark. Code Ann. § 11-9-512 (1987), that the appellant's failure to lose weight was tantamount to a refusal to submit to surgery. We find that, under the facts of this case, the Commission erred in considering the appellant's failure to lose weight in fixing the amount of compensation. It is clear from the record that the appellant was obese prior to her injury, and that she made three attempts to lose weight upon the advice of a physician who believed that she might benefit from additional surgery but would not perform the procedure unless the appellant lost a substantial amount of weight. Thus, we are not presented with the appellant's refusal to submit to a recommended surgical procedure; the appellant asserts that she is willing to undergo the procedure if the surgeon will perform it, and her willingness to do so is uncontroverted. Instead, the Commission regarded the appellant's failure to lose weight as the equivalent of an unreasonable refusal to submit to surgery. We hold that, under these facts, the Commission erred in so doing. Professor Larson has summarized the law in this area as follows:

> When the treatment prescribed takes the form of exercise or wearing a brace, or undergoing an alcohol detoxification program, obviously there is no element of risk, and unreasonable refusal to follow medical instructions will lead to a loss of benefits for any disability attributable to this refusal. But when the prescribed treatment involves weight reduction, although in principle the cases should be assimilated to the exercise cases, courts have been less stern, perhaps because almost everyone has some personal experience of good-faith but ineffective weight-reduction efforts — and are reluctant to stigmatize these all-too-human failures as "willful refusal."

1 A. Larson, *The Law of Workmen's Compensation* § 13.22(d). In the case at bar, the record is devoid of facts supporting a conclusion that the appellant's weight reduction efforts were not made in good faith, and we hold that the Commission erred in concluding that her failure to lose weight was tantamount to an unreasonable refusal of surgery.

Reversed and remanded.

JENNINGS and ROGERS, JJ., agree.

Phyllis June BROWN *v.* Billy E. BROWN

CA 91-308 828 S.W.2d 601

Court of Appeals of Arkansas
Special Division III
Opinion delivered April 29, 1992

Parker, Settle & McCarty, by: *Patrick McCarty*, for appellant.

Rex W. Chronister, P.A., by: *Rex W. Chronister*, for appellee.

ERNIE E. WRIGHT, Special Judge. Appellant, Phyllis Brown, and appellee, Billy Brown, were divorced by decree of the Crawford County Chancery Court June 20, 1989, after over thirty-seven years of marriage. They agreed on the settlement of all property rights except the division of appellee's military retirement benefits, 90 percent of which were earned during the marriage. The remaining 10 percent of the retirement benefits were attributable to appellee's military service prior to the marriage. Appellee had been retired and receiving retirement benefits some years prior to the divorce.

In August 1990, appellant filed a motion for contempt against the appellee for his failure to implement payments to her of increases in the military retirement benefits by cost of living adjustments occurring subsequent to the divorce decree. The appellee filed a response denying that appellant was entitled to share in cost of living increases occurring after the divorce.

The relevant provision of the divorce decree states:

> The Court finds that the Defendant is entitled to one-half of the gross retirement for that period of time in which the parties were married said period constituting 90% of the retirement benefits. The Court finds that the Defendant is entitled to one-half of 90% of the Plaintiff's military retirement. Each party shall be responsible for the respective taxes which may be attributable to their portion of the retirement benefits. The Plaintiff is ordered and directed to forthwith contact the Naval Finance Center in Cleveland, Ohio for the purpose of determining the most expedient manner to impliment [sic] the Defendant's direct receipt of these funds.

The decree specifically provided appellee was not required to maintain the appellant on the survivors benefit plan and there is no issue before us in that regard. The appellee implemented direct payment by the Navy to appellant beginning with the October 1989 payment, and the disbursement to appellant was based on the gross retirement benefits of appellee in effect in 1989. In January 1990, the appellee routinely received a monthly increase based on the cost of living adjustment and apparently the benefits will be subject to adjustment in January of each year. There was an increase in appellee's benefits in January 1990, and appellee has taken no steps to implement the payment of 90 percent of one-half of that increase to appellant.

There were other issues raised by each party relating to implementing the property settlement in keeping with the divorce decree, but all other issues were settled by the parties except appellant's claim to a share of the increased COLA benefits payable after October 1990. Incident to settlement of property rights under the divorce decree, appellant waived her rights to any share of the COLA increases through October 1990.

At a hearing on October 16, 1990, the issue was argued by counsel and subsequently letters were submitted to the trial court by counsel and filed in the record.

On April 30, 1991, the court entered an order finding that appellant was not entitled to share in the increases or decreases in appellee's Navy retirement payable after the date of the decree of divorce.

It is undisputed that appellee's military retirement benefits were marital property within the meaning of Ark. Code Ann. § 9-12-315 (Repl. 1991), except as to the 10 percent which he had earned prior to the marriage. There is no indication in the decree of divorce that the retirement benefits were to be divided on some equitable basis other than one-half of the portion earned during the marriage as contemplated by the statute. We find no valid reason for holding that the award of one-half of 90 percent of the gross retirement benefits does not carry with it the same portion of any COLA increases or decreases that occur subsequent to the divorce. The Arkansas appellate courts have not previously had occasion to pass on this specific issue. However, a number of cases from other states have addressed the issue and have held that a spouse upon divorce is entitled to share in COLA adjustments in retirement benefits applicable to the percentage of retirement benefits awarded to the spouse in the divorce decree. *See Neese* v. *Neese*, 669 S.W.2d 388 (Tex. App. 11 Dist. 1984), *Thorpe* v. *Thorpe*, 123 Wis.2d 424, 367 N.W.2d 233 (Wis. App. 1985), *In Re the Marriage of Bocanegra*, 58 Wash. App. 271, 792 P.2d 1263 (Wash. App. 1990) and *In re the Marriage of Haugh*, 58 Wash. App. 1, 790 P.2d 1266 (Wash. App. 1990).

From a review of our statute governing the division of marital property upon divorce, the divorce decree, and the above cases, we conclude that appellant is entitled to share in the COLA adjustments. Appellant is entitled to one-half of 90 percent of COLA adjustments incident to appellee's retirement pay made and to be made on and after November 1, 1990.

Reversed and remanded.

DANIELSON, J., agrees.

JENNINGS, J., concurs in the result.

Mary JERNIGAN *v.* STATE of Arkansas

CA CR 91-200 828 S.W.2d 864

Court of Appeals of Arkansas
Division I
Opinion delivered May 6, 1992

Paul E. Herrod, for appellant.

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

JOHN E. JENNINGS, Judge. Mary Jernigan was charged on January 5, 1988, with battery in the first degree. The information was later amended to charge battery in the first degree by means of a deadly weapon. On January 10, 1989, the jury found Jernigan guilty of battery in the second degree and the court sentenced her to ten years imprisonment with six years suspended. On May 16, 1990, in an opinion not designated for publication, this court reversed for reasons not pertinent here.

Jernigan was retried and on February 4, 1991, was again found guilty by a jury of battery in the second degree. This time the circuit court sentenced her to ten years imprisonment with seven years suspended. We find that the trial court erred in excluding certain proffered evidence and must again reverse and remand for new trial.

At trial, James Wright, an electrician from Arkoma, Oklahoma, testified that during 1988 he began having an extra-marital affair with the defendant. He then moved into her home in Fort Smith. Wright testified that on August 22, 1988, both he and Ms. Jernigan had been drinking beer. Wright testified that during an argument the defendant shot him five times with a pistol.

Wright had previously filed a civil complaint for damages against Jernigan, alleging that the shooting was accidental rather than intentional. In a hearing before the trial in the case at bar the circuit court ruled that the defendant could not use the prior civil complaint to impeach Wright. The court's ruling was based on *Razorback Cab of Fort Smith, Inc.* v. *Lingo*, 304 Ark. 323, 802 S.W.2d 444 (1991). It is true that the supreme court reversed the trial judge's ruling admitting a complaint into evidence in *Lingo*, stating, "Complaints, normally phrased in the most partisan language, are in no conceivable sense evidentiary. . . . While the cases bespeak no hard and fast rule, pleadings, and especially complaints, are generally treated as inadmissible." 304 Ark. at 325, 802 S.W.2d at 445.

The distinction between that case and this one is that in *Lingo* the plaintiff himself sought to introduce his own complaint as substantive evidence. In the case at bar, the defendant sought to impeach the prosecuting witness with the latter's complaint filed in a civil action. Under these circumstances the complaint qualifies as a prior inconsistent statement under Ark. R. Evid. 613. *See McDaniel* v. *State*, 291 Ark. 596, 726 S.W.2d 679 (1987). The defendant should have been permitted to pursue this line of inquiry.

Jernigan also argues that the sentence she received was "illegal". An illegal sentence is one which is illegal on its face. *Finn* v. *State*, 36 Ark. App. 89, 819 S.W.2d 25 (1991). Battery in the second degree is a class D felony. Ark. Code Ann. § 5-13-202

(1987). The maximum punishment for a class D felony is six years. Ark. Code Ann. § 5-4-401(a)(5) (1987). However, Ark. Code Ann. § 16-90-121 (1987) provides:

> Any person who is found guilty of or pleads guilty to a felony involving the use of a deadly weapon, whether or not an element of the crime, shall be sentenced to serve a minimum of ten (10) years in the state prison without parole but subject to reduction by meritorious good-time credit.

Appellant's argument is based on a statement contained in *Crespo* v. *State*, 30 Ark. App. 12, 780 S.W.2d 592 (1989): "The application of § 16-90-121 does not impose an additional sentence, but merely precludes the possibility of Crespo being eligible for parole before serving ten years, subject to reduction for meritorious good-time." That statement was true in *Crespo* because the defendant had been sentenced to twelve years for aggravated robbery apart from the application of § 16-90-121. However, in *Crespo* we also quoted from *Missouri* v. *Hunter*, 459 U.S. 359 (1983):

> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct under Blockburger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court may impose cumulative punishment under such statutes in a single trial.

Furthermore, the Arkansas Supreme Court has held that when two punishment statutes exist, a court is not prevented from using the more stringent provision. *Russell* v. *State*, 295 Ark. 619, 751 S.W.2d 334 (1988). We hold that the sentence was not illegal.

Reversed and Remanded.

COOPER and ROGERS, JJ., agree.

Ilee WILLMON *v.* ALLEN CANNING CO.

CA 91-251 828 S.W.2d 868

Court of Appeals of Arkansas
Division I
Opinion delivered May 6, 1992

Joseph C. Self, for appellant.

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

MELVIN MAYFIELD, Judge. Ilee Willmon has appealed a decision of the Workers' Compensation Commission which dismissed her claim because "the claimant has failed to meet her burden of proof."

Appellant's first argument is that the Commission did not base its decision on a de novo review of the entire record and the case should be remanded. The Commission, after reciting that it had conducted a de novo review of the entire record and finding that the appellant had failed to meet her burden of proof, affirmed and adopted the opinion of the law judge. In *White* v. *Air Systems, Inc.*, 33 Ark. App. 56, 800 S.W.2d 726 (1990), we explained the Commission's duty in reviewing a decision of an administrative law judge.

> The Arkansas Workers' Compensation Commission is not an appellate court. *Shippers Transport, supra.* [*Shippers Transport* v. *Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979)] It is, instead, the factfinder, and as such its duty and statutory obligation is to make specific findings of fact, on de novo review based on the record as a whole, and to decide the issues before it by determining whether the party having the burden of proof on an issue has established it by a preponderance of the evidence. *See Shippers Transport, supra: Johnson* v. *Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989); *Jones* v. *Tyson Foods, Inc.*, 26 Ark. App. 51, 759 S.W.2d 578 (1988); Ark. Code Ann. § 11-9-705(a)(3) (1987).

33 Ark. App. 59. And in *Wright* v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107(1986), we held that the Commission must make sufficient factual findings to justify the decision made so that the appellate court can conduct a meaningful review of the commission's decision. However, we held in *Second Injury Fund* v. *Robison*, 22 Ark. App. 157, 737 S.W.2d 162 (1987), that

a Commission opinion may contain findings of fact sufficient to satisfy the Wright standard when it adopts an opinion of the law judge which contains adequate findings. 22 Ark. App. at 166. By affirming and adopting the decision of the law judge in the instant case, the Commission supplied us with adequate findings of fact so that we can conduct a meaningful review.

Appellant also argues that the Commission's decision is not supported by substantial evidence. On reviewing a decision of the Workers' Compensation Commission, we must view the evidence 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. *McCollum* v. *Rogers*, 238 Ark. 499, 382 S.W.2d 892 (1964). Our standard of review on appeal is whether the decision of the Commission is supported by substantial evidence. *City of Fayetteville* v. *Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Phillips* v. *State*, 271 Ark. 96, 607 S.W.2d 664 (1980). We do not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached. *Silvicraft, Inc.* v. *Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983). These rules insulate the Commission from judicial review and properly so, as it is a specialist in this area and we are not. But a total insulation would obviously render our function in these cases meaningless. *Boyd* v. *General Industries*, 22 Ark. App. 103, 733 S.W.2d 750 (1987).

Appellant testified that on March 16, 1990, while she was employed by appellee canning company, her apron got caught in a conveyor belt and as the apron was released she was flipped over onto a concrete floor. She was taken by ambulance to the Crawford County Memorial Hospital where she stayed until March 29. She has not returned to work since her injury. She testified she is unable to work because her foot turns inward, swells, and is painful. She said Dr. R.W. Ross, her treating physician, had not released her to return to work, but she had not seen him for several months. She explained that when she returned to see him in April she discovered appellee had controverted her claim and would no longer pay the medical bills and she was unable to afford to pay the bills herself.

Dr. William L. Griggs, a neurologist, in a report dated March 24, 1990, diagnosed appellant as suffering from:

1. Conversion Reaction.
   Inversion Right Foot.
   Nondermatomal Numbness Involving Trunk, Left Hand, Right Leg.

2. No Neurological Disease Found.

In the hospital discharge summary dated March 29, 1990, Dr. Ross stated:

> As each day progressed, there were fewer and fewer findings but more complaints on the part of the patient. On about the third hospital day the patient announced to this attending physician that something was severely wrong with her back and right leg, that the right leg had shorten itself, was rotating the foot inward and that there was no way that she could control this. At this point, she was seen in consultation with Dr. Albert MacDade, a local neurosurgeon, Dr. Claude Martimbeau, a local orthopaedist, and Dr. William Griggs, a local neurologist. Tho[r]ough neurologic, neurosurgerical [sic] and orthopaedic investigation and stud[ies] were done and there were no forthcoming positive findings. All modalities of investigation indicated that indeed there was no neurologic involvement, no fractures, no dislocations and no other abnormalities. Dr. Griggs' very thorough neurologic and musculoskeletal evaluation in fact showed that the patient could straight[en] her leg and did not have abnormal function to that right lower extremity. It is therefore our conclusion that she is suffering a conversion hysteria and really believes that she cannot straighten the leg.

Anitra Fay, Ph. D., a psychologist, reported that appellant was "very defensive" in responding to the MMPI and the profile validity was reduced. Nevertheless, she said the appellant produced an abnormal profile, tending to be hypochondriacal in outlook, and she (Fay) recommended psychiatric consultation.

On April 11, Dr. Griggs reported that appellant's neurological exam continued to show multiple functional findings with no organic findings, and that she "has a conversion reaction." And

on May 18, 1990, the doctor reported motor nerve conduction velocity of the right lower extremity was normal as was the EMG. He concluded there had been no change from the April study.

In his opinion, which by adoption became the opinion of the Commission, the law judge stated:

> Drs. Ross, Griggs and Fay all shared the same opinion that the claimant in all probability was suffering from a conversion reaction. Conversion reaction is defined in *Taber's Cyclopedic Medical Dictionary* as follows:
>
> > A conversion type of hysterical neurosis in which there is loss of or alteration in physical functioning suggesting a physical disorder but instead representing the expression of a psychological conflict or need.

The Arkansas appellate courts have recognized conversion reaction as a compensable condition. In *Boyd* v. *General Industries*, 22 Ark. App. 103, 733 S.W.2d 750 (1987), we reversed the Commission's refusal to award benefits for a psychological reaction to a compensable injury. We stated:

> The threshold issue is whether the effects of this kind of mental disorder or psychoneurosis, if causally related to an on-the-job injury, are compensable. In *Wilson & Co.* v. *Christman*, 244 Ark. 132, 141, 424 S.W.2d 863, 869 (1968), the supreme court approved the following statement from Larson:
>
> > . . . [W]hen there has been a physical accident or trauma, and claimant's disability is increased or prolonged by traumatic neurosis, conversion hysteria or hysterical paralysis, it is now uniformly held that the full disability including the effects of the neurosis is compensable. Dozens of cases, involving almost every conceivable kind of neurotic, psychotic, depressive, or hysterical symptom or personality disorder have accepted this rule.
>
> Clearly the disabling effects of this type of disorder are compensable if the requirement of a causal connection is met. Although arguments can be made that this type of

> mental disorder ought not to be compensable, *see e.g.*, the discussion in *Deziel v. Difco Laboratories, Inc.*, 403 Mich. 1, 268 N.W.2d 1 (1978), neither we nor the Commission are free to disregard the supreme court's holding in *Christman.*

22 Ark. App. at 108-109.

The law judge's opinion in the instant case stated that "the two questions that must be addressed" were (1) is the conversion reaction causally connected to the claimant's injury of March 16, 1990, and (2) if there is a causal connection, is the condition disabling.

We note that the opinion assumes that the appellant suffered from a "conversion reaction." Certainly, the evidence supports that assumption. But the law judge's opinion goes on to say that even if there was such a causal connection "there is absolutely no medical proof that this condition is disabling."

This statement completely overlooks the March 24, 1990, report of Dr. Griggs which stated that appellant had an "inversion" of her right foot. The law judge's statement also overlooks the March 29, 1990, discharge summary of Dr. Ross which stated it was his and Dr. Grigg's conclusion that appellant "is suffering a conversion hysteria and really believes that she cannot straighten the leg." And the law judge's statement also overlooks the April 16, 1990, "progress notes" of Dr. Ross which state he had observed that appellant "carries her right foot internally rotated and gives to it as if there was a difference in the length of her legs." The "progress notes" also state, "I do not think it advisable that she try to work at the present time because of the way she walks and carriers her foot, she would probably stumble and hurt herself."

The law judge's opinion concluded that the appellant failed to prove by a preponderance of evidence that "the conversion disorder as diagnosed by the treating physicians was and is causally related to her compensable injury of March 16, 1990," or that "the conversion disorder is disabling." Guided by our standard of review as set out above, we do not think the law judge's opinion, adopted by the Commission, is supported by substantial evidence. Therefore, we reverse the Commission's

decision and remand this case for a determination of the workers' compensation benefits to which appellant is entitled as a result of the conversion reaction she suffered as a result of the compensable injury sustained on March 16, 1990.

Reversed and remanded.

COOPER, and DANIELSON, JJ., agree.

JOHN GARNER MEATS and Silvey Companies *v.* Gerald AULT

CA 91-209 828 S.W.2d 866

Court of Appeals of Arkansas
Division I
Opinion delivered May 6, 1992

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

Nolan & Caddell, P.A., by: *Bennett S. Nolan*, for appellee.

JUDITH ROGERS, Judge. The appellants, John Garner Meats and its insurer, Silvery Companies, appeal from a decision of the Arkansas Workers' Compensation Commission denying their claim of entitlement to proceeds from a settlement reached by appellee and a third-party tortfeasor. The issue on appeal is whether appellants can claim a lien or credit against the proceeds when they failed to intervene in the third-party action. We affirm the Commission's decision.

On October 2, 1987, appellee, Gerald Ault, was injured during the course and scope of his employment with John Garner Meats. His claim was accepted as compensable, and benefits were paid accordingly. Thereafter, appellee filed a lawsuit in the Circuit Court of Crawford County against a third-party in connection with the injury. Appellants had notice of the third-party action, and demand was made upon them to assist in the prosecution of the suit. However, a claims representative with the insurance carrier assessed appellee's chances of recovery as "slim," and appellant declined to either intervene or participate in the lawsuit. The third-party action was settled for the sum of $20,000, and on September 15, 1989, the circuit judge entered an order dismissing the case. Appellants did present a belated motion to intervene, but no action was taken on the motion by the circuit court.[1] Thereafter, appellants pursued their claim to the settlement proceeds before the Commission, which ruled that they were not entitled to a lien or credit from the settlement funds.

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[1] Appellants have submitted a motion before this court to supplement the record with a file-marked copy of their motion to intervene. We simply note that a belated motion to intervene was filed and consider appellants' motion to supplement the record as moot.

It is from the order incorporating this finding that appellants bring this appeal.

The issues in this case are centered upon Ark. Code Ann. § 11-9-410 (1987). Subsection (a)(1) of this statute, which is applicable under the facts of this case, recognizes the employee's common law right to maintain a tort action against a third party, as unaffected by the making of a claim for compensation benefits against the employer. *See St. Paul Fire & Marine Ins. Co.* v. *Wood*, 242 Ark. 879, 416 S.W.2d 879 (1967). This subsection also provides that the employer and its carrier are entitled to reasonable notice and opportunity to join in the action, and that they are entitled to a lien against the proceeds recovered in the action if they, or either of them, join in the action. Subsection (b) of Ark. Code Ann. § 11-9-410 sets out the employer or the carrier's right of subrogation, giving them the right to bring an action against any third party responsible for the employee's injury. Subsection (c) of the statute provides that the settlement of claims must have the approval of the court or commission.

On appeal, appellants contend that they are entitled to a lien or set-off against compensation benefits from the proceeds of the settlement because appellee did not obtain court or commission approval of the settlement, and also because their subrogation rights were not preserved in the settlement. We hold that appellants waived their right to claim a lien or credit against the settlement proceeds by failing to intervene in the third-party action, notwithstanding the absence of approval or the preservation of their subrogation rights.

We have held that the right to claim a lien or credit under Ark. Code Ann. § 11-9-410 is preserved by intervening in the action. *Jackson Cookie* v. *Fausett*, 17 Ark. App. 76, 703 S.W.2d 468 (1986). In *Jackson Cookie, supra*, we said:

> Where the employee has made a claim under the Workers' Compensation Act and the employer or carrier has had a reasonable opportunity to join in the third-party action, we hold that the employer and its carrier *must intervene in a third-party action to have a right to credit*, whether or not the liability of the employer or the carrier has been determined.

Id. at 81,703 S.W.2d at 471 (emphasis supplied). In this case, appellants had notice and the opportunity to join in the lawsuit, but they made the calculated decision not to intervene. Consequently, their right to share in the proceeds of the settlement was not preserved and they are not entitled to claim a lien or credit against the $20,000 received in the settlement.

We are not persuaded that appellee's failure to obtain approval or preserve appellants' right of subrogation alters this result. We can agree with appellants' position that Ark. Code Ann. § 11-9-410(c) is controlling and requires that either court or commission approval be obtained upon settlements of third-party actions. Such approval is meant is ensure that the various rights of the parties are protected. *See Liberty Mutual* v. *Billingsley*, 256 Ark. 947, 511 S.W.2d 476 (1974); *Travelers Insurance Co.* v. *McCluskey*, 252 Ark. 1045, 483 S.W.2d 179 (1972). However, appellants cannot be heard to complain about the lack of approval in claiming entitlement to a lien without first having preserved the right to a lien by intervening in the third party lawsuit. By failing to intervene, appellants waived this right that the statute was designed to protect. With regard to appellee's failure to reserve appellants' right of subrogation, appellants have pointed to no authority which requires an employee to protect this right for them. Furthermore, appellants have not demonstrated how the appellee's failure to do so would resurrect their entitlement to a lien which was waived when appellants did not intervene in the lawsuit. In sum, appellants did nothing to preserve their rights, and we cannot disagree with the Commission's decision that they are not entitled to credit against the proceeds of the settlement.

Affirmed.

COOPER, and JENNINGS, JJ., agree.

Johnnie E. DAVIS *v.* STATE of Arkansas

CA CR 91-116 828 S.W.2d 863

Court of Appeals of Arkansas
Special Division II
Opinion delivered May 6, 1992

Albert R. Hanna, for appellant.

Winston Bryant, Att'y Gen., by: *Chad Farris*, Asst. Att'y Gen., for appellee.

WILLIAM ENFIELD, Special Judge. Appellant was charged with aggravated robbery and theft of property. The charges arose from a convenience store robbery by two black males, one carrying a gun, on the evening of June 25, 1989. Appellant's defense was alibi. The clerk at the convenience store was unable to identify appellant as one of the robbers during a photographic line-up.

A police officer testified on direct examination that she had contacted Beverly Boone, a girlfriend of the admitted robber,

Thomas Wayne Cobb, pursuant to an anonymous telephone tip and Ms. Boone told the officer that appellant and Cobb were together on the night of the robbery. This testimony was objected to on the grounds of hearsay and the objection was sustained by the court.

In spite of the court's ruling the prosecutor returned to the subject on redirect examination. Over appellant's hearsay objection, the court permitted the officer to testify that she had learned from Ms. Boone that the appellant was present when Cobb had given her money of significant amounts and denominations about two hours after the robbery.

Rule 801(c) of Arkansas Rules of Evidence defines hearsay as:

> a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Certainly, the testimony admitted here was hearsay. Rule 802 of the Arkansas Rules of Evidence makes hearsay inadmissible, except as provided by law or the rules of evidence. None of the exceptions applied to the facts here.

The lower court based its ruling on a view that appellant had "opened the door." In other words, he waived his right to object to the hearsay by initiating the inquiry. But the record shows that the prosecutor, not appellant, brought up the subject of appellant's presence by opening the line of questions to the police officer, both on direct examination and redirect examination. Appellant objected both times. The judge correctly sustained the first objection but erred when he overruled the second objection.

The question remains whether the court's error was harmless. Although Cobb testified that the appellant was with him and participated in the robbery, it was shown that Cobb had a previous felony conviction, and the clerk at the store could not identify appellant. We cannot be certain how much weight the jury gave to the hearsay evidence, but it was certainly intended to counteract appellant's only defense, that of alibi. This placed the jury in the position of deciding whether to believe appellant and his witnesses, or the testimony of Cobb bolstered by the second-hand testimony of an absent witness whose credibility and

accuracy were impliedly supported by a police officer. This is exactly the type of thing the hearsay rule is intended to prevent. The error was not harmless. *See Harris* v. *State*, 36 Ark. App. 120, 819 S.W.2d 30 (1991); *Pennington* v. *State*, 24 Ark. App. 70, 749 S.W.2d 680 (1988).

Reversed and remanded.

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

Randy LEACH *v.* STATE of Arkansas

CA CR 91-169 831 S.W.2d 615

Court of Appeals of Arkansas
Division I
Opinion delivered May 13, 1992
[Rehearing denied June 17, 1992.]

Callis Childs, for appellant.

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

JOHN E. JENNINGS, Judge. Appellant, Randy D. Leach, was convicted of conspiracy to commit aggravated robbery and received a six year sentence and a $5,000.00 fine. Leach raises eighteen points on appeal, two of which require reversal. Pursuant to *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984), before we reverse and remand because of trial error we must consider whether the evidence is sufficient to sustain the conviction. Of the other issues raised we address only those which are

likely to arise again on retrial.

Some background is in order. On November 7, 1988, Conway Police Officer Ray Noblitt was killed when he investigated what appeared to be a theft of a flatbed trailer in progress. An investigation and manhunt resulted a few days later in the arrest of Kenneth Ray Clements, a felon, in connection with the murder. Pursuant to the investigation, police interviewed Denise Clements, wife of Kenneth, and her sister, Julie Nathe. Investigators then interviewed Conway Police Officer R.L. "Dickie" McMillen and later Leach, who was also a Conway police officer. Within a week of the murder both McMillen and Leach had been placed under arrest on suspicion of conspiracy to commit theft of property. A grand jury was impaneled to investigate the death of Noblitt. The grand jury handed down indictments charging Kenneth Clements with capital felony murder and multiple counts of theft of property, conspiracy to commit burglary, conspiracy to commit aggravated robbery, and several other criminal charges; Dickie McMillen with being an accomplice to capital felony murder, two counts of conspiracy to commit aggravated robbery, conspiracy to commit theft of property, and two counts of conspiracy to commit burglary; and Leach with conspiracy to commit aggravated robbery and conspiracy to commit burglary. Both McMillen and Leach subsequently resigned from the police force. In the case at bar, Leach was convicted of conspiring with Kenneth Clements and Dickie McMillen to commit aggravated robbery of a courier for Wal-Mart when the courier was to deliver night deposits to a bank.

1. SUFFICIENCY OF THE EVIDENCE

Leach first argues that the evidence was insufficient to sustain his conviction for conspiracy to commit armed robbery. When the sufficiency of the evidence is challenged on appeal of a criminal conviction, we review the evidence, including any evidence which may have been erroneously admitted, in the light most favorable to the State and affirm if there is substantial evidence to support the verdict. *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984); *Williams* v. *State*, 29 Ark. App. 61, 781 S.W.2d 37 (1989). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without

requiring one to resort to speculation or conjecture. *Ward* v. *State*, 35 Ark. App. 148, 816 S.W.2d 173 (1991). The fact that evidence is circumstantial does not render it insubstantial as the law makes no distinction between direct evidence of a fact and circumstances from which it may be inferred. *Ryan* v. *State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990).

At trial, Lieutenant Doug Williams of the Arkansas State Police testified that in November of 1988 he was involved in an investigation of the Conway Police Department. In the course of that investigation he interviewed Leach, and a transcription of that interview was prepared. Sergeant J.R. Howard of the Arkansas State Police testified that he was present at the taking of Leach's statement. Howard read into the record the transcription of Leach's statement. Leach's statement described his relationship and contacts with Dickie McMillen and Kenneth Ray Clements.

In this statement, Leach said that McMillen and Clements picked him up one afternoon to ride over to the house of one Nolan in order to look at some hunting dogs. During that ride there was a discussion of farm equipment, and Leach was led to believe that Clements had stolen a tractor. He stated that, on another occasion, he and McMillen had discussed the possibility of robbing a Wal-Mart courier. McMillen and Clements were to work it out so that on an evening when Leach was escorting the courier to the bank, Clements would "just come up and snatch the money and run." Leach was to "stall along and make it look good." He further stated:

> Shots were talked about. I told them I didn't want anybody shooting at me. Uh, I can't remember anything was said about me firing a shot. Talked about, you know, if I took off after them or something, you know, run at them, run into one of those teller machines or something, damage my car so I couldn't pursue him.

Denise Clements, Kenneth Clements's wife, testified with regard to the planned robbery of the Wal-Mart courier that "Kenneth was supposed to follow the courier truck and pull it over at some point or at the bank, rob the bank, and, uh, was to get away with the money and split it with the two other police officers." It is clear that the basis for this testimony was

statements made by her husband to her. She said that Clements told her that he had followed the courier to find the route and time. She stated that Clements never left the house without a gun, "no matter what he did." She testified that she was present at one meeting between Clements and McMillen where she sat in Clements's truck while he rode around with McMillen in McMillen's truck. She said that McMillen often called, and that he used an alias of "Frank." She testified that McMillen sold Clements a truck, that McMillen visited the house, and that Clements and McMillen had known each other for years.

Leach argues that there was no evidence that the men conspired to commit armed robbery, or that he or the co-conspirators agreed or planned that they would be armed with a deadly weapon or would represent by words or conduct that they were so armed. From appellant's statement and the testimony of Denise Clements, we believe there was substantial evidence from which the jury could find Leach guilty of conspiracy to commit armed robbery.

2. THE "IN FURTHERANCE OF" REQUIREMENT

Appellant argues that the trial court erred in allowing statements attributed to Kenneth Clements to be admitted through the testimony of Denise Clements. The statements were admitted under Ark. R. Evid. 801(d)(2)(v) which provides that a statement is not hearsay if the statement is offered against a party and is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. Appellant argues, as he did below, that there was no evidence to indicate that any of the statements made by Kenneth Clements to his wife Denise were made "in furtherance of the conspiracy," and thus the statements do not fall within the Rule. The witness herself characterized her husband as a liar, but added that "when it came to boasting and bragging about things he had and was planning on doing, he was also very good at that." Appellant argues that there is no proof that Kenneth Clements's boasting and bragging to his wife in any way furthered the objective of the conspiracy to rob the Wal-Mart courier. He relies on *United States* v. *Eubanks*, 591 F.2d 513 (9th Cir. 1979), applying Fed. R. Evid. 801(d)(2)(E), which is identical to the Arkanas rule. In *Eubanks*, Baca, the common-law wife of the deceased conspirator Gonzales, was allowed to

testify to statements made by Gonzales about his involvement in a conspiracy to distribute heroin. The Ninth Circuit Court of Appeals reversed, finding that not all statements made by co-conspirators can be considered to have been made in furtherance of the conspiracy. The Court said:

> In contrast, most of the statements made by Gonzales to Baca that incriminated appellants cannot reasonably be considered to have been in furtherance of the conspiracy. Gonzales and Baca had been living together in a common-law marriage relationship. Gonzales often discussed his activities with Baca, who did not participate in the alleged conspiracy until long after its inception. Baca testified that Gonzales told her that he was going to Tucson to obtain narcotics from Yanez. There is no evidence that Gonzales' statement was a declaration in furtherance of the conspiracy. Gonzales was not seeking to induce Baca to join the conspiracy and his statement did not assist the conspirators in achieving their objective. Gonzales' "statement was, at best, nothing more than [a] causal admission of culpability to someone he had individually decided to trust."
>
> Similarly, when Gonzales informed Baca about the persons to whom he had spoken over the telephone, he was not making a declaration in furtherance of the conspiracy. Instead, he was merely informing his common-law wife about his activities. . . .
>
> After Baca began travelling to Tucson with Gonzales and assisted him with the arrangements for obtaining heroin, she assumed a role in the alleged conspiracy. Yet Baca's participation in the conspiracy did not convert Gonzales' statements to her into declarations in furtherance of the conspiracy. Most of Gonzales' statements to Baca that were included in her testimony did nothing to advance the aims of the alleged conspiracy.

591 F.2d at 520 (citations omitted). The significance and necessity of the "in furtherance" requirement were examined by this court in *Williams* v. *State*, 7 Ark. App. 151, 645 S.W.2d 697 (1983), where it was noted that the reason for the "in furtherance" requirement was "the desire to strike a balance between the need to admit statements of coconspirators and the need to

protect the accused against idle chatter of criminal partners." *See also United States* v. *Layton*, 720 F.2d 548 at 556 (9th Cir. 1983), *cert. denied*, 405 U.S. 1069 (1984); *United States* v. *Johnson*, 927 F.2d 999 at 1002 (7th Cir. 1991). We said, "[T]he requirement is clear — although whether a statement meets the requirement may not be." *Williams*, 7 Ark. App. at 155, 645 S.W.2d at 699.

The facts in *United States* v. *Wood*, 834 F.2d 1382 (8th Cir. 1987), were similar to those in *Eubanks*. Wood and Stanton were alleged co-conspirators and the District Court had permitted Stanton's wife, Mary, to testify that Stanton had told her that he was working for Wood by putting radios in boats used for drug smuggling. The Court said:

> Whether the statement was made in furtherance of the conspiracy is a close question. Mary Stanton testified that her husband told her that he was working for Wood installing radio equipment in boats "used for marijuana." Although the statement refers to drugs, it doesn't appear that Michael Stanton was seeking to induce his wife to join the conspiracy. There is no evidence that Stanton's statement prompted action in furtherance of the conspiracy by either participant in the conversation. Stanton's statement did not identify the role of one conspirator to another, because Mary Stanton was not involved in the conspiracy. A more credible, albeit pedestrian, interpretation is that he was merely informing his wife about his activities. We hold that the statement was not in furtherance of the conspiracy, and therefore did not qualify for admission under Fed.R.Evid. 801(d)(2)(E).

834 F.2d at 1385.

At trial, the State argued that Kenneth Clements's statements to his wife were in furtherance of the conspiracy because the statements were "for the purpose of covering his tracks." The State argued strenuously and repeatedly that the court had so ruled in the first McMillen trial and in the second McMillen trial and that it should so hold here. As the prosecutor argued:

> We've been through this twice before, and I ask the Court to hold in accordance with its previous ruling, which is

> someone who's involved in a conspiracy and has someone living with them and works with them, who answers the telephone and deals with people coming and going, must be aware of what that person is involved with; otherwise, the wife would trip that person up and put him flat on his back in jail. And, that's exactly why she had to be made aware of these things. It was in furtherance of the conspiracy.

The State makes essentially the same argument on appeal.

The facts in the case at bar cannot be successfully distinguished from those in *Eubanks* and *Wood*, and we find the reasoning of those decisions persuasive. We hold that the trial court's finding that statements made by Kenneth Clements to his wife Denise were "in furtherance of a conspiracy" was erroneous and that Denise Clements's testimony was therefore inadmissible as hearsay.

3. ADMISSIBILITY OF APPELLANT'S STATEMENTS

Appellant argues that his statement was coerced by the prosecuting attorney's threat and should not have been admitted. Custodial statements are presumed to be involuntary, and the State has the burden of proving otherwise. A statement induced by fear or hope of reward is not voluntary. *Sanders* v. *State*, 305 Ark. 112, 805 S.W.2d 953 (1991). On appeal, we make an independent review of the totality of the circumstances, but will reverse only if the trial court's finding is clearly against a preponderance of the evidence. *Porchia* v. *State*, 306 Ark. 443, 815 S.W.2d 926 (1991).

Appellant testified at the pretrial hearing regarding the circumstances of his giving a statement. The chief of police called appellant down to the station to talk to the state police investigators. Appellant described his contact with the prosecuting attorney as follows:

> A. Well, we sat down there and, uh, they said, "Well, we need to ask you some questions. Before we do," said, uh, "Mr. Foster wants to tell you something," or wants to speak to you.
>
> . . . .

Q. Okay. What did Mr. Foster tell you?

A. Mr. Foster came in. He, uh, sat down there at Bobby's desk, and I believe he crossed his hands, and he said, uh, "Randy," said, "this is the hardest thing I've ever had to do." He said, "I'm going to charge you with capital felony murder or accessory to capital felony murder, if you don't give me a statement."

Q. Did—was there anything said about the death penalty?

A. Yes. He said, uh—he said, "I'm gonna' charge you or—with accessory or accomplice to capital felony murder, and I'm gonna' ask for the chair." I remember his saying, "I'm gonna' ask for the chair."

Q. Why are you—why are you so—

A. Because it scared me to death. I mean it's just—it's just like somebody says, well, I'm fixing to blow your head off, you know.

. . . .

Q. Okay. Uh, what effect did Mr. Foster's statements have on you?

A. Well, it was just—I don't know, I just was out of control. My—I just couldn't think of what—what was happening. I—all I could think of was my family, my job, just, you know, everything seemed to be—you know, it was going to be down the tube, you know. My—

Q. Did—I think I've already asked you. Did you give Mr. Swesey and Mr. Williams and Mr. Howard a statement?

A. Yes, I did.

Q. Did you give them the statement as a result of what Mr. Foster had told you?

A. Yes.

Appellant's version of this exchange basically corroborated the earlier testimony of State Police Officer Howard, except for the statement attributed to the prosecutor about "asking for the

chair." It is undisputed that Leach was advised of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

In examining the totality of the circumstances, the supreme court has said that the inquiry should be divided into two main components: the statement of the officer (in this case, the prosecutor) and the vulnerability of the defendant. *See Sanders* v. *State*, 305 Ark. 112, 805 S.W.2d 953 (1991); *Williams* v. *State*, 281 Ark. 91, 663 S.W.2d 700 (1983), *cert. denied*, 469 U.S. 980 (1984); *Davis* v. *State*, 275 Ark. 264, 630 S.W.2d 1 (1982).

Here, the defendant was an experienced police officer. There was no contention that he was unable to understand his rights for any reason.

Nor does the nature of the statement by the prosecuting attorney require suppression. The circumstances of the case at bar are similar to those found in *Tippitt* v. *State*, 285 Ark. 294, 686 S.W.2d 420 (1985). There, Tippitt was a suspect in an aggravated robbery and attempted capital murder case. Two accomplices were charged with aggravated robbery and attempted capital murder. Investigating officers agreed not to charge Tippitt with attempted capital murder if he would give a statement. The court said:

> The issue before us is whether the inculpatory custodial statement, given in exchange for a promise not to prosecute appellant for an additional crime, should have been suppressed. There is no dispute that the statement was given in exchange for the promise not to charge appellant with attempted capital murder. The *Miranda* warnings were given prior to the statement being made. Custodial statements are presumed involuntary and the state must overcome the presumption by a preponderance of the evidence. Statements given with hope of reward are not voluntary.
>
> . . . .
>
> Under the facts and circumstances of this case, when considered in their totality, we think the trial court was correct in admitting the statement. The appellant struck a bargain, which was closely related to a plea bargain, and

> both sides kept their promises. Most likely the deal was a wise one for the appellant. In any event we can find no prejudicial error. [Citations omitted.]

Tippitt v. *State*, 285 Ark. at 295, 686 S.W.2d at 421; *see also Williams* v. *State*, 281 Ark. 91, 663 S.W.2d 700 (1983), *cert. denied*, 469 U.S. 980 (1984). We find no error in the court's denial of the motion to suppress the defendant's statement.

Appellant also argues that it was error to allow Ollie Willborg, an investigator for the prosecuting attorney, to testify about comments made by appellant while he was awaiting bail and on another chance encounter at the courthouse. Appellant argues that the inculpatory nature of those statements compels the conclusion that, due to the coercive nature of the prosecutor's earlier statements, "appellant did not possess sufficient mental freedom" to confess or deny his participation in the crime. These statements were freely offered, and the circumstances do not display coercion any more than those surrounding the giving of the initial statement to the investigators.

4. THE MOTION IN LIMINE

At trial the State moved in limine for an order prohibiting appellant from testifying about the prosecutor's offer to charge him with capital murder unless he gave a statement. The court granted the motion. This was error.

In *Kagebein* v. *State*, 254 Ark. 904, 496 S.W.2d 435 (1973), addressing a similar argument, the court said:

> The purpose of our *Denno* hearing statute (Ark. Stats. 43-2105) is to prevent a jury from hearing a confession before the court determines that it has been voluntarily given. It is not intended to restrict evidence a jury may hear after a court determination of voluntariness has been made. The defendant still has the constitutional right to have his case heard on the merits by a jury, including the weight and credibility the jury might give to the voluntariness of the confession. *Walker* v. *State*, 253 Ark. 676, 488 S.W.2d 40 (1982); *Lego* v. *Twomey*, 404 U.S. 477, 30 L. Ed. 2d 618, 99 S.Ct. 619 (1972).

And in *Crane* v. *Kentucky*, 476 U.S. 683 (1986), the United

States Supreme Court stated:

> As the Court noted in Jackson, because "questions of credibility, whether of a witness or of a confession, are for the jury," the requirement that the court make a pretrial *voluntariness* determination does not undercut the defendant's traditional prerogative to challenge the confession's *reliability* during the course of the trial.
>
> . . . .
>
> Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?
>
> . . . .
>
> [W]e have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial. [Citations omitted.]

The record will not support the State's contention that appellant's counsel somehow invited the error.

5. SEQUESTERED VOIR DIRE

Before trial, the court denied appellant's request for individual sequestered voir dire. Appellant argues that he was thereby inhibited from asking prospective jurors questions about their knowledge of related criminal litigation, and urges us to adopt § 3.4(a) of the Standards Relating to Fair Trial and Free Press promulgated by the American Bar Association Project on Standards for Criminal Justice. That section provides:

> (a) Method of examination. Whenever there is believed to be a significant possibility that individual talesmen will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept, by court reporter or tape recording whenever possible. The questioning shall be

> conducted for the purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude towards the trial, not to convince him that he would be derelict in his duty if he could not have cast aside any preconception he might have.

Appellant concedes that the decision to grant or deny sequestered individual voir dire is left to the discretion of the trial court. *Burnett* v. *State*, 287 Ark. 158, 697 S.W.2d 95 (1985). He also concedes that reversal will not lie absent a showing of prejudice. *See, e.g., Logan* v. *State*, 300 Ark. 35, 776 S.W.2d 341 (1989). Because here, as in *Logan*, the record does not reflect the requisite prejudice, appellant urges us to adopt the ABA standard and overrule the supreme court's decisions in *Logan*; *Heffernan* v. *State*, 278 Ark. 325, 645 S.W.2d 666 (1983); and other supreme court cases stating the same principle. Despite appellant's contention to the contrary, we lack the authority to overrule decisions of the Arkansas Supreme Court. *Huckabee* v. *State*, 30 Ark. App. 82, 785 S.W.2d 223 (1990). It will be for the circuit court to decide whether, on retrial, sequestered voir dire is necessary.

6. JURY INSTRUCTIONS

Appellant also argues that it was error for the trial court to refuse to give a series of five requested jury instructions on conspiracy. These instructions were based on those given in other states and supported by language in some Arkansas cases, commentary to statutes, Corpus Juris Secundum, and a federal case. The trial court gave AMCI 707, the standard instruction on conspiracy, as well as appellant's requested instruction defining an "overt act."

Just because appellant's offered instructions contained correct statements of the law does not mean that it was error for the trial court to refuse to give them. *Hardcastle* v. *State*, 25 Ark. App. 157, 755 S.W.2d 228 (1988). It is not necessary to give a requested instruction if it is sufficiently covered by another instruction. *Clark* v. *State*, 15 Ark. App. 393, 695 S.W.2d 396 (1985). Non-model instructions are to be given only when the trial court finds that an AMCI instruction does not accurately state the law or is inapplicable. *Campbell* v. *State*, 294 Ark. 639, 746 S.W.2d 37 (1988). Because AMCI 707 accurately

states the law and is applicable, the court did not err.

7. CLOSING ARGUMENT

Ollie Willborg, the investigator employed by the prosecuting attorney's office, testified for the State. In closing argument the prosecutor said, "I hope you looked into that man's [Willborg's] eyes. Y'all don't know him like some of the rest of us do, but I hope that you looked into his eyes." Appellant objected on the basis that the prosecuting attorney was personally vouching for the credibility of the witness. We agree that the comment could be so construed. As such it was improper, *see Harrison* v. *State*, 276 Ark. 469, 637 S.W.2d 549 (1982), and should be avoided on retrial.

Our conclusion is that the trial court erred in admitting the hearsay testimony of Denise Clements, and in prohibiting the appellant from testifying about the circumstances under which he gave his statement to the police. We remand the case to the circuit court for further proceedings in keeping with this opinion.

Reversed and remanded.

DANIELSON and MAYFIELD, JJ., agree.

David James CLARK *v.* Barbara Jo TABOR

CA 91-458 830 S.W.2d 873

Court of Appeals of Arkansas
Division II
Opinion delivered May 13, 1992

Davis & Associates, by: *Charles E. Davis*, for appellant.

Charles E. Hanks, for appellee.

MELVIN MAYFIELD, Judge. David Clark appeals the amount of child support awarded in a paternity action brought by the appellee. He contends the chancellor abused his discretion in setting the amount of support without considering the support appellant provides for his own dependent children. Because we find the chancellor erred in holding that he could not consider appellant's other dependents in setting child support, we reverse and remand.

Appellant is married to Betsy Clark, and they are the parents of two minor children, who reside with them. In March 1990, appellee, Barbara Tabor, filed a complaint in the Washington County Chancery Court, alleging that the appellant is the biological father of her son, Alex, born out of wedlock on December 15, 1989. In her complaint, appellee sought child support for her son from appellant. Initially, appellant denied

paternity of Alex, but in his amended answer, he admitted he was Alex's biological father and sought custody of him.

A stipulated settlement was read into the record by the parties on February 8, 1991. Among other things contained in the agreement, the parties agreed that appellant would pay $80.00 per week for the care, maintenance, and support of Alex. Although the record contains no explanation of why a hearing would be necessary after the settlement had been made, a hearing was held on May 23, 1991, for the determination of the questions of paternity, custody, visitation, and child support. At the conclusion of this hearing, the chancellor held that appellant was the father of Alex and awarded appellee child support of $77.00 per week. In setting this amount, the chancellor stated:

> This amount is based on the weekly family support chart considering the weekly take home pay amount as set forth on the Affidavit of Financial Means which has been filed herein and set forth as Plaintiff's Exhibit 1, as that amount is applied to the weekly family support chart effective July 1, 1987, and upon consideration of the fact that mother is employed at this time, the Court is taking the chart amount herein based on weekly take home pay of $470 per week and using the amount shown in the dependents' column of one.
>
> . . . .
>
> [The $77.00 per week amount] is based upon the amount shown in the Affidavit of Financial Means. I'm basing it on the weekly take home pay of four hundred seventy-eight per month, and that would then in the weekly family support chart which was made effective July 1, 1987, in the weekly take home column of $470, the amount for one dependent is $77. I note the previous argument made to the Court concerning setting that without consideration of other dependents herein, and I find that I have to consider this just as a one child. That's the way I'm treating it, as one dependent, and it's set strictly in accordance with the amount set forth on the chart.

Appellant argues the chancellor erred in not taking into consideration his two children who live with him and the legal

obligation he has to provide support for those children.

In its per curiam adopting the Family Support Chart, the Supreme Court stated that weekly take-home pay, as it relates to the Family Support Chart, refers to the definition of income in the federal income tax laws, less proper deductions for federal and state income tax; social security (FICA) or railroad retirement equivalent; medical insurance; and presently paid support for other dependents by Court order. *In Re: Guidelines for Child Support Enforcement*, 301 Ark. 627, 629-30, 784 S.W.2d 589, 591 (1990).

Here, the chancellor set support by taking appellant's weekly take-home pay and referring to the proper table in the Family Support Chart. He stated that this calculation was made without considering appellant's other children and his obligation to support them. The appellee argues our holding in *Waldon* v. *Waldon*, 34 Ark. App. 118, 806 S.W.2d 387 (1991), prohibited the chancellor from considering appellant's other dependent children.

In *Waldon*, the chancellor set the appellee's child support obligation for one child by applying appellee's income to the column on the chart based on three dependents. The chancellor justified this application by noting that appellee had two other children by his current marriage. The appellant contended that it was error for the chancellor to have used the column for three dependents in setting support. We agreed, stating:

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

> adjusting the amount as deemed warranted under the facts of a particular case. As explained by the supreme court, the presumption may be overcome if the chancellor determines, upon consideration of all the relevant factors, that the chart amount is unjust or inappropriate. *See Scroggins* v. *Scroggins*, 302 Ark. 362, 790 S.W.2d 157 (1990). The relevant factors include food, shelter and utilities, clothing, medical and education expenses, accustomed standard of living, insurance and transportation expenses. *Id. See also In re: Guidelines for Child Support Enforcement, supra.* However, when deviating from the chart, the chancellor must explain his or her reasoning by the entry of a written finding or by making a specific finding on the record. *See Scroggins* v. *Scroggins*, *supra*; Ark. Code Ann. § 9-12-312(2) (Repl. 1991).

Waldon, 34 Ark. App. at 123, 806 S.W.2d at 390.

Our holding in *Waldon* v. *Waldon*, however, does not prohibit a chancellor from considering other matters in addition to the child support chart that have a strong bearing in determining the amount of support. *See Black* v. *Black*, 306 Ark. 209, 214, 812 S.W.2d 480, 482 (1991). A payor spouse's other children, even if not supported under a court order, may be considered in determining the financial ability to support another child. *Stewart* v. *Winfrey*, 308 Ark. 277, 283, 824 S.W.2d 373, 377 (1992). If the chancellor considers such factors, the chancellor must enter a written finding or a specific finding on the record as to why the amount so calculated, after consideration of all relevant factors, is inappropriate. *See Scroggins* v. *Scroggins*, 302 Ark. 362, 365, 790 S.W.2d 157, 159 (1990).

The supreme court in *Stewart* v. *Winfrey, supra*, has recently discussed the chancellor's ability to consider a payor spouse's other dependents in setting support:

> We have recently held that the child support chart and the criteria used for deviating from it are not mandatory. There may be other matters in addition to the support chart that have a strong bearing upon determining the amount of support. The factors listed in the *per curiam* order are examples of these other matters. *Black* v. *Black*, 306 Ark. 209, 812 S.W.2d 387 (1991). The financial

> ability to pay child support could be one factor in determining whether a deviation from the chart is appropriate. Reference to the chart is mandatory, but applying the specific chart amounts is not mandatory if it would be unjust or inequitable, and if written findings are made to that effect.
>
> The Court of Appeals has also recognized that a payor spouse's other children, even if not supported under a court order, may be considered in determining the financial ability to support another child. *Waldon* v. *Waldon*, 34 Ark. App. 118, 806 S.W.2d 387 (1991).
>
> The Chancellor's decision in this case that other children may not be considered under the support chart could have been error if taken to mean the Chancellor could not look beyond the chart to determine the appropriate support amount. [Appellant], however, does not argue this aspect of the issue in his brief and only contends the chart violates the equal protection clause. After figuring the child support amount under the chart, a chancellor has the discretion to adjust the amount if equitable and if written findings are made to that effect. In making the decision, the chancellor can consider a parent's ability to pay. This would necessarily include a consideration of other children the parent is legally obligated to support. The family support chart thus poses no equal protection clause violation.

308 Ark. at 283-84, 824 S.W.2d at 377. See also our most recent decision on this point in *Howard* v. *Wisemon*, 38 Ark. App. 27, 826 S.W.2d 314 (1992).

Appellant also argues that this state's statutory system for allocating child support violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. As can be noted from the proceeding quotation, the supreme court has held that the Family Support Chart does not violate the equal protection clause. *Stewart* v. *Winfrey*, 308 Ark. at 283, 824 S.W.2d at 377. Furthermore, appellant is raising this argument for the first time on appeal, and issues raised for the first time on appeal will not be considered by the appellate court. *See Cox* v. *Bishop*, 28 Ark. App. 210, 217, 772 S.W.2d 358, 361

(1989). Even arguments of constitutional dimensions must be argued below if they are to be preserved on appeal. *Chapin* v. *Stuckey*, 286 Ark. 359, 368, 692 S.W.2d 609, 615 (1985).

We hold that the chancellor erroneously concluded he was prohibited from considering appellant's other dependents in setting child support. Because it is discretionary with the chancellor whether consideration of such a factor would warrant an adjustment in the amount of support ordered, we cannot conclude that the chancellor's refusal to consider such a factor was harmless error. Therefore, we remand the case for the chancellor's reconsideration in light of this opinion.

Reversed and remanded.

COOPER and DANIELSON, JJ., agree.

David DAVISON *v.* STATE of Arkansas

CA 90-287 831 S.W.2d 160

Court of Appeals of Arkansas
Division I
Opinion delivered May 13, 1992
[Rehearing denied June 17, 1992.]

Art Dodrill, for appellant.

Steve Clark, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. On November 6, 1986, the State of Arkansas filed a petition for seizure and forfeiture against David Davison, pursuant to Ark. Stat. Ann. § 82-2629 (Supp. 1985) (now codified as Ark. Code Ann. § 5-64-505 (1987)).

Later, in a separate case, Davison was convicted of possession of a controlled substance with intent to deliver. On March 1, 1989, the conviction was affirmed in the Arkansas Court of Appeals by an opinion not designated for publication. On April 11, 1990, a judgment of forfeiture was entered nunc pro tunc to January 11, 1990, ordering that Davison's vehicle and pistol be forfeited to the State of Arkansas and that the $4,730.00 cash found in the vehicle be forfeited, one-half to the Searcy County Sheriff's discretionary fund and one-half to the Searcy County Indigent Attorney's Fees Fund.

Ark. Stat. Ann. § 82-2629(a) allows forfeiture of, among other things, controlled substances and their containers, equipment used in manufacturing and delivering controlled substances, vehicles used to transport controlled substances, and any valuables obtained as a result of the exchange of controlled substances. Furthermore, this section provides for a rebuttable presumption that all valuables found in close proximity to controlled substances are forfeitable, and the burden of proof is upon the claimant of the property to rebut this presumption.

A forfeiture is an *in rem* civil proceeding, independent of any criminal charges which may be pending, to be decided on a preponderance of the evidence. *Limon* v. *State*, 285 Ark. 166, 685 S.W.2d 515 (1985). A forfeiture may be ordered by the court when the court "finds upon a hearing by a preponderance of the evidence that grounds for a forfeiture exist. . . ." Ark. Code. Ann. § 5-64-505(e) (1987); *Beebe* v. *State*, 298 Ark. 119, 765 S.W.2d 943 (1989). Because the forfeiture statute is penal in nature and because forfeitures are not favorites of the law, we interpret the statute narrowly. *Beebe, supra.* On appeal, we reverse the findings of the trial court only if clearly against the preponderance of the evidence. Ark. R. Civ. P. 52(a); *Gallia* v. *State*, 287 Ark. 176, 697 S.W.2d 108 (1985).

In this appeal, Davison argues that the seizure and forfeiture of his property was improper because it did not comply with Ark. Stat. Ann. § 82-2629(b)(1) (Supp. 1985) (now Ark. Code Ann. § 5-64-505(b)(1) (1987)). That statute provides:

> (b) Property subject to forfeiture under this Act may be seized by any law enforcement agent upon process issued by any circuit court having jurisdiction over the

> property on petition filed by the prosecuting attorney of the judicial circuit. Seizure without process may be made if:
>
> (1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant; . . . .

Appellant also argues that the court failed to hold the hearing promptly, pursuant to Section (c), which provides:

> (c) In the event of seizure pursuant to subsection (b), proceedings . . . shall be instituted promptly.

The petition for forfeiture was filed on November 6, 1986, status hearings on the petition were held on December 8, 1988, and December 14, 1989, but the forfeiture hearing was not held until January 11, 1990.

The "prompt hearing" issue can be disposed of quickly. In *Murray* v. *State*, 275 Ark. 46, 628 S.W.2d 549 (1982), the Arkansas Supreme Court held that an appellant cannot fight a forfeiture on its merits and then, once he has lost, raise the failure to hold a prompt hearing as support for the argument that the proceeding should never have been conducted at all. Here, on appeal, the appellant is raising this issue for the first time.

Appellant's other argument contends that the state failed to present any evidence at trial to support the trial court's order of forfeiture. He says that Officer Nick Castro stopped him on the pretext that his vehicle had no license plate; that pretextual stops are prohibited by *South Dakota* v. *Opperman*, 428 U.S. 364 (1976), and *United States* v. *Wilson*, 636 F.2d 1161 (8th Cir. 1980); and that the state presented no evidence to prove that he possessed a controlled substance with the intent to deliver in violation of Ark. Stat. Ann. § 82-2617 (Repl. 1976) (now Ark. Code Ann. § 5-64-401).

Officer Nick Castro testified:

> On October 21, 1986, it was about 5:00 p.m., I was on my way to Mr. Davison's house. He was wanted for questioning in an assault that occurred the evening before. I was given a vehicle description of what he'd probably be driving, and it was supposed to be a late model, silver, Nissan, four-wheel drive pickup. I was also given a

> physical description of Mr. Davison, himself. And, just before I got to his residence, at the intersections of County Road 34 and 233, I observed a pickup matching that description leaving a residence. I observed the driver and it matched—also matched the description of Mr. Davison. The pickup didn't have any license plates on it; I stopped it under those pretenses. As soon as I stopped the vehicle, Mr. Davison exited the driver's side of the vehicle and approached my vehicle. I met him in between the two vehicles. I immediately noticed a strong smell of marijuana on his person. I told Mr. Davison that he was wanted for questioning in an assault case. I then attempted to place him under arrest. I got one handcuff on one arm, and he began to resist, at that time. I had to physically restrain him and put the other handcuff on him, and then I placed him in the back of the patrol car. I then walked back up to his vehicle and looked in the window, and I could smell a strong odor of marijuana. I also observed a shotgun lying in the front passenger seat. I also observed a partially smoked, hand-rolled cigarette in the ash tray. I then called for a wrecker, at that time. I transported Mr. Davison to the Sheriff's office, and during the booking procedure, a small bag of marijuana was found in one of his pockets.

Castro also testified that an inventory search of the vehicle revealed a paper sack containing approximately two pounds of marijuana, $4,730.00 cash, a shotgun, a .357 revolver, money wrappers and ammunition. He said they also found several small pieces of scrap paper that had little notes written on them; for instance, a person's name, an amount and a dollar figure.

A vehicle used to transport, or facilitate the transportation, of a controlled substance is subject to forfeiture, Ark. Stat. Ann. 82-2629(a)(4) (Supp. 1985), and may be seized without process if the seizure is incident to an arrest, Ark. Stat. Ann. 82-2629(b)(1) (Supp. 1985). Castro testified that he stopped appellant's vehicle because it had no license plate and because appellant was wanted for questioning in an assault that had occurred the evening before. Once appellant got out of his truck and Castro smelled marijuana on him, Castro had probable cause to arrest appellant. Castro could then search appellant's truck incident to the arrest. Castro's testimony that two pounds of

marijuana was found in the truck supports the trial court's finding that the truck was being used to transport marijuana and was, therefore, subject to forfeiture. *See* Ark. Stat. Ann. § 82-2629(a)(4) (Supp. 1985).

Money found "in close proximity to forfeitable controlled substances" is "presumed to be forfeitable." *See* Ark. Stat. Ann. 82-2629(a)(6) (Rebuttable Presumptions) (Supp. 1985). This means the state must demonstrate that the money was "very near" forfeitable controlled substances. *Kaiser* v. *State*, 24 Ark. App. 19, 25, 746 S.W.2d 559, *rev'd on other grounds*, 296 Ark. 125, 752 S.W.2d 271 (1988). Castro's testimony that $4,730.00 cash was discovered in appellant's truck, along with the marijuana, constitutes a preponderance of the evidence to support the forfeiture of the money.

In regard to the gun, in *Beebe* v. *State, supra*, the Arkansas Supreme Court reversed a forfeiture of guns found in Bebee's house because the state produced no evidence showing the guns fell within the statutory description of the kind of property to be forfeited. The court stressed that the only provision of the forfeiture statute which might possibly permit forfeiture of guns is Ark. Code Ann. § 5-64-505(a)(2) (1987) (formerly Ark. Stat. Ann. § 82-2629(a)(2) (Supp. 1985)) which allows forfeiture of "all raw materials, products, and equipment of any kind which are used, or intended for use, in . . . delivering . . . any controlled substance."

In this case, a .357 revolver and ammunition were found in the truck. Officer Castro testified that people who deliver drugs are in the practice of carrying guns because they usually carry large quantities of money and deal with other drug dealers so they want to protect what they have. This testimony supports the trial court's finding that the gun was being used in the delivery of marijuana and was subject to forfeiture.

Affirmed.

COOPER and DANIELSON, JJ., agree.

TREMCO, INC. *v.* VALLEY ALUMINUM PRODUCTS CORP.

CA 91-125 831 S.W.2d 156

Court of Appeals of Arkansas
Division II
Opinion delivered May 13, 1992

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

Carl A. Crow, Jr., for appellee.

JUDITH ROGERS, Judge. The appellant, Tremco, Inc., appeals from a jury verdict in favor of appellee, Valley Aluminum Products Corporation, finding that appellant was in breach of both express and implied warranties in connection with its sale of defective window gaskets, and awarding damages as a result thereof. On appeal, appellant does not question the jury's finding of liability. For reversal, appellant contends that the trial court erred in allowing the jury to assess damages for lost profits and the replacement costs of the gaskets. We find no error, and affirm.

Appellee, a curtain wall manufacturer, entered into a contract with Win-Wall, Inc., a glazing subcontractor, to provide window assemblies for two commercial buildings, one to be constructed in New York and the other in Connecticut. In turn, appellee contracted with appellant to design and manufacture the gaskets for the window assemblies. The gaskets were custom designed for the building projects by appellant based on die drawings and a sample production run of the window assemblies sent to it by appellee. Appellant shipped the gaskets directly to the construction sites where they were fitted into the window assemblies by Win-Wall, Inc. After the window assemblies had been installed, however, a problem was identified with the gaskets. The function of gaskets in a window assembly was said to provide compression to hold the unit together for purposes of providing a seal against air infiltration and water penetration, as well as to provide structural support for the glass. The gaskets in this case, however, did not fit, and began to droop, sag and fall out of the

window assemblies. There was testimony at trial that the gaskets were not properly designed.

After attempts to resolve the problem proved unsuccessful, appellant sued appellee for the unpaid balance on its open account which appellee had refused to pay. Appellee filed a counterclaim against appellant alleging the breach of express and implied warranties and seeking both direct and consequential damages. The issues were submitted to the jury on interrogatories. The jury returned a verdict in favor of appellant for the amount appellee owed on the open account, $1,201.42. It also awarded appellee damages on its counterclaim in the amounts of $7,650 as the difference in value of the gaskets as accepted and warranted, $58,850 in lost profits, and $93,000 for the costs associated with replacing the gaskets.

As its first issue, appellant argues that the trial court erred in allowing the jury to assess consequential damages for lost profits. Appellee's claim for anticipated profits was based on the allegation that Win-Wall, Inc. had refused to allow it to bid on subsequent contracts as a result of the problem with the gaskets; therefore, it sought consequential damages in the form of profits lost on the contracts it would have received from Win-Wall, Inc. had appellant not supplied defective gaskets. Appellant characterizes this claim for damages as a loss of good will, and argues that such damages are not recoverable as being speculative, not reasonably certain, and an unforeseeable consequence of its breach. Appellant objected to the evidence and the jury instruction offered on this element of damages and further raised this issue by motions for a directed verdict and judgment notwithstanding the verdict.

Consequential damages resulting from a seller's breach include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. Ark. Code Ann. § 4-2-715(2)(a) (1987). While lost profits will not be allowed as damages if the trier of fact is required to speculate as to the fact or amount of profits, less certainty is required to prove the amount of lost profits than is required to show that profits were lost. *Reed* v. *Williams*, 247 Ark. 314, 445 S.W.2d 90 (1969). If it is reasonably

certain that profits would have resulted had the contract been carried out, then the complaining party is entitled to recover. *Crow* v. *Russell*, 226 Ark. 121, 289 S.W.2d 195 (1956). Loss may be determined in any manner which is reasonable under the circumstances. *Green Seed Co. of Ark.* v. *Williams*, 246 Ark. 463, 438 S.W.2d 717 (1969). The fact that a party can state the amount of damages he suffered only approximately is not a sufficient reason for disallowing damages if from the approximate estimates a satisfactory conclusion can be reached. *Jim Halsey Co.* v. *Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985). With respect to breach of warranty, lost profits are held to be foreseeable if they are proximately caused by and are the natural result of the breach. *Lewis* v. *Mobil Oil Corp.*, 438 F.2d 500 (8th Cir. 1971).

The testimony presented on this issue was as follows. Tony Dinapoli, the president of Win-Wall, Inc., related that he had first met Jerry Brown, the president of appellee-Valley Aluminum, when Brown had been working for another company. Mr. Dinapoli said that he saw Mr. Brown at a convention and learned that Brown had formed his own company, Valley Aluminum. Dinapoli testified that he was looking to procure another supplier at that time. He explained tht he had been doing business for years with only one metal supplier and he no longer wished to be "locked in" with that one company. He recalled that he had previously gotten along well with Mr. Brown, and stressed that a company's reputation was as important as the prices offered when choosing a company with which to do business. Therefore, he decided to establish a relationship with Mr. Brown and Valley Aluminum to accomplish his goal of obtaining another supplier. Appellee was thus awarded the contracts on these two projects as well as another one involving the construction of a library.

Mr. Dinapoli described the problem with the gaskets as "major," and said that he looked to appellee to correct it. He testified that because of the problem he had withheld $6,000 still owing under the contract with appellee, and further, that he had refused to allow appellee the opportunity to bid on subsequent projects. Mr. Dinapoli listed ten contracts he had been awarded since the gasket incident, totalling $1,408,000, which required materials of the kind supplied by appellee. He said that he was "very confident" that he would have sublet at least half of them to appellee but for the problem experienced with the gaskets. In

keeping with his testimony that he desired another supplier, Dinapoli acknowledged that he had let 25% of these contracts to another concern, stating that appellee would have received a higher percentage because appellee had a larger product line.

John Brown testified that he had been told by Mr. Dinapoli that he would receive no further business from him as long as the gasket problem existed, and that, in fact, he had not had any further dealings with Dinapoli. He also gave testimony that his average profit margin during this period of time was 20.27%. Brown further testified that he told representatives of appellant that he treasured the business from Win-Wall and that it was a key account. Wayne Taylor, a former employee with appellant, testified that Brown told him that he had developed this business relationship with Win-Wall and that he was expecting more business in the future.

In arguing that damages of the kind claimed here are not recoverable, appellant places principal reliance on the decision of *Sol-O-lite Laminating Corp.* v. *Allen*, 353 P.2d 843 (Or. 1960). From our reading of this case, we do not believe it is supportive of appellant's view. As in the case at bar, there was evidence that customers were lost as a result of the breach of warranty. Contrary to appellant's assertion, the Oregon Supreme Court held that damage to good will by breach of warranty was compensable in that case, saying:

> We believe it is a proper basis for the recovery of damages in an otherwise adequate case of breach of warranty where, as in this case, there is evidence that the seller knew the goods were being purchased for resale for a use which required a certain standard of clarity and that they were being resold with similar goods which were sold under the purchaser's trade name. Such damages then can hardly be said not to be within the contemplation of the parties.

Id. at 850.

Although appellant refers us to additional cases from other jurisdictions, we need look no further than our own supreme court's decision in *Jim Halsey Co.* v. *Bonar*, 284 Ark. 461, 683 S.W.2d 898 (1985). The appellee in that case was a concert promoter who had sued appellant for breach of contract, fraud

and negligence arising from appellant's failure to procure Rick Nelson for a concert benefit. Bonar presented testimony that concert promoters would not hire him because of what had happened with the Rick Nelson concert, and he claimed lost profits for the damage to his reputation. It was the appellant's contention on appeal that damages for lost profits based on the loss of potential future earnings was improper as being speculative and conjectural. The supreme court disagreed and found sufficient proof to support the jury's award. *See also e.g. Lee Rubber & Tire Corp.* v. *Camfield*, 233 Ark. 543, 345 S.W.2d 931 (1961).

On appellate review of a trial court's denial of a motion for a directed verdict or a motion for a judgment notwithstanding the verdict, we must determine whether the verdict is supported by any substantial evidence. *Johnson Timber Co.* v. *Sturdivant*, 295 Ark. 622, 752 S.W.2d 241 (1988). In cases in which it is contended that the evidence is insufficient to support the appellee's claim, the evidence, along with all reasonable inferences deducible therefrom, is examined in the light most favorable to the party against whom the motion is sought. *See Thomas* v. *Allstate Ins. Co.*, 27 Ark. App. 27, 766 S.W.2d 31 (1989). Viewed in this light, we cannot agree with appellant's contention that the evidence does not support an award for lost profits under the circumstances of this case. We think that there was substantial evidence introduced showing that appellee suffered a loss in profits as a consequence of the breach, and that there was substantial evidence presented as to the amount of its loss. We also believe that the type of loss here is one that could be reasonably expected to flow from the breach. We find no error on this point.

It is also the appellant's contention that the award of damages for the cost of replacing the gaskets is speculative because this expense had not yet been incurred and because appellee was under no legal obligation to make the repairs. We disagree.

There was testimony adduced that the use of caulking or other sealants to shore up the window assemblies was not a viable solution, and that the deglazing of both buildings to replace the gaskets was required to correct the problem. It was estimated that

the cost of this undertaking would be $93,000, which is the amount that the jury awarded. Mr. Dinapoli testified that he looked to appellee to make the necessary repairs, and that he would not pay appellee the outstanding balance on the contract or allow him to bid on projects until these measures were taken. He also asserted that taking care of problems is necessary in order to survive in the business.

Professors White and Summers have expressed disapproval of the position taken by appellant that these damages are not recoverable in the absence of a legal obligation. 1 J. White & R. Summers, Uniform Commercial Code § 10-4 (3rd ed. 1988). Instead, the authors agree with the decision in *Woodbury Chemical Co.* v. *Holgerson*, 439 F.2d 1052 (10th Cir. 1971), in which it was held that the plaintiff in the aerial insecticide spraying business could recover as consequential damages the costs of respraying from the seller of inferior weedkiller when it was the accepted practice in the business to respray if the first spray was ineffective, even though the plaintiff was under no legal obligation to respray. The authors favor this approach in that it recognizes practical obligations that require a businessman to conform to custom and usage in his trade in order to remain in business. We are also persuaded by this reasoning and find it applicable here. Consequently, we find no error in the trial court's ruling on this issue.

Affirmed.

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

Mary I. CLARK *v.* Harold R. REISS

CA 91-278 831 S.W.2d 622

Court of Appeals of Arkansas
Division I
Opinion delivered May 20, 1992

Westphal & Steenken, by: *Lewis Steenken*, for appellant.

Marcia McIvor, for appellee.

JAMES R. COOPER, Judge. The parties in this chancery case were divorced in 1989, and the appellant, Mary Clark, was awarded custody of their minor twin daughters. Prior to the fall school semester of 1990, the appellant obtained permission from the Arkansas Department of Education to provide home schooling for her children. In response to a petition filed by the appellee, the chancellor entered a temporary order directing the appellant to keep the parties' daughters enrolled and in attendance at the Kingston, Arkansas, public schools and to refrain from making changes in the children's school enrollment. After a hearing on the merits, the chancellor entered a permanent order denying the appellant the right to remove the children from public school in order to provide them with home schooling. From that decision, comes this appeal.

The appellant contends that the chancellor erred in construing the home schooling statute, Ark. Code Ann. § 6-15-503 (Supp. 1991), to require that both parents must consent to a home school education. She also contends the chancellor erred in finding that she was not qualified to educate her children under § 6-15-503. It is unnecessary, however, for this court to address these issues, because the chancellor did not make these findings that the appellant challenges. The chancellor did find, however, that, at this time, it was not in the children's best interest to be withdrawn from public schools in order to be home schooled by

the appellant. We cannot say this finding is clearly against the preponderance of the evidenced.

Minors are wards of the chancery court, and it is the duty of those courts to make all orders that will properly safeguard their rights. *Jones* v. *Jones*, 13 Ark. App. 102, 105, 680 S.W.2d 118, 120, (1984). The prime concern and controlling factor is the best interest of the child, and the court in its sound discretion will look into the peculiar circumstances of each case and act as the welfare of the child appears to require. *Id.* at 107, 680 S.W.2d at 121. An agreement entered into by a husband and wife relating to the custody of their minor children does not affect the right of a court of equity to award the custody of the children and to make reasonable provisions for their support and education. *Penny* v. *Penny*, 210 Ark. 16, 18, 193 S.W.2d 811, 812 (1946); *Daily* v. *Daily*, 175 Ark. 161, 164, 298 S.W. 1012, 1013 (1927). Moreover, an award of custody to one parent does not lessen the non-custodial parent's responsibility relative to the children nor does it affect his rights as a parent to provide guidance and to participate in decisions affecting the welfare of the children. *See Provin* v. *Provin*, 264 Ark. 551, 555, 572 S.W.2d 853, 855 (1978).

The appellant testified that she is a chiropractor and works three days a week, Tuesday, Thursday and Saturday, and the other days, she stays at home. She testified that, prior to the 1990 school year, she was approved as a home school teacher by the Arkansas Department of Education and educated her children at home for a brief period. She testified that, on the days that she was home, the children worked all day until bedtime with a lot of breaks. She stated that, on the days she works in her office, the girls have a room where they can do things such as their math papers and writing. She stated that they can also go to the library to research social studies projects and things of that nature. She stated that she wants to home school the children because she feels she can supply a better education in the areas of social studies, history, geography, health, and anatomy than is being offered in the public school system. She also testified that she is concerned over the two and one-half hours the children spend on the school bus going to and from school each day. She testified that home schooling would give her more flexibility and she would not have to worry about getting the children to school when the

weather is bad. She testified that, although she has had no special training in elementary education, she feels that she could provide a better education than they currently receive.

The appellant admitted that, if she were allowed to home school the children, it would alter the appellee's visitation with them. Currently, when the children have a Monday school holiday and it is the appellee's weekend for visitation, he is allowed to keep the children through the weekend until Tuesday morning. The appellant testified that, if she is allowed to home school the children, she would need the children to be brought home on Monday.

The appellee objected to the children being withdrawn from public school. He testified that, since the children began attending school, they have changed schools five times. He stated he did not believe the continuity of their education could be maintained by home schooling and that he believed home schooling would interfere with his children's social interaction with their peers. He also testified that the children's grades have been low and their report cards indicate part of the problem is due to their number of absences. He stated that, although he had no objection to the appellant home schooling the children in addition to their attending public school, he felt the children's primary educational environment should be public school.

The evidence also demonstrated that the appellee actively participated in his children's education. He testified that, during the current school year, when the appellant temporarily withdrew the children from school in order to provide their education at home, the children missed more than the allowable amount of days, but stated he was able to enroll them back in public school after he explained their situation to their principal and the superintendent of schools and promised to help the children catch up with their classmates. He testified that he had conferences with their teachers, collected past homework assignments, and worked with the children each weekend until they were current with their classmates. He also testified that home schooling would adversely affect his visitation with the children. He testified that, currently, he can visit their school, check on their progress, and have lunch with them. He testified that the previous year, he was a "class mother."

In restraining the appellant from withdrawing the children from public school, the chancellor recognized that the appellant is the custodial parent and therefore has a certain degree of latitude in decisions involving the children. Notwithstanding this fact, he went on to state that, because the decision to remove the children from the structured school system is so important and could drastically affect their entire future, in this situation, it should be a unanimous decision of both parents. He further noted that the appellant did not have a structured educational environment and that the work the children would be performing during the days that the appellant works would not provide the basic fundamental educational requirements that the state requires. The chancellor concluded that it was in the best interest of the children for them to remain in a structured school environment. We cannot say the chancellor's finding in this regard was clearly erroneous or clearly against a preponderance of the evidence.

The chancellor's findings in a child custody case will not be reversed unless they are clearly against the preponderance of the evidence, and since the preponderance of the evidence turns largely on the credibility of the witnesses, the appellate court defers to the superior position of the chancellor. *Rush* v. *Wallace*, 23 Ark. App. 61, 70, 742 S.W.2d 952, 957 (1988). Especially in child custody cases, a heavier burden is cast upon the chancellor to utilize to the fullest extent all of his powers of perception in evaluating the witnesses, their testimony, and the children's best interest. *Calhoun* v. *Calhoun*, 3 Ark. App. 270, 273, 625 S.W.2d 545, 547 (1981).

Affirmed

JENNINGS and MAYFIELD, JJ., agree.

Lester E. HENSON *v.* STATE of Arkansas

CA CR 90-134 832 S.W.2d 269

Court of Appeals of Arkansas
Division I
Opinion delivered May 27, 1992

Richard A. Garnett, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this criminal case appeals from his conviction of possession of a controlled substance with intent to deliver for which he was sentenced to five years in the Arkansas Department of Correction and a fine of $5,000. His sole point for reversal is that the court erred in refusing to dismiss the charges against him based on a violation of the speedy trial act. We disagree, and though the Supreme Court has already addressed the appellant's speedy trial argument by denying his petition for writ of prohibition, we will set forth the merits of his argument and address them accordingly.

On September 19, 1987, an information was filed alleging that the appellant committed the crime of possession of a controlled substance with intent to deliver. Trial was set for March 15, 1989, four days before the speedy trial time was to have run. At that time, Arkansas Rule of Criminal Procedure Rule 28.1(c) stated that a defendant charged in circuit court was entitled to have the charges dismissed with an absolute bar to prosecution if not brought to trial within eighteen months from the date the charge was filed (now twelve months). The appellant failed to appear in court on the date of his trial, and per a Governor's warrant, he was returned to Arkansas from the state of Ohio on August 3, 1989. A bond hearing was held on August 7, 1989, and he was given a trial date of August 15. On motion by the State, the trial was continued until August 30, but was again continued due to the appellant's filing a petition for writ of prohibition with the Supreme Court. After denial of that petition, the trial date was set for September 29, 1989, but was continued on the court's own motion due to another trial taking place at that time. On November 1, 1989, a jury convicted the appellant of the offense charged.

It is important to note that the appellant twice filed motions in circuit court to dismiss the charges based on the speedy trial violation. The first was filed August 27, 1989, and the second was filed October 26, 1989. Both were denied. The petition for writ of

prohibition was based on the same argument and was denied without opinion, the mandate being issued September 19, 1989.

In cases where the defendant is tried outside the applicable time period, the State bears the burden of showing that any delay was the result of the defendant's conduct or was otherwise legally justified. *Williams* v. *State*, 275 Ark. 8, 627 S.W.2d 4 (1982). We have placed responsibility on the defendant to be available for trial, excluding such time delays which result from his failure to appear for trial. *Allen* v. *State*, 294 Ark. 209, 742 S.W.2d 886 (1988).

The appellant states that upon being returned to Arkansas and placed into custody on August 7, 1989, the State had three days in which to try him; that the date set was August 15, five days after the speedy trial time had lapsed, and trial was continued without reason until August 30.[1] First, he argues that after August 10, the State could no longer try him and he was entitled to absolute discharge. Rule 30.1; *Matthews* v. *State*, 268 Ark. 484, 598 S.W.2d 58 (1980). He also argues that the trial judge erred in failing to enter a showing of which periods were excludable from the running of the speedy trial time on the docket as required by Rule 28.3.

His first argument is without merit as the delay was chargeable to the appellant as a result of his fleeing the state. *See Williams* v. *State, supra.* Arkansas Rule of Criminal Procedure Rule 28.3(e) provides that periods when the defendant's whereabouts are unknown are excludable. According to the trial judge, he was then given the earliest date possible for trial. Rule 28.3(b) provides that a period of delay may be excluded in computing time for trial when it is resulting from congestion of the trial docket and the delay is attributable to exceptional circumstances. We find this delay to be legally justified. The Supreme Court stated in *Stanley* v. *State*, 297 Ark. 586, 764 S.W.2d 426 (1989) that though the defendant's trial could have been held earlier than it actually was, (ten days after the time for speedy trial had

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[1] The appellant does not allege that he was available from March 1989 to August 1989, nor does he argue that the continuance from August 30 to November 1 was impermissible, thus conceding that the time for a speedy trial was tolled during these periods.

run) it was reasonable for the trial judge to postpone it when he believed an ongoing trial would run into the time set for the defendant's trial. The court pointed out that "the fair administration of justice was best served by postponing the appellant's trial to the next criminal docket." As this trial was originally delayed due to the appellant's unavailability, we find that the trial court's giving him the first available date, which was five days after the time for speedy trial expired, to be one of the "exceptional circumstances" contemplated by Rule 28.3.

The continuance from August 15 until August 30 was granted to the State due to the unavailability of a State's witness. This period is excludable pursuant to Rule 28.3(d)(1). In response to the appellant's request for an order showing the status of the docket, the court entered an order on September 14 providing that August 30 was the next date available for trial, and thus, this period was also excludable.

The appellant also argues that the court committed reversible error by failing to set forth the excludable periods in question by way of a docket sheet notation as required by Rule 28.3(i). First, a trial court's failure to comply with Rule 28.3(i) does not result in automatic reversal. *McConaughy* v. *State*, 301 Ark. 446, 784 S.W.2d 768 (1990). We have held that when a case is delayed by the accused and that delaying act is memorialized by a record taken at the time it occurred, that record may be sufficient to satisfy the requirements of Rule 28.3(i). *Id.*; *Key* v. *State*, 300 Ark. 66, 776 S.W.2d 820 (1989). The appellant's unavailability is evident from the record and the requirements of Rule 28.3(i) have been met for the period to August 15.

Finally, nothing in the record reflects that the appellant has ever argued that the trial court erred by failing to set forth the excludable periods in a docket entry or order. He merely requested an order showing the status of the docket, and the order giving the basis for the continuance granted the State was entered. Failure to raise this issue precludes its consideration on appeal. *Johnson* v. *State*, 27 Ark. App. 217, 769 S.W.2d 37 (1989). For the reasons stated above, we find no violation of the Speedy Trial Act and we affirm.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

Douglas KIRK *v.* STATE of Arkansas

CA CR 91-212 832 S.W.2d 271

Court of Appeals of Arkansas
Division I
Opinion delivered May 27, 1992

Robert Meurer, for appellant.

Winston Bryant, Att'y Gen., by: *Teena L. White*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Douglas Kirk was injured in a one vehicle accident in White County. Kirk was rendered unconscious and taken by ambulance to the hospital; his car was rendered inoperable.

White County Deputy Ed Meharg arrived at the accident scene and began looking through the car for registration papers. In the process he found a black box between the console and the driver's seat. When he opened the box he found several small plastic bags containing white powder. The powder was later identified as methamphetamine and Kirk was charged with its possession. When the trial judge denied Kirk's motion to suppress the evidence, Kirk entered a conditional plea of guilty under Rule 24.3(b) of the Arkansas Rules of Criminal Procedure, reserving his right to appeal. The sole issue before us is whether the search of appellant's car violated the Fourth Amendment to the United States Constitution. We conclude that it did and that the case must be reversed.

The State's only witness at the suppression hearing was Deputy Meharg. He testified that the car was "totaled out" and was located on private property. He said that he did not think that there was a license plate on the car and that, as best he could remember, there was some reason why he was trying to find out who the owner of the automobile was. He knew that Kirk was the

driver because emergency personnel had given him Kirk's driver's license. He thought that Kirk may have been unconscious.

Deputy Meharg testified that the car was filled with "bingo cards or papers." He testified that he opened the black box in the front seat because he thought there might be some identifying papers in it. He said that he had no reason to believe that the car was stolen, but that he was "just curious who it belonged to." There was no indication that the car was obstructing a public way, and it had not been impounded.

The State concedes that the officer's actions constituted a "search" within the meaning of the Fourth Amendment. All searches conducted without a valid warrant are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant.[1] *Johnson* v. *State*, 291 Ark. 260, 724 S.W.2d 160 (1987) *cert. denied*, 484 U.S. 830. While the interior of an automobile is not subject to the same expectation of privacy that exists with respect to one's home, a car's interior, as a whole, is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police. *New York* v. *Class*, 475 U.S. 106 (1986). A citizen does not surrender all the protections of the Fourth Amendment by entering an automobile. *See Delaware* v. *Prouse*, 440 U.S. 648 (1979). When a search is made without a warrant, the burden of proof rests on those who seek to justify it. *Dominguez* v. *State*, 290 Ark. 428, 720 S.W.2d 703 (1986).

The State first argues that the defendant abandoned his automobile and thus relinquished any reasonable expectation of privacy. *See Wilson* v. *State*, 297 Ark. 568, 765 S.W.2d 1 (1989). One who has no reasonable expectation of privacy lacks standing to complain of an illegal search. *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980).

Abandonment, in this sense, is primarily a matter of intent. *United States* v. *Colbert*, 474 F.2d 174 (5th Cir. 1973);

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[1] It has been said that the warrant requirement has become so riddled with exceptions that it is basically unrecognizable. *California* v. *Acevedo*, 500 U.S. ___, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991) (Scalia, J., concurring).

United States v. *Manning*, 440 F.2d 1105 (5th Cir. 1971) *cert. denied*, 404 U.S. 837.

> The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had *voluntarily* discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.

Wilson v. *State, supra* (quoting *U.S. v. Colbert*) (emphasis added); *State* v. *Tucker*, 268 Ark. 427, 597 S.W.2d 584 (1980). In the case at bar the defendant was removed from his vehicle while unconscious and taken to the hospital. There was no evidence of intent to abandon. It cannot be said that he "voluntarily" left his car behind. This is also not a case of apparent abandonment as in *Lipovich* v. *State*, 265 Ark. 55, 576 S.W.2d 720 (1979); here, the officer was aware of the facts regarding the vehicle.

The State next contends that the intrusion into the vehicle here was pursuant to the "community caretaking functions" of the police and that the search was in the nature of an inventory. The State relies in large part on *Cady* v. *Dombrowski*, 413 U.S. 433 (1973), and *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). If we assume that the search was in the nature of an inventory search,[2] it is governed by the principle stated in *Florida* v. *Wells*, 495 U.S. 1 (1990). In that case, Wells was arrested and his car was impounded. In the subsequent inventory search, officers found a locked suitcase in the trunk of the car. The suitcase was opened and found to contain marijuana. There was no evidence of any police department policy on the opening of closed containers found in the course of an inventory search. Chief Justice Rehnquist, speaking for the Court, said:

> Our view that standardized criteria, or established routine, must regulate the opening of containers found during

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[2] *But see State* v. *Hill*, 115 N.J. 169, 557 A.2d 322 (1989), *Caplan* v. *State*, 531 So.2d 88 (Fla. 1988), and *State v. Teeter*, 249 Kan. 548, 819 P.2d 651 (1991). (An inventory search in an attempt to discover ownership papers could not be upheld when the car had not been legally impounded.)

> inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. . . .
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> . . . .
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> . . . We hold that absent such a policy the instant search was not sufficiently regulated to satisfy the Fourth Amendment and that the marijuana which was found in the suitcase, therefore, was properly suppressed by the Supreme Court of Florida. [Citations omitted.]

Both *Cady* v. *Dombrowski* and *South Dakota* v. *Opperman* are distinguishable. In both cases the police had lawfully impounded an automobile and the subsequent inventory was pursuant to standard police procedures. The opening of closed containers in an inventory search is permissible only if officers are following standard police procedures. *See Colorado* v. *Bertine*, 479 U.S. 367 (1987). It is apparent that the burden rests on the State to show what the standard policy is. *See Florida* v. *Wells, supra; People* v. *Lear*, 217 Ill. App. 3d 712, 577 N.E.2d 826 (1991).

The case at bar shows factual similarity to *Asher* v. *State*, 303 Ark. 202, 795 S.W.2d 350 (1990) *cert. denied*, 111 S. Ct. 757. In that case, however, there apparently was no issue raised relating to the opening of closed containers and the vehicle had been impounded.

It could also be argued that the situation is similar to the facts in *New York* v. *Class*, 475 U.S. 106 (1986). There the defendant was stopped for speeding. While the driver was outside the car talking to one officer, another officer opened the car door to look for a vehicle identification number. In doing so he moved some papers obscuring the dashboard where the number was located and saw a gun. The driver was arrested on a firearms violation.

The Court held that the intrusion by the officer was a search, but that in balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the governmental interests alleged to justify the intrusion, the Court concluded that the search was permissible. Significantly, the Court in *Class* noted:

> The officer did not root about the interior of the respondent's automobile before proceeding to examine the VIN. He did not reach into any compartments or open any containers. He did not even intrude into the interior at all until after he had checked the door jamb for the VIN. When he did intrude, the officer simply reached directly for the unprotected space where the VIN was located to move the offending papers. We hold that this search was sufficiently unintrusive to be constitutionally permissible in light of the lack of a reasonable expectation of privacy in the VIN and the fact that the officers observed respondent commit two traffic violations.

475 U.S. at 118-19.

We also recognize that the decision in *Class* was based, in part, on the fact that federal law requires that the VIN be placed in the plain view of someone outside the vehicle. 745 U.S. at 111-12.

We conclude that in the absence of any evidence as to the standard policy regulating the opening of closed containers, the State's contention that the search can be justified under the "community caretaking" or inventory search exception to the warrant requirement cannot be sustained under *Florida* v. *Wells*. We also conclude that the search here cannot be sustained under the exception to the warrant requirement established in *New York* v. *Class*. Finally, just as there is no murder scene exception to the warrant requirement, *Mincey* v. *Arizona*, 437 U.S. 385 (1978), we know of no exception permitting a general search of a wrecked car for evidence of ownership, at least when the identity of the driver is known.[3]

The State's contention that the search can be justified under the "plain view" doctrine is without merit. While the container here may have been in plain view from outside the vehicle, its contents clearly were not. *See, e.g., State* v. *Risinger*,

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[3] *Paschall* v. *State*, 523 N.E.2d 1359 (Ind. 1988), and *People* v. *Russell*, 174 Mich. App. 357, 435 N.W.2d 487 (1989), both offer some support for the State's position. Those cases, however, were decided prior to the Supreme Court's decision in *Florida* v. *Wells*, which we are clearly bound to follow.

297 Ark. 405, 762 S.W.2d 787 (1989); *see also Arizona* v. *Hicks*, 480 U.S. 321 (1987).

Reversed and remanded.

COOPER and ROGERS, JJ., agree.

ARKANSAS DEPARTMENT OF HUMAN SERVICES
v. COUCH

CA 91-436 832 S.W.2d 265

Court of Appeals of Arkansas
Division II
Opinion delivered May 27, 1992

David K. Overton, for appellant.

Baxter, Wallace, Jensen & McCallister, by: *Terence C. Jensen*, for appellee.

ELIZABETH W. DANIELSON, Judge. Appellant Arkansas Department of Human Services (DHS) appeals from a probate

court order granting a petition for adoption filed by appellees, Jim and Lana Couch. The court denied the petition of DHS seeking termination of parental rights and appointment of DHS as custodian with power to consent to adoption. Appellant's position was that Jennifer, the child adopted by appellees, and her sister Misty, who has cerebral palsy, should be adopted together as a sibling group. Appellees sought to adopt only Jennifer. After careful review of the record and of the arguments raised by appellant, we affirm the lower court's ruling that it serves the best interests of both children for them to be adopted separately.

Misty was born on May 26, 1988, and removed from her mother's care on February 10, 1989. At that time she was placed with a foster parent, Jean Goff. Misty has cerebral palsy and goes to Easter Seals for therapy four days a week. Jennifer was born on June 30, 1989. She was removed from her mother's care on August 30, 1989, and placed in foster care with Ms. Goff.

On March 8, 1991, appellant filed a petition for termination of parental rights regarding Jennifer and sought custody with the power to consent to adoption. The same had been filed regarding Misty on February 21, 1991. Sometime during this same time frame, appellees became aware of Jennifer and the possibility of adopting her. Appellees tried to arrange the adoption through DHS, but decided to pursue a private adoption when they met with resistance from DHS. They obtained consent for adoption of Jennifer from her biological mother and were allowed by the court to intervene in the termination of parental rights action filed by appellant. After several hearings on the matter, the court granted appellees' petition to adopt Jennifer.

Appellant's first contention is that the trial court's ruling was clearly against the preponderance of the evidence. Appellant argues that the trial court abused its discretion when it allowed Jennifer to be adopted separate and apart from her sister. Although we review probate proceedings de novo on the record, it is well settled that the decision of a probate judge will not be disturbed unless it is clearly against the preponderance of the evidence, giving due regard to the opportunity and superior position of the trial court to judge the credibility of the witnesses. *In Re Adoption of Perkins/Pollnow*, 300 Ark. 390, 779 S.W.2d 531 (1989). In cases involving child custody, a heavier burden is

cast upon the court to utilize to the fullest extent all its powers of perception in evaluating the witnesses, their testimony, and the child's best interests. The appellate court has no such opportunity, and it has often been said that we know of no case in which the superior position, ability, and opportunity of the trial court to observe the parties carry as great a weight as when the interests of minor children are involved. *See In Re Adoption of Milam*, 27 Ark. App. 100, 766 S.W.2d 944 (1989).

Appellant states in its brief that DHS's operating policy and Arkansas case law indicate that a court should place siblings together for adoption purposes unless sufficient conditions warrant otherwise. In any proceeding involving the welfare of young children, the court is in no way bound by DHS policy; rather, the paramount consideration is the best interests of the children. *See id.*

Arkansas case law does recognize the principle that unless exceptional circumstances exist, young children should not be separated from each other by dividing their custody. *See, e.g., Johnston* v. *Johnston*, 225 Ark. 453, 283 S.W.2d 151 (1955), and *Ketron* v. *Ketron*, 15 Ark. App. 325, 692 S.W.2d 261 (1985). Our courts, however, have recognized that the existence of exceptional circumstances does sometimes warrant the separation of siblings. In *Fries* v. *Phillips*, 189 Ark. 712, 74 S.W.2d 961 (1934), the supreme court affirmed an order that allowed a brother and sister to be adopted separately. While recognizing the "forceful" argument that siblings should not be separated, the court noted that the two children had been separated for some time and did not know each other. 189 Ark. at 716. In *Riddle* v. *Riddle*, 28 Ark. App. 344, 775 S.W.2d 513 (1989), this court affirmed the chancellor's decision to separate the custody of two half-brothers. In response to appellant's arguments based on the principle set forth in *Ketron*, this court stated that it did not agree that the law of child custody must be applied in such a rigid and mechanical fashion and that the theory advanced by appellant required no consideration of the child's best interests. 28 Ark. App. at 349. A petition for adoption may only be granted upon a finding that the adoption is in the best interest of the individual to be adopted. Ark. Code Ann. § 9-9-214(c) (Supp. 1991).

In light of our case law, Ark. Code Ann. § 9-9-214(c),

and our well-settled rule that the primary consideration in cases involving the welfare of a child is the best interest of that child, we conclude that while keeping siblings together is a commendable goal and an important consideration as a general rule, it is but one factor that must be taken into account when determining the best interest of the child.

Jean Goff, the foster parent of Misty and Jennifer, testified that she thought it would be in the best interests of the children to be placed separately. Ms. Goff described the care necessary for Misty, testifying that there is nothing Misty can do by herself; she has to be fed, dressed, and carried around. She said that the two children have to be watched constantly when they are together because of the danger that Jennifer will put something into Misty's mouth and that Misty is easily frightened around other children. Ms. Goff testified that Jennifer is jealous of the time spent with Misty. It is Ms. Goff's opinion that the two girls do not recognize each other as sisters and that there is no bonding between them.

Appellant offered no evidence other than its general policy that it would not be in Jennifer's and Misty's best interests to be placed separately. Although it is DHS's policy to keep siblings together, there was testimony that there are exceptions that would warrant separation. These exceptions include situations where one child would be in danger from the other or where one would be neglected because of the other. The record indicates that no official recommendation had even been made as to whether these two children should be placed separately or together. Although DHS employees testified regarding two potential adoptive families for both girls, neither of these two families had been officially approved, nor were they present for the court to examine.

Appellant's argument that the court was indulging in sheer speculation when it voiced concern that Jennifer was being used as an inducement for Misty's adoption is discredited by the very testimony elicited by appellant. Lillie Owens, a witness for and employee of appellant, replied in the affirmative when asked if she thought Misty would be hard to adopt if she was being adopted by herself. Ms. Owens also stated, "A special needs child is more difficult for placement than a healthy child." Additionally, Ms.

Owens testified that when searching for adoptive families, Misty and Jennifer had been presented only as a sibling group; there was no attempt to place them separately. This evidence supports the court's concern that Jennifer was being used as an inducement to get someone to adopt Misty and that Misty would be better off with someone who was willing to accept her alone in light of her special needs.

Upon review of the record, we are convinced that the court made its decision based upon the best interests of both Misty and Jennifer. We cannot say the court's decision to grant appellee's petition for adoption was clearly against the preponderance of the evidence.

Appellant's second argument is that the trial court abused its discretion in denying appellant's motion for a new trial. Appellant filed its motion for new trial according to Ark. R. Civ. P. 59, averring that it suffered surprise by the court's reasoning that materially affected its substantial rights at trial. Appellant contends that the court based its decision exclusively on the possibility that Jennifer was being used as an inducement for Misty's adoption, and that this was sheer speculation.

Though this was a concern voiced by the court, there was other evidence to support its decision, particularly the testimony of Jean Goff. And as we stated earlier, this concern was not based on mere speculation, but was supported by the very testimony offered by appellant. We agree with appellee that logical inferences drawn from the evidence introduced by appellant can not be used as the basis for an allegation of surprise. The motion for new trial was properly denied.

Appellant's contention that the court erred in considering the recommendation of Jennifer's and Misty's guardian ad litem is without merit. Appellant asserts that Paul Lancaster's representation was inadequate but nothing in the record supports this allegation. Instead, the record demonstrates Mr. Lancaster's participation in and contribution to the proceedings and his concern for the welfare of both children.

Appellant's fourth contention is that the biological mother's consent to adoption was legally insufficient based on her mental incapacity. The record shows that the court was con-

cerned about this issue. The mother, Vivian, was appointed an attorney who spoke with her at length about the consent and the ramifications of adoption. Joe Hardin, Vivian's attorney, stated at trial that based on his discussions with Vivian, his discussions with her counselor, and reports he had read, he felt Vivian was not incapable of understanding what was going on; he felt she was legally capable of giving consent. He said he had spoken with her again the day of the hearing and she restated that she did wish to consent to the adoption. The court also questioned Vivian regarding her understanding of the proceedings and was satisfied that Vivian was legally capable of giving consent for Jennifer to be adopted. We cannot say this finding is clearly against a preponderance of the evidence.

Appellant's final point on appeal is that appellee's petition for adoption was fatally defective in that it failed to include all the information required by Ark. Code Ann. § 9-9-210. In *Taylor* v. *Collins*, 172 Ark. 541, 289 S.W. 466 (1927), the supreme court upheld the validity of a petition for adoption where there was substantial compliance with the statutory requirements. Appellant relies on *Ozment* v. *Mann*, 235 Ark. 901, 363 S.W.2d 129 (1962), which held an adoption order fatally defective because it failed to recite essential jurisdictional facts. Here, however, jurisdiction and venue of the case were established by appellant's own petition to terminate parental rights, filed before appellees filed their petition as intervenors. Other statutory information required was introduced by the pleadings and testimony of the parties. We find there was substantial compliance with the statutory requirements and the petition was not fatally defective.

Affirmed.

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

CITY OF FORT SMITH *v.* TATE

CA 91-430 832 S.W.2d 262

Court of Appeals of Arkansas
Division II
Opinion delivered May 27, 1992

[redacted]

Public Employee Claims Division, by: *Frank Gobell*, for appellants.

Odom & Elliott, by: *Don R. Elliott, Jr.*, for appellee.

ELIZABETH W. DANIELSON, Judge. In this worker's compensation case, appellants appeal the decision of the Workers' Compensation Commission holding that appellants were responsible for the payment of the remarriage lump sum benefits under Ark. Code Ann. § 11-9-527(d)(1) (1987). Appellee William Tate is deceased and it is his widow's interest in benefits that are at issue here. We affirm the commission's decision.

Tate was killed in January of 1981 during the course of his employment with the Fort Smith Police Department. He was survived by his wife, Anita, and two minor children. The claim was accepted as compensable and appellants began paying death benefits. At the time of Tate's death, the maximum liability of an employer or carrier in weekly benefits was $50,000. Appellants reached payment of the maximum amount in August of 1988. The Death and Permanent Total Disability Trust Fund (Fund) then began making the weekly benefit payment, as required by Ark. Code Ann. § 11-9-502(b)(2) (1987). On June 8, 1990, Anita remarried and requested the 104-week lump sum award provided pursuant to Ark. Code Ann. § 11-9-527(d)(1) (1987).

At the hearing before the administrative law judge, appel-

lants contended that the Fund was liable for the lump sum payment. Relying on *Death & Permanent Total Disability Trust Fund* v. *Tyson*, 304 Ark. 359, 801 S.W.2d 653 (1991), the administrative law judge concluded that appellants were responsible for payment of the lump sum benefit.

On appeal before the commission, appellants raised a new argument, contending that Anita is not qualified for the lump sum benefit because of the "limiting language" found in Ark. Code Ann. § 11-9-527(d)(1). That provision states:

> In the event the widow remarries before *full and complete payment* to her of the benefits provided in subsection (c) of this section, there shall be paid to her a lump sum equal to compensation for 104 weeks, subject to the limitation set out in §§ 11-9-501—11-9-506.

(Emphasis added.) Subsection (c), to which this provision refers, sets out the amounts the beneficiaries are entitled to receive. It refers back to §§ 11-9-501—506. Section 11-9-502 specifically provided at the time of Tate's death that the employer's liability for weekly benefits ceased at $50,000 and that the Fund thereafter became liable for benefits.

Appellants base their contention that the commission erred in finding them responsible for the lump sum benefit on the "before full and complete payment" language in § 11-9-527(d)(1). Under § 11-9-502, a widow's entitlement to benefits will never end unless she dies or remarries, but the employer's liability does cease at $50,000. Appellants argue that since the only type of benefit that can be fully and completely paid is the employer's maximum liability for weekly benefits, the widow must remarry *before* the employer or carrier pays the full $50,000 in order to qualify for the lump sum benefit.

In a well-reasoned opinion, the commission observed that the "full and complete payment" phrase does create uncertainty when considered in light of the unlimited nature of the benefits provided in Ark. Code Ann. § 11-9-527(c), but rejected appellants' contention that Anita was not qualified for the lump sum benefit. Based on the reasoning discussed below, the commision determined Anita was entitled to receive the lump sum benefit and that appellants were responsible for payment of the benefit.

As did the commission, we find it helpful to review the history of this provision and related provisions. The provision containing the language in question was part of the original Workers' Compensation law that was passed in 1939. *See* Act 319 of 1939, § 15(b) and 15(d). Under this act, a widow's weekly benefits were limited to a total sum of $7,000. Initiated Act No. 4 of 1948 increased this amount to $8,000. Initiated Act No. 1 of 1956 again increased the limit, setting it at $12,500. Therefore, as originally enacted, a widow's entitlement to weekly benefits was limited and "full and complete payment" of a widow's weekly benefits was possible prior to either her remarriage or death.

In 1968 the legislature eliminated the statutory limitation on the total amount of death benefits payable to the dependents of a deceased employee. In 1973, a new provision was added, limiting the employer's liability to the first $50,000 in weekly benefits and making the Fund liable for the weekly benefits in excess of $50,000. Although these new provisions were enacted, changing the nature of a widow's benefits from limited to unlimited, the "full and complete payment" language was left in the provision regarding the lump sum benefit.

The first rule in interpreting a statute is to construe it just as it reads by giving words their ordinary and usually accepted meaning. *Arkansas Vinegar Co.* v. *Ashby*, 294 Ark. 412, 743 S.W.2d 798 (1988). Statutes relating to the same subject should be read in a harmonious manner if possible. All statutes on the same subject are *in pari materia* and must be construed together and made to stand if capable of being reconciled. *Id.* Provisions of our Workers' Compensation Act are to be construed liberally in favor of the claimant. *Id.* In interpreting a statute and attempting to construe legislative intent, we look to the langauge of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, legislative history, and other appropriate matters that throw light on the matter. *Hanford Produce Co.* v. *Clemons*, 242 Ark. 240, 412 S.W.2d 828 (1967).

As pointed out by the commission, the statutory history of the provisions in question reflects an effort to balance the need to limit the total liability of employers and carriers against the need to adequately compensate employees and their dependents.

The delimitation of benefits in 1968 and the establishment of the Fund in 1973 reflects the goal of adequately compensating the widow and dependents of a deceased employee. The obvious purpose of the lump sum benefit provision upon remarriage is to lessen the disincentive to remarry that would be inherent in a flat cutoff of dependency benefits. *See* 2 Arthur Larson, *The Law of Workmen's Compensation* § 64.42 (1992). This disincentive for marriage does not cease to exist when the employer reaches his maximum liability in weekly benefits; it continues indefinitely because the widow continues to receive benefits from the Fund. Therefore, the need for the reduction of the disincentive, in the form of a lump sum payment, is still needed even after the employer reaches his maximum liability.

Significant also is the fact that the limit on an employer or carrier's liability under § 11-9-502 applies only to weekly benefits. The employer or carrier is still responsible for any benefits in addition to weekly compensation to which the claimant is entitled. *See, e.g., Tyson*, 304 Ark. 359, 801 S.W.2d 653. It is therefore not inconsistent with the limitations on liability found in § 11-9-502 to require the employer or carrier to pay the lump sum benefit.

The commission noted that although its interpretation of the statute does leave the "full and complete payment" language without meaning under the current statutory scheme, the interpretation proposed by appellants would create a ground for termination of a widow's entitlement to receive the lump sum benefit upon remarriage that is not evident from the language of the statute. Such a construction would be in favor of the employer and therefore violate the requirement that we liberally construe workers' compensation law in favor of the claimant. *See Ashby*, 294 Ark. 412, 743 S.W.2d 798.

We agree with the commission's finding that allowing the widow to receive the lump sum payment at the time she is remarried, regardless of whether the employer or carrier has reached its maximum liability in weekly benefits, is the only interpretation of the statute that is consistent with the plain language of the statute, the history of the provisions in question, and the purposes underlying these provisions. It appears that the "full and complete payment" langauge was inadvertently left in

from a time when it had some relevance and, in light of the delimitation on a widow's weekly benefits, it is now meaningless surplusage. Although a statute should be construed to give meaning and effect to every word therein if possible, *Locke* v. *Cook*, 245 Ark. 787, 434 S.W.2d 598 (1968), unnecessary or contradictory clauses in acts will be deleted and disregarded in order to give effect to the clear legislative intent. *See Cherry* v. *Leonard*, 189 Ark. 869, 75 S.W.2d 401 (1934), and cases cited therein.

The decision of the commission that appellee's widow is entitled to the lump sum remarriage benefit and that appellants are liable for payment of that benefit is affirmed.

Affirmed.

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

CENTENNIAL VALLEY RANCH MANAGEMENT, INC. *v.* AGRI-TECH LIMITED PARTNERSHIP and Agri-Tech Ltd.

CA 90-482 832 S.W.2d 259

Court of Appeals of Arkansas
Division II
Opinion delivered May 27, 1992

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

Harper, Young, Smith & Maurras, by: *Don A. Smith*, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal by Centennial Valley Ranch Management, Inc., (CVR) from an order granting the motion to dismiss filed by the appellees Agri-Tech Limited Partnership and Agri-Tech Ltd. The appellant is an Ohio corporation. The partnership appellee was organized under the laws of Arizona; the other appellee is an Arizona corporation.

The initial complaint in this matter was filed by CVR in Yell County Circuit Court in 1985. It was dismissed by CVR in 1988.

Suit was then filed in federal district court and dismissed by the court for lack of jurisdiction in May of 1989.

On June 15, 1989, CVR filed a complaint in Yell County Circuit Court alleging that on July 24, 1984, CVR had entered into a cattle management agreement with Agri-Tech Ltd., acting on its own behalf and as general partner of the limited partnership, under which CVR agreed to undertake a cattle management operation on lands located in Yell County, Arkansas. It was alleged that the cattle were shipped to Arkansas from Montana by a Canadian corporation; that beginning in October 1984, Agri-Tech made monthly payments to CVR, under the agreement, for the care and feeding of the cattle; that on November 7, 1985, Agri-Tech canceled the agreement due to economic conditions and asked for the return of the cattle; and that Agri-Tech refused to pay the balance due (approximately $31,500.00) on the last monthly management fee.

Count I of the complaint alleged breach of contract and asked for judgment in the amount of $3,367,000.00. Count II of the complaint allged fraudulent misrepresentation and asked for punitive damages. Count III of the complaint alleged the defendants were estopped from denying the agreement or their liability to pay and asked for judgment for all sums expended. Count IV of the complaint alleged that 890 cows and 839 calves were removed from CVR's possession in violation of CVR's first lien on the cattle. The complaint prayed for joint and several judgment against both appellees.

On July 19, 1989, the appellees, Agri-Tech Ltd. and Agri-Tech Limited Partnership, filed a motion to dismiss on the basis of Ark. R. Civ. P. 12(b)(1-6): for lack of subject matter and personal jurisdiction; improper venue; insufficient process; insufficiency of service of process; and failure to state a claim on which relief may be granted. Attached to the brief in support of the motion was the federal court order dismissing appellant's suit in federal court along with numerous pleadings, documents, and evidence considered in federal court.

On August 16, 1989, CVR filed an amended complaint, and on August 18, 1989, the appellees filed another motion to dismiss in which they reasserted and realleged all matters set out in their July 1989 motion to dismiss.

After the case had been removed to federal court and remanded, the Yell County Circuit Court held a hearing on the appellees' motion to dismiss and on August 13, 1990, the motion was granted. The order simply stated that the motion "is well founded and should be sustained."

On appeal, CVR argues that the trial court granted the motion to dismiss because the Wingo Act, Ark. Stat. Ann. §§ 64-1201-02 (Repl. 1980), and the statutes that replaced that Act, Ark. Code Ann. §§ 4-27-1501-02 (Repl. 1991), prohibit a foreign corporation transacting business in Arkansas from enforcing its contracts in an Arkansas court unless the corporation is registered to do business in Arkansas. Appellant contends the court erred because (1) the contract in this case was executed and put into force in Arizona, and (2) the transaction was a component part of interstate commerce. Under either situation, according to the appellant, the prohibitions of the Wingo Act and the statutes that replaced it do not apply. Moreover, the appellant contends that it alleged causes of action which were not based on contract, and those causes of action are not affected by the Wingo Act or the statutes that replaced it.

As pointed out by the appellees, the Arkansas Business Corporation Act was enacted by Act 958 of 1987. *See* Ark. Code Ann. § 4-27-101 (Repl. 1991). The comment to that section states that the Act was based primarily upon the Revised Model Business Corporation Act, which was a product of a committee of the American Bar Association. *See* Ark. Code Ann. *Commentaries* 415 (1987). The 1987 Act provides that, "A foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority." Ark. Code Ann. § 4-27-1502(A) (Repl. 1991). The parties in this case seem to assume that this section of the 1987 Act is applicable to this case filed in June of 1989. That certainly appears to be a correct assumption. A law review article on that subject states:

> Unlike the provisions applicable to domestic corporations, those sections of the 1987 ABCA applicable to foreign corporations were not covered by a grandfather clause. The new statute stated that any foreign corporation authorized to transact business in Arkansas at midnight,

> December 31, 1987, was subject to the new statute, and the old provisions were specifically repealed.

Mary Elizabeth Matthews, *Corporate Statutes — Which One Applies?*, 13 U. Ark. Little Rock L.J. 69, 76 (1990).

The above law review article also explains that the 1987 Act made the penalty less severe for doing business in Arkansas without authority. *Id.* at 76. Under the old law (Wingo Act) the non-qualifying foreign corporation was not permitted to enforce any contract made in Arkansas. *Id.* at 77. But the law review article says that, "The commentary to the Revised Model Business Corporation Act on which the section is based makes clear the drafters intended a nonqualifying foreign corporation be able to enforce a contract simply by qualifying." *Id.* at 77.

Although it is agreed that the appellant corporation in the present case has not qualified to do business in Arkansas, that does not completely solve the issues presented. Ark. Code Ann. § 4-27-1501 (Repl. 1991) provides in subsection A that a foreign corporation may not transact business in this state until it obtains a certificate of authority, but in subsection B the statute lists some activities that do not constitute doing business within the meaning of subsection A, and subsection C states that the activities listed in B are not exhaustive. Under B(11) the activity listed which does not constitute transacting business in this state is, "Transacting business in interstate commerce." This is heavily relied upon by the appellant in support of its position that the trial court was wrong in dismissing appellant's complaint.

Before continuing with a discussion of the interstate commerce issue, we look at the procedural manner in which this case was decided by the trial court. The appellees' motion to dismiss alleged the appellant's complaint should be dismissed under the provisions of Ark. R. Civ. P. 12(b), and was based upon all six of the defenses listed in Rule 12(b). As we have already stated, there were numerous matters attached to the motion and brief filed by the appellees. Included with those matters was the transcript of a portion of the evidence considered in federal court. Subsection (c) of civil procedure Rule 12 provides that if, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment. Attached

to appellant's response to the motion to dismiss were, among other matters, two affidavits. Although the trial court's order did not so state, it seems clear that the motion to dismiss was treated and disposed of as a motion for summary judgment. *See Godwin* v. *Churchman*, 305 Ark. 520, 810 S.W.2d 34 (1991). Thus, we examine the record to determine if there is any genuine issue of fact. Ark. R. Civ. P. 56(c).

The contract sued upon is in the record and we have already briefly described it in our summary of the allegations of the appellant's complaint. It specifically provides that it shall be governed by the law of Arizona, and for our decision in this case, we will assume that it was made in Arizona as the appellant contends.

There are other matters about which the record shows there is no genuine issue of fact. We know that the appellant (CVR) was established in 1979. Clyde Lawson, who was president of the corporation when he made an affidavit on April 11, 1989, began working for CVR in 1979. In 1984 a Canadian corporation made an agreement with Agri-Tech Ltd. to sell it 1600 artifically impregnated cows. Agri-Tech then made an agreement, as general partner in Agri-Tech Limited Partnership, for CVR to feed and care for these cattle. According to his affidavit, Clyde Lawson and his wife later purchased a ranch in Arkansas and leased the ranch to CVR for it to use to maintain the 1600 head of cattle which CVR had agreed with Agri-Tech to feed and care for; Lawson and his wife also purchased CVR; this purchase covered only the maintenance agreement with Agri-Tech; since July of 1985, CVR has operated in no state other than Arkansas.

The appellant cites *Goode* v. *Universal Plastics, Inc.*, 247 Ark. 442, 445 S.W.2d 893 (1969); *Hough* v. *Continental Leasing Corp.*, 275 Ark. 340, 630 S.W.2d 19 (1982); and *Bassett* v. *Hobart Corporation*, 292 Ark. 592, 732 S.W.2d 133 (1987), for the proposition that corporations who do business in Arkansas, but fail to qualify for that purpose in this state, may nevertheless enforce contracts in this state if those contracts were made in another state. These cases do not help appellant because they were controlled by the Wingo Act, Ark. Stat. Ann. § 64-1201-02. That section provided that "any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as

aforesaid, cannot make any contract in the state which can be enforced by it either in law or in equity." As we have pointed out, the 1987 Act simply states that "a foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority." The prohibition is not the same under the "new" Act as it was under the "old" Wingo Act.

Appellant also cites *Uncle Ben's, Inc.* v. *Crowell*, 482 F. Supp. 1149 (E.D. Ark. 1980), for the proposition that a contract may be enforced by nonqualifying foreign corporations if it is only a component part of interstate commerce and not wholly in interstate commerce. That case also said that a nonqualifying corporation "although engaging in an essentially interstate activity, can conduct sufficient activities which are local in nature so that it should properly be subject to state regulation." *Id.* at 1155. *See* also *Independence County* v. *Tad Screen Advertising Co.*, 199 Ark. 205, 133 S.W.2d 1 (1939) (interstate shipment of film held incidental to otherwise intrastate activity).

Again, however, the point in the present case is that Act 958 of 1987, known as the Arkansas Business Corporation Act, was in effect when this present suit was filed on June 15, 1989. A provision of that Act, Ark. Code Ann. § 4-27-1502(A) (Repl. 1991), provides that a nonqualifying foreign corporation transacting business in this state may not maintain a proceeding in any court in this state until it obtains a certificate of authority to do business here. Although Ark. Code Ann. § 4-27-1501(B)(11) (Repl. 1991), provides that transacting business in interstate commerce does not constitute transacting business in Arkansas for the purpose of having to obtain a certificate of authority from this state, we think the material facts revealed by the record, as to which there is no genuine issue, show that when the appellant filed this case it was a foreign corporation transacting business in this state without a certificate of authority.

This suit was filed in June of 1989. According to the April 1989 affidavit of appellant's president, Clyde Lawson, the appellant was an Arizona corporation; was owned by Lawson and his wife; and had not operated in any state except Arkansas since July of 1985. The only business in which it was engaged when this suit was filed was feeding and caring for cattle shipped to

Arkansas, under a contract made in Arizona, on land it had leased in Arkansas for that purpose.

We think it was necessary for the appellant to obtain a certificate of authority to transact business in this state before it could maintain this suit in the courts of this state. This includes all causes of action alleged in appellant's complaint. Therefore, we affirm the trial court's order of dismissal.

Affirmed.

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

DYNAMIC ENTERPRISES INC., d/b/a Car Mart *v.* Ron TAYLOR, Commissioner of the Insurance Department for the State of Arkansas

CA 91-505 832 S.W.2d 278

Court of Appeals of Arkansas
Division I
Opinion delivered June 3, 1992

John R. Scott and *William P. Watkins, III, P.A.*, for appellant.

Steve A. Uhrynowycz and *Cynthia Lea Fearno*, for appellee.

JAMES R. COOPER, Judge. The appellant in this chancery case sought a declaratory judgment to determine whether a contract it proposed constituted "insurance" within the meaning of Ark. Code Ann. § 23-60-102 (1987). The appellee moved for dismissal, alleging that the appellant had failed to exhaust its administrative remedies and the chancellor granted the appellee's motion. From that decision, comes this appeal.

For reversal, the appellant contends that the chancellor erred in dismissing its complaint, asserting that the pursuit of administrative remedies would be futile, inefficient, and result in unnecessary delay. We affirm.

The record shows that the appellant proposed to sell a contract referred to as a "Total Loss — Vehicle Purchase Contract Waiver". This contract was to be offered to buyers of used vehicles which are sold and financed by the appellant's dealerships. The contract calls for the financing dealership to waive any balance due on the purchase price of the vehicle involved if the buyer suffers a total loss of that vehicle by theft or accident prior to full payment of the purchase price. In January 1990, the appellant corresponded with a representative for the appellee, requesting an opinion as to whether the proposed contract would be considered insurance as defined by Ark. Code Ann. § 23-60-102 (1987). On April 4, 1990, an attorney for the

Arkansas Insurance Department wrote to the representative of the appellant and stated that the contract submitted to the insurance department for review was in fact considered an insurance product by the department and that any person or entity offering such a contract would first have to qualify as an insurance company and comply with the provisions of the Arkansas Insurance Code. The appellant then filed its declaratory judgment action which, as we have noted, was dismissed for failure to exhaust administrative remedies.

The parties are required to exhaust their administrative remedies prior to seeking a declaratory judgment because declaratory judgment actions are intended to supplement rather than replace ordinary causes of action. *Rehab Hosp. Serv. Corp.* v. *Delta-Hills Health Sys. Agency, Inc.*, 285 Ark. 397, 399, 687 S.W.2d 840, 841 (1985). A basic rule of administrative procedure requires that the agency be given the opportunity to address a question before resorting to the courts. *See Truck Transport, Inc.* v. *Miller Transporters, Inc.*, 285 Ark. 172, 173-74, 685 S.W.2d 798, 799 (1985).

The appellant asserts on appeal that it would have been futile to pursue an administrative hearing and that, therefore, it has met the requirements of one of the exceptions to the exhaustion of remedies doctrine which were set out in *Barr* v. *Arkansas Blue Cross and Blue Shield, Inc.*, 297 Ark. 262, 267, 761 S.W.2d 174, 177 (1988). In *Barr*, the Supreme Court held that exhaustion of administrative remedies is not required where an administrative appeal would be futile. *Id.* In this regard, the appellant asserts that the insurance commissioner had already made up his mind on this particular issue and that an administrative appeal would be futile, inefficient, and result in an unnecessary delay.

The record discloses, however, that Arkansas Insurance Commissioner Lee Douglass (who had succeeded Ron Taylor as Commissioner by the time of trial) testified at the hearing that he had not made up his mind as to the merits of the appellant's proposed contract and that he had not reviewed any of the documentation which may have been submitted to the department, including the proposed contract itself. Commissioner Douglass also stated that he had not reviewed applicable Arkansas case law or law from other jurisdictions which might

apply to the appellant's proposed contract. Further, the record does not reveal that the appellant presented any evidence that there would be an undue delay if the appellant were to proceed with the administrative remedies available. The chancellor found that the appellant failed to show that it fell within any exceptions to the doctrine. We cannot say that such a finding is against the preponderance of the evidence. Ark. R. Civ. P. 52(a). The appellant also argues that, because the provision for an administrative hearing set out in Ark. Code Ann. § 23-61-303 (1987) is not mandatory, the exhaustion of administrative remedies doctrine does not apply. We cannot accept the appellant's argument in this regard. Section 23-61-303 provides in part as follows:

> (a) The commissioner may hold hearings for any purpose within the scope of this code deemed by him to be necessary.
>
> (b)(1) The commissioner shall hold a hearing if required by any provision or upon written demand for a hearing by a person aggrieved by any act, threatened act, or failure of the commissioner to act, or by any report, rule, regulation, or order of the commissioner, other than an order for the holding of a hearing, or an order on hearing or pursuant thereto.

It is true that the statute itself does not require the appellant to seek a hearing before the Insurance Department. However, if the appellant wishes to seek a declaratory judgment, it must first give the agency the opportunity to address the issue involved. *Rehab Hosp. Serv. Corp.* v. *Delta-Hills Health Sys. Agency, Inc.*, 285 Ark. at 399, 687 S.W.2d at 842. The appellant's failure to seek a hearing before the Department was clearly a failure to exhaust its administrative remedies. *See Arkansas Motor Vehicle Comm'n* v. *Cantrell Marine, Inc.*, 305 Ark. 449, 450, 808 S.W.2d 765, 766 (1991). We find no error in the chancellor's action dismissing the appellant's complaint for declaratory judgement.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

Arnold LUNSFORD *v.* RICH MOUNTAIN ELECTRIC COOP, et al.

CA 91-223 832 S.W.2d 291

Court of Appeals of Arkansas
En Banc
Opinion delivered June 3, 1992

Eddie H. Walker, Jr., and *Melissa E. Smith*, for appellant.

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

JAMES R. COOPER, Judge. The appellant in this workers' compensation case sustained a compensable back injury in 1983. On March 7, 1988, the appellant went horseback riding and, after dismounting, experienced pain which caused him to faint, fall, and injure his spine. The appellant sought benefits for the medical expenses resulting from his 1988 injury, contending that the 1988 incident was a continuation and recurrence of his 1983 injury. The Workers' Compensation Commission found that the appellant's horseback riding was an unreasonable activity constituting an independent intervening cause, and concluded that the employer was therefore not liable for medical expenses resulting from the 1988 incident. In our opinion delivered December 26, 1990, we noted that the question before the Commission was whether the 1988 injury was triggered by activity on the part of the appellant which was unreasonable under the circumstances, and held that the Commission erred by failing to consider the appellant's knowledge of his condition in determining whether his horseback riding was unreasonable under the circumstances. *Lunsford* v. *Rich Mountain Electric Co-op*, 33 Ark. App. 66, 800 S.W.2d 732 (1990). Noting that the Commission found that the appellant "believed he had cleared this activity with Dr. MacDade," his physician, but failed to find whether the appellant's horseback riding was unreasonable in light of his belief that the activity had been cleared with the doctor, we reversed and remanded for the latter finding to be made. *Lunsford*, 33 Ark.

App. at 70. On remand, the Commission again denied and dismissed the appellant's claim. From that decision, comes this appeal.

For reversal, the appellant contends that the Commission erred in failing to follow this Court's instructions on remand, and that the Commission's dismissal of the claim is not supported by substantial evidence. We agree with both points, and we reverse.

The appellant correctly asserts that the Commission failed to follow our instructions on remand. We observed in our prior opinion that the Commission found that the appellant believed his horseback riding activity had been cleared with Dr. MacDade, and remanded with specific instructions which directed the Commission to find whether the appellant's activity was unreasonable in light of his belief that it had been cleared by his physician. The Commission did not comply with these instructions, but instead found that the appellant's testimony lacked credibility and stated that it had not intended to find that the appellant believed that Dr. MacDade had cleared his horseback riding activity.

Regardless of what the Commission may have intended, the Commission found in its previous opinion that the appellant believed Dr. MacDade had cleared the activity. Having once so found, the Commission cannot now say that the appellant's testimony was not sufficiently credible to permit such a finding, because the doctrine of res judicata, which is applicable to the decisions of the Commission, forbids the reopening of matters once judicially determined by competent authority. *Tuberville* v. *International Paper Co.*, 18 Ark. App. 210, 711 S.W.2d 840 (1986). Moreover, matters decided on our prior appeal are the law of the case and govern our actions on the present appeal to the extent that we would be bound by them even if we were now inclined to say that we were wrong in those decisions. *Ouachita Hospital* v. *Marshall*, 2 Ark. App. 273, 621 S.W.2d 7 (1981). We are not so inclined, because the Commission plainly stated in its opinion that the appellant "believed that he had cleared this activity with Dr. MacDade." A simple, straightforward statement of what happened, like the statement quoted above, is a finding of fact. *See Wright* v. *American Transportation*, 18 Ark. App. 18, 709 S.W.2d 107 (1986). Our

interpretation of the Commission's language as a finding of fact was essential to our prior opinion in that our instruction on remand was premised on our conclusion that the Commission found that the appellant believed his doctor had cleared the activity. As such, the matter was decided, and therefore governs the actions of the Commission on remand and our actions on a second appeal. *See Pickle* v. *Zunamon*, 19 Ark. App. 40, 716 S.W.2d 770 (1986). By ignoring our instructions on remand and our decision in this matter, the Commission committed error.

We also find merit in the appellant's argument that the Commission's decision was not supported by substantial evidence. The Commission concluded in its opinion that "horseback riding by a man in the Claimant's condition was unreasonable, even assuming *arguendo* that he did believe that his doctor had cleared the activity." The Commission's conclusion was based on the appellant's testimony that he suffered episodes of intense pain from time to time which could cause him to lose consciousness; given evidence to this effect, the Commission found that it was unreasonable for the appellant to ride horses even if he believed that his doctor had authorized that activity. This holding was premised on the Commission's conclusion that horseback riding was dangerous *per se* to the appellant and caused an increased potential for the episodes of intense pain described above. However, we find no evidence in the record to show that horseback riding would exacerbate the appellant's back injury. Although we defer to the Commission's experience and knowledge when employed to make a finding based on the evidence before it, the Commission's expertise is not evidence and cannot be substituted for evidence. *See Perry* v. *Mar-Bax Shirt*, 16 Ark. App. 133, 698 S.W.2d 302 (1985). Under these circumstances, where the appellant believed that his doctor had approved the activity, where medical evidence of the effect of the activity on the appellant's condition is absent from the record, and where the appellant was not riding a horse when the incident occurred, we hold that the Commission's finding that the appellant engaged in an unreasonable activity is not supported by substantial evidence. We reverse and remand for the Commission to award benefits.

Reversed and remanded.

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

JOHN E. JENNINGS, Judge, dissenting. While I agree that the Commission may not, on remand, change its findings of fact, I do not agree that the Commission's opinion fails to display a substantial basis for the denial of the relief sought. *See Linithicum* v. *Mar-Bax Shirt Co.*, 23 Ark. App. 26, 741 S.W.2d 275 (1987).

Mr. Lunsford suffered a herniated disc in 1985 and underwent a laminectomy. In 1986 he suffered a "reoccurrence" of the herniated disc and underwent a second laminectomy. After the second surgery he continued to suffer from severe back pain.

The Commission might reasonably decide, as it did, that regardless of any conversations between the claimant and his doctor, the undertaking of a "long sojourn on horseback" was an unreasonable activity under the circumstances so as to break the chain of causation between Mr. Lunsford's compensable injury and his subsequent spinal fracture.

I respectfully dissent.

CRACRAFT, C.J., joins in this dissent.

Edgar A. STACY, III, Peggy K. Stacy, and Stacy Lands, Inc. *v.* W. Hunter WILLIAMS, Jr., and Alba Williams

CA 91-457 834 S.W.2d 156

Court of Appeals of Arkansas
En Banc
Opinion delivered June 3, 1992

Friday, Eldredge & Clark, by: *Joe D. Bell*, for appellants.

Ball & Barton, by: *Whit Barton*, for appellees.

JOHN E. JENNINGS, Judge. Appellants appeal from a judgment of the Mississippi County Circuit Court which dismissed their claim for breach of contract and awarded appellees, on their counterclaim, the return of their $10,000.00 earnest money deposit. Appellants contend that the circuit judge erred in finding that appellees' ability to obtain financing to purchase appellants' property was a condition precedent to the enforcement of their contract. We find no error and affirm.

Appellants own a 588-acre farm in Mississippi County. On June 14, 1985, Hunter Williams, Jr., Alba Williams, and Hunter Williams, Sr. (now deceased), signed a contract to purchase

appellants' farm for $882,000.00. Specifically, the pre-printed contract provided:

> Seller covenants and agrees to sell and convey Property, with all improvements thereon, or cause it to be conveyed, by good and sufficient warranty deed, to Purchaser, or to such person or persons as Purchaser may designate; Purchaser, however, shall not be released from any of Purchaser's agreements and undertakings as set forth herein, unless otherwise stated; and Purchaser covenants and agrees to purchase and accept Property for the total price of *($882,000.00) Eight Hundred Eighty Two Thousand and no/100—Dollars*, upon terms as follows:

After this language, the following typed insertion was added by appellants' real estate agent, Kemp Whisenhunt:

> Buyers to pledge approximately 900 acres of land in Tallahatchie County in Mississippi together with lands herein described for loan to pay purchase price. 1985 crop rent of 1/4 cotton and 1/3 other crops to be transferred to buyer. Closing on or before August 1, 1985.

The contract also provided that appellees were to obtain possession of the property on January 1, 1986.

Initially, appellees encountered some problems in obtaining financing for the property because the farm had been leased to a third party until December 1987. Appellees sought financing from a number of different lending institutions, without any success. Equitable Life Assurance Society was the only lender appellees found that was interested in making the loan. The loan was never made, however, because Equitable ran out of farm mortgage money before the loan could be finalized. On September 15, 1985, Hunter Williams, Sr., became ill, and he died on October 10, 1985. Several months later, appellants sold the farm to their tenant, Koehler Blankenship, for $630,000.00. Appellants then sued appellees for breach of contract, seeking $252,000.00, which represented the difference between the $882,000.00 purchase price offered by appellees and the $630,000.00 paid by Mr. Blankenship. Appellees counterclaimed for the return of their earnest money deposit. The case was tried to the court sitting as the jury.

The court found that the agreement referred to the purchase price as $882,000.00, upon terms that appellees pledge approximately 900 acres of land in Mississippi, together with the subject lands, for a loan to pay the purchase price. The court also found that, before drafting the sale contract, appellants' agent, Kemp Whisenhunt, was aware that appellees could not purchase the farm without first obtaining a loan. The court concluded that appellees' ability to obtain a loan was a condition precedent to their performance of the contract and, since they used more than reasonable efforts to obtain a loan and were unable to do so, the contract terminated and was unenforceable.

Appellants argue on appeal that the trial court erred in holding that appellees' ability to obtain a loan to purchase the farm was a condition precedent to their duty to purchase the farm. Appellants contend that the parties' contract does not contain language which creates a condition precedent and does not allow for appellees to be released from the contract in the event they are unable to obtain a loan.

Whether a provision in a contract amounts to a condition precedent is generally dependent on what the parties intended, as adduced from the contract itself. *McMinn* v. *Holley*, 86 Idaho 186, 384 P.2d 229, 231 (1963). When the terms of a written contract are ambiguous and susceptible to more than one interpretation, extrinsic evidence is permitted to establish the intent of the parties and the meaning of the contract then becomes a question of fact. *Floyd* v. *Otter Creek Homeowners Ass'n*, 23 Ark. App. 31, 35, 742 S.W.2d 120, 122-23 (1988). *See also Marlatt* v. *LaGrange*, 145 Colo. 50, 52, 357 P.2d 927, 928 (1960); *Hawkins & Chamberlain* v. *Mathews*, 242 Ky. 732, 47 S.W.2d 547, 548 (Ct. App. 1932); and *Lopez* v. *Broussard*, 308 So.2d 837, 840-41 (La. Ct. App. 1975). Furthermore, evidence of a parol agreement that a written agreement is being delivered conditionally constitutes an exception to the parol evidence rule. *Bradbury* v. *Giordano*, 10 N.J. Super. 414, 76 A.2d 815, 817 (1950); *see also VJK Prods, Inc.* v. *Friedman Meyer Prod., Inc.*, 565 F. Supp. 916, 919 (S.D. N.Y. 1983).

Appellee Hunter Williams, Jr., testified that appellants' broker, Kemp Whisenhunt, knew that appellees did not have sufficient cash to pay for the farm unless they obtained a loan. Mr.

Hunter testified that this fact was made perfectly clear to Mr. Whisenhunt. Additionally, on July 3, 1985, Hunter Williams, Jr., wrote to appellant Edgar Stacy announcing appellees' intent to rescind the contract for several reasons. One such reason provided:

> There was a mutual mistake between your agent, Kemp Whisenhunt, and my family as to the market value of farm land that my family owns in Tallahassee County, Mississippi. Your agent and my family were of the opinion that the market value of this land was between $900.00 and $1,000.00 an acre. In actuality, the land only enjoys a present market value of $600.00 per acre. The basis of any offer to purchase your land was to finance the purchase by selling the Mississippi land. In fact, an exchange of property along with the cash difference between the market value of the properties was being negotiated to avoid any payment of capital gains taxes.

On July 16, 1985, Joe Bell, attorney for appellants, responded to this letter, stating in part:

> The offer is not conditioned on the Mississippi land having a value of $900 to $1,000 per acre. Instead, that land, along with the Stacy farm, was to be used as collateral for a loan to your family to purchase the Stacy farm. Your position on this issue is untenable, and any further delay on your part to immediately seek such a loan, and close the sale with the Stacys, will be treated as a breach of your agreement to pay the Stacys the full purchase price.

It can be inferred from Mr. Bell's letter that appellants were aware that it would be necessary for appellees to obtain a loan in order to purchase the property. There is no testimony by appellants or their witnesses which disputes appellees' contention that their success in obtaining a loan was a condition of the agreement.

When two provisions in a contract are contradictory, typewritten provisions prevail over printed ones. *Leonard* v. *Merchants and Farmers Bank*, 290 Ark. 571, 574, 720 S.W.2d 908, 910 (1986); *McKinnon* v. *Southern Farm Bureau Casualty*

Ins. Co., 232 Ark. 282, 285-86, 335 S.W.2d 709, 711 (1960). The typed insertion contained in the parties' agreement "buyers to pledge approximately 900 acres of land in Tallahatchie County in Mississippi together with lands herein described for loan to pay purchase price. . .," clearly created an ambiguity in the contract, and the intent of the parties could not be discerned from the four corners of the agreement. The circuit court, therefore, could properly consider evidence of the parties' intent in construing the language of the contract.

The findings of fact of a circuit court sitting as a jury will not be reversed on appeal unless clearly against a preponderance of the evidence, and in making that determination, we give due regard to the superior opportunity of the trial court to judge the credibility of the witnesses and the weight to be given their testimony. *Bass* v. *Service Supply Co.*, 25 Ark. App. 273, 276, 757 S.W.2d 189, 190 (1988); Ark. R. Civ. P. 52(a). We cannot say that the trial court's holding that appellees' ability to obtain financing was a condition precedent to enforcement of the contract is clearly against the preponderance of the evidence.

Appellants point out that, at the time the contract was drafted, appellee Hunter Williams, Jr., was a newly-licensed first-year attorney and that, if appellees had intended to make their obtaining a loan a condition precedent to the contract, they could have clearly so provided. While this is true, it does not render the language in the agreement unambiguous. The fact that a clause fails to employ the usual words denoting a condition such as "subject to" or "if," is not controlling in determining whether a condition precedent was created. Restatement (Second) of Contracts § 226, Comment a (1981). The contract was drafted by appellants' broker, and therefore, if the language is unclear, it should be construed strictly against appellants. *See Elcare, Inc.* v. *Gocio*, 267 Ark. 605, 608-09, 593 S.W.2d 159, 161 (1980); *Bradbury* v. *Giordano*, 10 N.J. Super. 414, 418, 76 A.2d at 817; *Hawkins & Chamberlain* v. *Mathews*, 242 Ky. 732, 735, 47 S.W.2d at 548.

Furthermore, courts from other jurisdictions have construed similar language, equally unclear, to create conditions precedent. In *Hawkins & Chamberlain* v. *Mathews*, 242 Ky. 732, 733-34, 47 S.W.2d at 547, the following language was found to create a

condition that had to be met before the contract could be enforced: "[A]t the agreed price of Nine Thousand ($9,000.) Dollars, to be paid as follows: At least $1500.00 plus an amount of not less than $6,000 obtained on loan in a building association secured by a first mortgage, to be paid in cash. . . ." In *Bradbury* v. *Giordano*, 10 N.J. Super. 414, 416, 76 A.2d at 816, the appellant, Mr. Giordano, agreed to sell the appellee property for $12,500.00. The appellee agreed to satisfy the purchase price in the following manner:

"On execution of this agreement for which this is also a receipt	$1,000.00
On delivery of deed, cash	$
By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof	$9,600.00
On Bond and Mortgage * * *	$
The purchaser agrees to assume an F.H.A. mortgage now existing on these premises in the amount of $9600.00, and *the purchaser agrees to apply and secure a secondary GI mortgage in the amount of $1,900.* (Italics mine.)	1,900.00
	12,500.00"

In addressing this language, the court stated:

> The language we here deal with is the language of the defendants and should be construed strictly against them. It does not require a strict construction to reach the result that both vendor and vendee dealt with respect to an assumed condition to arise in the future and that the performance of the agreement by each of the parties was contingent and conditioned upon the contemplated event arising.

10 N.J. Super. at 418, 76 A.2d at 817. The court in *Marlatt* v. *LaGrange*, 145 Colo. 50, 52-53, 357 P.2d at 928, found the language " '$2,000.00 in cash including the above deposit on or before ten days from date; Obtained maximum loan and balance to be carried on 2nd Deed of Trust by Seller. . .' " to be vague

and indefinite and, therefore, held that the trial court could receive parol evidence to determine the parties' intentions. And in *Lopez* v. *Broussard*, 308 So.2d at 839, the court found that a contract provision which stated " '16.000-I.S.L.' " meant the remaining $16,000 purchase price was to be paid from the proceeds of a loan obtained from Iberia Savings & Loan Association and that the sale was conditioned on Ms. Broussard obtaining a loan. 308 So.2d at 839-41.

Appellants cite *Christy* v. *Pilkington*, 224 Ark. 407, 273 S.W.2d 533 (1954), and *Ingham Lumber Co.* v. *Ingersoll*, 93 Ark. 447, 125 S.W. 139 (1910), for the proposition that financial inability to pay does not discharge an unqualified contractual duty to perform a contract. In *Christy* v. *Pilkington*, the Christys executed a valid written contract by which they agreed to buy an apartment house from Mrs. Pilkington for $30,000.00. When the time came to pay, the Christys were unable to do so, and Mrs. Pilkington sued for specific performance. In affirming the chancery court's decree in favor of Mrs. Pilkington, Justice George Rose Smith wrote:

> Proof of this kind does not establish the type of impossibility that constitutes a defense. There is a familiar distinction between objective impossibility, which amounts to saying, "The thing cannot be done," and subjective impossibility—"I cannot do it." Rest., Contracts, § 455; Williston on Contracts, § 1932. The latter, which is well illustrated by a promisor's financial inability to pay, does not discharge the contractual duty and is therefore not a bar to a decree for specific performance.

224 Ark. at 407, 273 S.W.2d at 533. In *Christy*, there was no evidence the duty to perform was conditional. In the case at bar, however, there is evidence from which the court could find that appellees' duty to perform was conditioned on obtaining the necessary loan.

Likewise, in *Ingham Lumber Co.* v. *Ingersoll*, the appellant sought to be released from a contract because the appellant "could not get money into the country with which to pay for the work." The supreme court responded:

> But the written contract did not provide for a release of the defendant from liability upon such a contingency. The

> rights of the parties must be measured by the contract which they themselves made. A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform. A valid contract cannot be abrogated or modified unless both parties assent thereto; and if one of the parties manifests in unequivocal language his intention not to perform the contract unless it is modified, he breaches the contract. He may not be compelled to perform the undertaking but he cannot, on account of the hardship of the undertaking, relieve himself from the liability incurred by the contract.

93 Ark. at 452, 125 S.W. at 142. The court, quoting from *Johnson* v. *Bryant*, 61 Ark. 312, 315, 32 S.W. 1081, 1089 (1895), went on to state: "Inconvenience or the cost of compliance, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful." *Ingham Lumber Co.* v. *Ingersoll*, 93 Ark. at 452, 125 S.W. at 142. The issue in the case at bar, however, is not impossibility; the issue is whether the appellees' duty to perform was made conditional under the terms of the parties' agreement.

Appellants further argue that appellees and their agents unreasonably delayed in attempting to obtain the necessary loan, and therefore, did not exercise good faith. *See Betnar* v. *Rose*, 259 Ark. 820, 826-27, 536 S.W.2d 719, 723 (1976), which held that, in the absence of specific provisions in a contract, the buyers have the duty to make reasonable efforts and to accept reasonable terms in procuring a loan. Here, the circuit judge found the contrary to be true. In fact, he held that appellees not only made reasonable efforts, but made extensive efforts, to obtain a loan within a reasonable time and further noted that they went beyond their obligation by pledging an additional 120 acres of land in attempting to obtain the loan.

The evidence demonstrated that the agreement was signed on June 14, 1985; however, appellees were not notified that the problem regarding the existing lease of the farm had been resolved until a month later. Burl Calhoon, appraiser for Equitable Farm Mortgage Department, testified that he could not have

made the loan if there were any outstanding leases. Mr. Calhoon also testified that he told appellants' agent, Kemp Whisenhunt, at a meeting on June 25, that he would need a legal description, because one was not attached to the contract. On August 5, 1985, however, he still had not received the description from Mr. Whisenhunt, and he had to go to the office of appellees' attorney in order to get it from the abstracts. He also testified that the appellees were prompt and cooperative in getting him everything he needed to process the loan.

Malcomb Greenway, appellee Hunter Williams, Jr.'s great uncle, acted as appellees' agent in obtaining a loan. He testified that he had been arranging farm loans for over thirty-five years and that he contacted seven different lending institutions regarding making the loan. He stated that Equitable was the only lender who showed any interest.

Appellants also argue that appellees failed to use reasonable efforts by not following through on appellants' offer to finance a portion of appellees' purchase. The terms of this offer are very vague. Appellants introduced a letter into evidence, dated September 17, 1985, from their attorney, Joe Bell, to appellees' attorney, Graham Sudbury, informing appellees that appellants were willing to finance a portion of the purchase price. No other details were given. The letter further provided:

> This proposal needs to be acted on this week, as the Stacys will offer the land to other buyers, because of the Williams' failure to close. If the Williams desire to pursue the matter further, they should get in touch before September 20, 1985, since the farm will be offered for sale next week.

Graham Sudbury testified that he had an earlier conversation with Joe Bell in September in which Bell stated that appellants would be willing to sell the property for $750,000.00, with a four-hour time limit. Sudbury testified that he interpreted this offer to mean that appellees had four hours to come up with $750,000.00, which he felt was ridiculous. Hunter Williams, Jr., testified that he first saw Bell's letter on September 20th and by that time, his father, one of the buyers, was unconscious and, under the circumstances, he did not know what else he could do.

Whether the efforts of the appellees in the case at bar were reasonable was a question for the trier of fact. *See Betnar* v. *Rose*, 259 Ark. at 827, 536 S.W.2d at 723. Based on the evidence before the circuit judge, we cannot say his holding is clearly against the preponderance of the evidence.

Affirmed.

ROGERS and COOPER, JJ., dissent.

JUDITH ROGERS, Judge, dissenting. I respectfully dissent from the decision of the majority because the language employed in the purchase agreement did not create a condition precedent. The majority affirmed the chancellor's holding that a condition precedent existed in the contract which conditioned the appellees' obligation to purchase appellants' farm on their ability to obtain financing. This interpretation is clearly contrary to the terms of the agreement.

We have held that, when contracting parties express their intention in a written instrument in clear and unambiguous language, it is our duty to construe the written agreement according to the plain meaning of the language employed. *Student Loan Guar. Found.* v. *Barnes*, 34 Ark. App. 139, 147, 806 S.W.2d 628, 632 (1991). In construing a contract, the intention of the parties is to be gathered, not from some particular phrase, but from the whole context of the agreement. *Arkansas Power & Light Co.* v. *Murry*, 231 Ark. 559, 563, 331 S.W.2d 98, 100 (1960). In *North* v. *Philliber*, 269 Ark. 403, 602 S.W.2d 643 (1980), the supreme court stated:

> It is also a well-settled rule in construing a contract that the intention of the parties is to be gathered not from particular words and phrases but from the whole context of the agreement. In fact, it may be said to be a settled rule in the construction of contracts that the interpretation must be upon the entire instrument and not merely on disjointed or particular parts of it. The whole context is to be considered in ascertaining the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause. Every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any

> reasonable purpose thereof which can be gathered from the whole instrument. The contract must be viewed from beginning to end, and all its terms must pass in review, for one clause may modify, limit, or illuminate the other. Taking its words in their ordinary and usual meaning, no substantive clause must be allowed to perish by construction, unless insurmountable obstacles stand in the way of any other course. Seeming contradictions must be harmonized, if that course is reasonably possible. Each of its provisions must be considered in connection with the others, and, if possible, effect must be given to all.

269 Ark. at 406-07, 602 S.W.2d at 645 (quoting *Fowler* v. *Unionaid Life Ins. Co.*, 180 Ark. 140, 144-45, 20 S.W.2d 611, 613 (1929)).

The contract does not contain any language creating a condition precedent. The contract clearly provides that the purchaser "shall not be released from any of [p]urchaser's agreements and undertakings as set forth herein, unless otherwise stated. . . ." No provision for release of the appellees in the event they are unable to obtain financing is included in the contract. In fact, the contract specifically provides for the only conditions under which appellees can be released:

> If the title is not good and cannot be made good within a reasonable time after written notice has been given that the title is defective, specifically pointing out the defects, then the above earnest money shall be returned to Purchaser and the usual commission shall be paid to the undersigned Agent by Seller. If the title is good and Purchaser shall fail to pay for Property as specified herein, Seller shall have the right to elect to declare this contract cancelled, and upon such election, the earnest money shall be retained by and divided equally between Seller and Agent, as liquidated damages and commission respectively, but in no event shall Agent's share exceed the regular commission. The right given Seller to make the above election shall not be Seller's exclusive remedy, and either party shall have the right to elect to affirm this contract and enforce its specific performance or recover full damages for its breach. . . .

For the majority to find the contract is conditional renders this language meaningless. A construction which neutralizes any provision of the contract cannot be adopted if the contract can be construed in a way which gives effect to all its provisions. *Lindell Square Ltd. Partnership* v. *Savers Fed. Sav. and Loan Ass'n*, 27 Ark. App. 66, 71, 766 S.W.2d 41, 44 (1989).

The majority has affirmed the chancellor's finding that the following typed language the parties inserted in the printed agreement created a condition precedent:

> Buyers to pledge approximately 900 acres of land in Tallahatchie County in Mississippi together with lands herein described for loan to pay purchase price. 1985 crop rent of 1/4 cotton and 1/3 other crops to be transferred to buyer. Closing on or before August 1, 1985.

It is clear that the parties never intended by this language to condition the sale on appellees' obtaining financing. Read as a whole, this provision speaks not only of appellees' pledging certain lands as collateral for the purchase, but also of appellees' receiving the benefit of crop rents on the land to be purchased. According to the plain language of the contract then, the obvious construction of the language inserted in the agreement is that it was simply intended to explain the terms of financing the purchase.

> Contracts for the sale and purchase of land frequently contain provisions referring to financing arrangements proposed to be made by the purchaser. Determination of the force and effect of such provisions involves the application of the usual rules for construction of contracts for the purchase and sale of land.
>
> Whether or not a provision in a contract for the sale of realty referring to the purchaser's uncompleted arrangement for financing the balance of the purchase price creates a condition precedent to performance of the contract depends primarily upon the intention of the parties as deduced from the language of the contract, the surrounding circumstances at the time the contract was executed, and the purpose sought to be accomplished by the contract.

77 Am. Jur. 2d *Vendor and Purchaser*, § 66 (1975). Moreover,

the court's finding that the parties intended for a condition precedent to be included in the contract is clearly against the preponderance of the evidence.

Appellee Hunter Williams, Jr., testified at trial that it was made perfectly clear to appellants' broker that appellees had to obtain a loan in order to purchase the farm and, after these discussions, the purchase agreement was prepared. If appellees had intended that such a condition be a term of the contract, they could have clearly so provided. Nevertheless, appellees signed the agreement without such a condition being included. Appellee is a lawyer and presumably knows that a written contract merges and thereby extinguishes all prior and contemporaneous negotiations, understandings, and verbal agreements of the same subject matter. *See Farmers Cooperative Ass'n, Inc.* v. *Garrison*, 248 Ark. 948, 952, 454 S.W.2d 644, 646 (1970).

Furthermore, appellees' actions negate any inference that the purchase agreement was conditional. After the agreement was executed, appellees discovered there was an outstanding lease on the property and attempted to rescind the contract. In his letter notifying appellants of the intended rescission, appellee Hunter Williams, Jr., discussed his understanding of the parties' agreement. He stated:

> 3. There was a mutual mistake between your agent, Kemp Whisenhunt, and my family as to the market value of farm land that my family owns in Tallahassee County, Mississippi. Your agent and my family were of the opinion that the market value of this land was between $900.00 and $1,000.00 an acre. In actuality, the land only enjoys a present market value of $600.00 per acre. The basis of any offer to purchase your land was to finance the purchase by selling the Mississippi land. In fact, an exchange of property along with the cash difference between the market value of the properties was being negotiated to avoid any payment of capital gains taxes.
>
> 4. In light of the present market value of the Mississippi land, and the age of my parents, it is highly doubtful that any lending institution would finance this purchase.

Although in his letter he discussed the value of the collateral to be used in obtaining a loan, he never stated that appellees' performance was conditioned on obtaining a loan.

In response to this letter, appellants' attorney replied:

> This firm, along with Oscar Fendler represents Ed and Peggy Stacy in connection with your family's June 14, 1985 agreement to buy a 588 acre farm from the Stacys. Your July 3, 1985 letter to Ed Stacy, stating your family's unilateral attempt to rescind the agreement has been referred to Mr. Fendler and me for answer. It is Ed and Peggy Stacys' position that a binding contract to purchase has been consummated and they are unwilling to rescind that contract.

The majority infers from this statement that appellants were aware appellees needed financing in order to purchase the property. While this may be a correct inference, it is not evidence that the parties agreed that obtaining this financing would be condition precedent to the contract.

Furthermore, on being notified that the problems regarding the outstanding lease had been cleared, appellee responded:

> I am in receipt of your letter of July 16, 1985. My family welcomes the news that Koehler Blankenship has agreed to vacate the Stacy farm prior to January 1, 1986. With that news, most of the problems my family had with consummating this land purchase have been remedied.
>
> My family has always wanted to purchase the Stacy farm and have been working toward that goal since July 3, 1985. An appraisal of our Mississippi land was conducted and the value attached to the cultivable acres was between $900.00 and $1,000.00 an acre.

Again, no mention is made of any existing condition which would relieve appellees from performing under the contract. Even the letter from appellees' attorney, Graham Sudbury, advising appellants that appellees had been unable to obtain financing, does not state that the appellees were released from their obligation to purchase the farm because they were unable to obtain financing. In fact, it was not until appellees filed their counterclaim, almost a

year after appellants had filed suit, that they first argued the agreement terminated because of the failure of a condition precedent.

Although it may have been impossible for appellees to purchase the farm when they were unable to obtain the necessary loan, that impossibility does not relieve them of the obligation to do so.

> Subjective impossibility, except in cases where it is also objective, does not excuse non-performance of a contract. Insolvency or inability to obtain necessary funds is a perfect illustration of subjective impossibility. It absolutely precludes making a payment contracted for; but unless wrongfully caused by the creditor, insolvency is no excuse. And any impossibility arising from a promisor's inadequate pecuniary resources will very rarely afford an excuse.

18 Samuel Williston, *Contracts*, § 1932 at 10-11 (3d ed. 1978). *See also Christy* v. *Pilkington*, 224 Ark. 407, 273 S.W.2d 533 (1954); *Ingham Lumber Co.* v. *Ingersoll*, 93 Ark. 447, 452, 125 S.W. 139, 142 (1910).

It is the duty of the court to construe a contract according to its unambiguous language without enlarging or expanding its terms. *Christmas* v. *Raley*, 260 Ark. 150, 153, 539 S.W.2d 405, 407 (1976). It is not within the province of the court to add conditions in order to relieve a party from the harshness of the binding effect of a contract. *Accord Rector-Phillips-Morse, Inc.* v. *Vroman*, 253 Ark. 750, 753, 489 S.W.2d 1, 4 (1973). Here, there is no provision in the contract making appellees' obligation to perform the contract contingent upon their ability to obtain a loan. In the absence of such a provision in the agreement, a condition cannot be read into the contract by the court. *See Baugh* v. *Johnson*, 6 Ark. App. 308, 315, 641 S.W.2d 730, 734 (1982). For the majority to look outside the four corners of this purchase agreement and add additional terms in order to allow appellees to escape the binding effect of their agreement renders thousands of contracts uncertain and will throw them into the courts.

In sum, I do not regard the provision as being ambiguous,

and I think it clear that this provision was included as merely a reference to the proposed financing arrangements but not as a condition precedent such that appellees' inability to obtain a loan would relieve them of their obligations under the contract of sale. There is no language in this contract which states that the provision was intended as a condition precedent, and while it can be said that it was known that appellees needed a loan to purchase the property, the evidence introduced does not support a finding that the purchase was conditioned on their obtaining a loan. I think it an unwise course to expand the terms of the contract to create a condition precedent, thereby allowing the appellees to escape the binding effect of their agreement to purchase the property. Contracts should not be so easily discarded, and I object to taking such wide latitude in interpreting contracts so as to alter the plain meaning of the language employed. The import of the decision by the majority goes far beyond this particular case. It places in jeopardy the custom and usage in the commercial world of offer and acceptance in real estate transactions. I would therefore reverse the decision of the chancellor but remand the case to him for a determination of appellants' damages.

Judge Cooper joins in this dissenting opinion.

Terry Michael STEVENS *v.* STATE of Arkansas

CA CR 91-255 832 S.W.2d 275

Court of Appeals of Arkansas
Division I
Opinion delivered June 3, 1992

John Joplin, for appellant.

Winston Bryant, Att'y Gen., by: *Melissa K. Rust*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Terry Stevens was charged by information with possession of drug paraphernalia and possession of methamphetamine. The State also alleged that he had at least four prior felony convictions and was subject to extended imprisonment as an habitual offender under Ark. Code Ann. 5-4-501

(1987). The jury found Stevens guilty of possession of drug paraphernalia and he was sentenced by the court to ten years imprisonment.

On appeal three issues are raised: (1) that the court erred in not granting appellant's motion to suppress; (2) that the court erred in denying a motion for mistrial made during closing argument; and (3) that the court erred in admitting evidence of some of the appellant's prior convictions. We find no error and affirm.

On June 4, 1990, Jerry Roller, a Fort Smith police officer, saw the appellant run a red light. Roller pursued Stevens at speeds approaching eighty miles an hour and saw Stevens run several stop signs. When he was finally stopped, the appellant got out of his car, locked it, tossed the keys inside, and shut the door. The vehicle was a Chevrolet Chevette hatchback. The appellant was immediately placed under arrest for DWI and fleeing an officer. Police officers promptly unlocked the car and searched it. Drug paraphernalia was found in an athletic bag located in the hatchback area.

At the hearing on the motion to suppress, Officer Roller testified that it was the normal practice of the department to search the vehicle when the driver is placed under arrest. Roller also testified that this was "an inventory type search" and that the department had no policy whatever in regard to the opening of closed containers.

Stevens argues that this was an inventory search and that because the department had no policy regulating opening of closed containers the search was not a reasonable one within the meaning of the Fourth Amendment to the United States Constitution. *Florida* v. *Wells*, 495 U.S. 1 (1990); *see also Kirk* v. *State*, 38 Ark. App. 159, 832 S.W.2d 271 (1992). The State, on the other hand, contends that the case is governed by *New York* v. *Belton*, 453 U.S. 454 (1981), because it was a search of an automobile incident to a lawful custodial arrest. We agree with the State.

All searches conducted without a valid warrant are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant. *Coolidge* v.

New Hampshire, 403 U.S. 443 (1971); *Johnson* v. *State*, 291 Ark. 260, 724 S.W.2d 160 (1987), *cert. denied* 484 U.S. 830. In *New York* v. *Belton*, 453 U.S. 454 (1981), the defendant was stopped for speeding, the officer smelled marijuana, and the defendant was arrested for possession. The officer then searched the passenger compartment of the car, found a leather jacket, unzipped one of the pockets, and discovered cocaine. In rejecting the defendant's contention that the Fourth Amendment had been violated the Court said:

> [W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.
>
> It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment. . . . Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.

In the case at bar, there is no question but that the defendant was lawfully arrested and that the search was a contemporaneous incident to the arrest. Although the Court in *Belton* stated that its holding did not extend to the trunk of a car,[1] courts which have considered the issue have held that the "hatchback" area of a vehicle is within the "passenger compartment" of the car, as that phrase was used in *Belton*. *United States* v. *Russell*, 670 F.2d 323 (D.C. Cir. 1982), *cert. denied* 457 U.S. 1108; *State* v. *Delossantos*, 211 Conn. 258, 559 A.2d 164 (1989), *cert. denied* 110 S.C. 188. *See also* 3 Wayne R. LaFave, *Search and Seizure* § 7.1(c) at 16 (2d ed. 1987 & Supp. 1992). We agree with the conclusions of the courts in *Russell* and *Delossantos*.

We do not think it determinative that the officer described the search as an "inventory search". A search that is justifiable as incident to a lawful custodial arrest is made no less

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[1] *New York* v. *Belton*, 453 U.S. at 461, footnote 4.

so by the officer's description of it as an inventory. We find no error in the court's denial of the motion to suppress.

During closing argument, the appellant's lawyer said:

> The officer saw this car only for a matter of minutes. The testimony did show that it was Terry Stevens' car, but when you consider the evidence in light of your common sense, think — think how it works. A lot of times you know how it is in a household situation. Everyone doesn't just have his or her own car and nobody else rides in it. A lot of times family members use cars to go somewhere. Maybe they borrow the car for a day or two. There's a lot of situations where more than one person uses a vehicle. I don't think you can say just because somebody was seen driving a car for just a few minutes that that proves that he knew everything that was in the car.

He then discussed for the jury the appellant's right to refuse to testify. On rebuttal the prosecuting attorney said:

> He has raised the specter that maybe it is not the defendant's. Well, whose is it? If this bag belonged to somebody else, why isn't anybody in here testifying that they had seen somebody else with this bag or that it is their bag? I can understand why they wouldn't come in and say it's their bag, but. . .

At this point defense counsel was permitted to approach the bench. He argued that the prosecutor's statement was a reference to the defendant's failure to testify and moved for a mistrial. The court denied the motion.

The crux of appellant's argument is that the prosecutor's statement constituted a veiled reference to his failure to testify. *See Bailey* v. *State*, 287 Ark. 183, 697 S.W.2d 110 (1985). In *Bailey* the supreme court held that the trial judge should have granted a mistrial when the prosecutor said, in closing:

> The only thing that we've heard here today about which occurred in that room is from Doris Watson. She's the only person. These two ladies that were called, they weren't in that room.

In *Adams* v. *State*, 263 Ark. 536, 566 S.W.2d 387 (1978),

the court reversed for failure to grant a mistrial when the prosecutor said: "To convict him, you don't have to disbelieve any part of their case, because what did the defense, how many witnesses did the defense put on for your consideration?"

The statement made in the case at bar does not fit within the purview of the decisions in *Bailey* and *Adams*. In *Bailey* the court noted that the *Adams* court had distinguished remarks which seemed to refer to the defendant's failure to personally dispute the State's case from remarks relating to the failure of the defense to present any witness or evidence to dispute the State's case. In the case at bar the defendant suggested in closing to the jury that the athletic bag may have belonged to a family member. On rebuttal, the State rhetorically asked, in effect, why that family member had not come forward to testify. We do not think that the statement can be characterized as a veiled reference to the defendant's failure to testify.

Finally, appellant contends that the trial court erred in admitting evidence of prior convictions in which he contends there was "no finding of guilt," relying on *English* v. *State*, 274 Ark. 304, 626 S.W.2d 191 (1981). In *English* the court held that a "court probation" proceeding did not qualify as a previous conviction for purposes of the habitual offender act. Citing *Cantrell* v. *State*, 258 Ark. 833, 529 S.W.2d 136 (1975), the court described "court probation" as one in which there is "a formal refusal to accept [the defendant's] guilty plea." The evidence of the three prior offenses in issue here was a "Statement of the Court Respecting Statutory Probation" and docket sheets in each case showing the entry of a plea of nolo contendere. Each docket sheet indicated that the defendant was placed on five years statutory probation. There is no indication in any of the documents that the court refused to accept the defendant's plea, formally or otherwise. We conclude that Stevens' probation was not the type of court probation discussed in *English*, *supra*. *See Scroggins* v. *State*, 276 Ark. 177, 633 S.W.2d 33 (1982).

Affirmed.

COOPER and ROGERS, JJ., agree.

ROSE DEVELOPMENTS, INC. *v.* PEARSON PROPERTIES, INC., and First National Bank of Sharp County

CA 91-275 832 S.W.2d 286

Court of Appeals of Arkansas
En Banc
Opinion delivered June 3, 1992

C. Dwayne Plumlee, for appellant.

Jeffrey E. Hance, for appellee Pearson Properties, Inc.

Samuel F. Beller, for appellee First National Bank of Sharp County.

MELVIN MAYFIELD, Judge. Rose Developments appeals from the order of the circuit court which permanently enjoined the drawing on, or honor of, a letter of credit, pursuant to Ark. Code Ann. § 4-5-114(2)(b) (Repl. 1991), on the finding that appellant had committed fraud.

On December 6, 1988, appellee Pearson contracted with the appellant Rose to provide material and labor in connection with the construction of building "K" in a condominium project known as Solomons Landing Project. The amount of the contract was $458,200.00. In lieu of a performance bond, Pearson delivered an irrevocable letter of credit in the amount of $25,000.00 to secure its performance under the contract. The letter of credit authorized Rose to draw up to $25,000.00 available by "your drafts at sight" accompanied by an authorized statement that Pearson (d/b/a Homes, Inc.) had failed to perform its obligations

as required under the terms and conditions of its construction contract and the original of the letter of credit. Under the terms of the letter of credit, drafts had to be drawn and negotiated no later than July 15, 1989. Subsequently, buildings "E" and "L" were made addendum to the original contract. The only change was an increase in the price.

On July 5, 1989, S. Brooks Grady, Sr., Vice-President of Rose, stated in a letter to First National Bank (Bank) that "Homes, Inc. has been working on our job at Solomons Landing in Maryland since November 1988. We have been very satisfied with their work, and they are presently working on our third building." On July 15, 1989, the letter of credit was extended until January 12, 1990, for the purpose of working on buildings "E" and "L".

On December 4, 1989, the Bank was notified that Homes, Inc., had failed to perform its obligations as required under the terms and conditions of its construction contract and immediate payment of $25,000.00 was requested under the letter of credit.

On December 12, 1989, Pearson filed a petition for a temporary restraining order against Rose and the Bank alleging among other things that the draft was fraudulently presented upon misrepresentations by Rose, and alternatively that "Ark. Code Ann. Section 4-5-114 specifically grants the Court authority to enjoin the honor of a draft or demand based on 'fraud, forgery, or other defect not apparent on the face of the documents.' "

On December 13, 1989, the court granted the petition. Subsequently, the Bank filed an answer admitting its obligation to honor the draft drawn against the letter of credit unless enjoined by the court and tendered a cashier's check for $25,000.00 to the clerk of the court for safekeeping until further orders.

After a hearing, held May 31, 1990, the trial court found Rose had committed fraud which should prevent it from drawing on the letter of credit and permanently enjoined the Bank from honoring the draft and Rose from drawing on the letter of credit.

■ A letter of credit is a three-party arrangement involving two contracts and the letter of credit: 1) the underlying contract

between the customer and the beneficiary, in this case between Pearson and Rose; 2) the reimbursement agreement between the issuer and the customer, in this case between First National Bank and Pearson; and 3) the letter of credit between the issuer and the beneficiary, in this case between First National Bank and Rose. The significant part of this arrangement is the "independence principle" which states that the bank's obligation to the beneficiary is independent of the beneficiary's performance on the underlying contract. 2 J. White & R. Summers, *Uniform Commercial Code* § 19-2 (3d ed. 1988). "Put another way, the issuer must pay on a proper demand from the beneficiary even though the beneficiary may have breached the underlying contract with the customer." *Id.* at 8. "It is not a contract of guarantee. . . even though the letter fulfills the function of a guarantee." Id. at 9.

The letter of credit involved in this case is a standby letter of credit which has been characterized as a "back-up" against customer default on obligations of all kinds. *Id.* § 19-1, at 4. Such letters function somewhat like guarantees because it is the customer's default on the underlying obligation that prompts the beneficiary's draw on the letter. *Id.* at 4. The risk to the issuer is somewhat greater than in a commercial letter of credit in that the commercial letter gives the issuer security in goods whereas the standby letter gives no ready security, and the banker behaves as a surety. *Id.* at 6. The standby letter of credit is somewhat akin to a performance bond in that:

> In place of a performance bond from a true surety, builder (customer) gets his bank (issuer) to write owner (beneficiary) a standby letter of credit. In this letter, issuer engages to pay beneficiary-owner against presentment of two documents: 1) a written demand (typically a sight draft) which calls for payment of the letter's stipulated amount, plus 2) a written statement certifying that customer-builder has failed to perform the agreed construction work.

Id. at 4. One difference between the standby letter of credit and the surety contract is that the standby credit beneficiary has different expectations.

In the surety contract situation, there is no duty to

> indemnify the beneficiary until the beneficiary establishes the fact of the obligor's nonperformance. The beneficiary may have to establish that fact in litigation. During the litigation, the surety holds the money and the beneficiary bears most of the cost of delay in performance.
>
> In the standby credit case, however, the beneficiary avoids that litigation burden and receives his money promptly upon presentation of the required documents. It may be that the account party has in fact performed and that the beneficiary's presentation of those documents is not rightful. In that case, the account party may sue the beneficiary in tort, in contract, or in breach of warranty; but during the litigation to determine whether the account party has in fact breached his obligation to perform, the beneficiary, not the account party, holds the money.

J. Dolan, *The Law of Letters of Credit*, at 1-18, 1-19 (2d ed. 1991).

Letters of credit are governed by the "Uniform Commercial Code-Letters of Credit," Ark. Code Ann. § 4-5-101 through 117 (Repl. 1991). Section 4-5-114(1) provides that an issuer must honor a draft which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract between the customer and the beneficiary. However, the issuer does not have an absolute duty to honor a draft authorized by the letter of credit. An exception is provided by § 4-5-114(2) which provides that an issuer need not honor the draft if "a required document does not in fact conform to the warranties made on negotiation or transfer of a document of title (§ 4-8-306) or of a certificated security (§ 4-8-306) or is forged or fraudulent or there is fraud in the transaction." Section 4-5-114(2)(b) provides that in all other cases as against its customer an issuer may honor the draft despite notification from the customer of fraud, forgery, or other defect not apparent on the face of the documents but a court of appropriate jurisdiction may enjoin such honor.

On appeal, it is argued that the trial court erred in finding the appellant committed fraud which would prevent it from drawing on the letter of credit. Appellant admits that courts have allowed injunctions for "fraud in the transaction" but argues an injunc-

tion is proper only if there is no bona fide claim to payment, and the wrongdoing of the beneficiary has so vitiated the entire transaction that the legitimate purposes of the independence principle would no longer be served. *See Intraworld Industries, Inc.* v. *Girard Trust Bank*, 336 A.2d 316 (Pa. 1975); *Sztejn* v. *Henry Schroder Banking Corp.*, 31 N.Y.S.2d 631 (1941). Appellant contends that Pearson has established only that there may be a dispute as to some of the "back charges". (Back charges have to do with material and labor that needs or needed to be performed, that Pearson was supposed to be responsible for, but appellant had to take over.)

Appellees agree the only issue on appeal is whether appellant committed fraud which would justify the issuance of the injunction and argue the injunction was proper. Appellee Pearson contends that in December 1989 or January 1990 it received a number of back charges dating as far back as December 1988; that it had never previously received these charges; that appellant, while in possession of documents it claimed were back charges, wrote a letter to obtain an extension of the letter of credit stating it was "very satisfied with the work of Homes, Inc."; and that appellant knowingly misrepresented the facts in order to obtain an extension of the letter of credit.

In support of its argument, appellee Pearson cites *W.O.A. Inc.* v. *City National Bank of Fort Smith, Ark.*, 640 F. Supp. 1157 (W.D. Ark. 1986), and *Shaffer* v. *Brooklyn Park Garden Apartments*, 250 N.W.2d 172 (Minn. 1977). Those cases, however, involved false certification accompanying drafts for payment and have no application here. In *City National Bank* the appellant intentionally misrepresented the state of affairs when, though it had been paid, it presented drafts for payment under a letter of credit. That case relied on *Roman Ceramics Corp.* v. *Peoples National Bank*, 714 F.2d 1207 (3d Cir. 1983), which held that a beneficiary who tenders a draft knowing that its certification of nonpayment by the buyers is false, is guilty of fraud in the transaction. Similarly, *Shaffer* involved a situation where letters of credit guaranteed payment of certain promissory notes. The issuer received documents which appeared to comply with the presentation requirements under the letters of credit; however, the certifications which stated the customers had defaulted on their loans were false.

In the instant case, the certification stated that "Homes, Inc., has failed to perform its obligations as required under the terms and conditions of their construction contract." At trial, Robert Pearson III, Vice-President of Homes, Inc., testified they did not allege that there were forgeries "or anything like that" involved in the demand for payment on the letter of credit. Pearson admitted the letter of credit was to protect appellant in the event Pearson did not pay for labor, materials and other supplies that might be incorporated into the structure; that there were outstanding materialmen's and laborers' liens against the project; and that some of those liens were for materials, labor, and supplies that were the responsibility of Pearson. Pearson testified his allegation of fraud was based on the contention that he had been billed for work outside his contract and that Rose had called upon the letter of credit based upon certain back charges. Pearson said the majority of the back charges were unacceptable, but acknowledged that 10% of the charges were legitimate.

Appellee Bank admits this case does not involve forgery or "other defect not apparent on the face of the documents". John Thornton, Executive Vice-President of the Bank, testified he would not have extended the original letter of credit without Rose's statement that the jobs were being done in a satisfactory manner. Appellee Bank argues that none of the back charges, that predated the extension of the letter of credit, were mentioned in appellant's letter which induced the Bank to extend the letter of credit. And the Bank contends that Rose's fraud can be categorized as both egregious and intentional and that the injunction was a proper statutory remedy.

The narrow question to be decided by this court is whether the evidence will support a finding that there was "fraud in the transaction." Our research has revealed no Arkansas cases containing a definition of "fraud in the transaction" as used in the section of the Uniform Commercial Code that is involved in this case. Some courts have held that fraud in the transaction must be of such an egregious nature as to vitiate the entire underlying transaction so that the legitimate purposes of the independence of the bank's obligation would no longer be served. *See Roman Ceramics Corp.* v. *Peoples National Bank*, 517 F. Supp. 526 (M.D. Pa. 1981), *aff'd*, 714 F.2d 1207 (3d Cir. 1983); *Intraworld*, *supra*; *Sztejn*, *supra*. Other cases and writers have

suggested intentional fraud should be sufficient to obtain injunctive relief in letter of credit cases. *See NMC Enterprises, Inc.* v. *Columbia Broadcasting System, Inc.*, 14 U.C.C. Rep. Serv. 1427 (N.Y. Sup. Ct. 1974); 6 W. Hawkland, *Uniform Commercial Code Series*, § 5-114:09 (1984); Edward L. Symons, Jr., *Letters of Credit: Fraud, Good Faith and the Basis for Injunctive Relief*, 54 Tul. L. Rev. 338 (1980). Professor Symons concludes "a proper definition of fraud will necessarily encompass and be limited by the requirement of scienter: that there be an affirmative, knowing misrepresentation of fact or that the beneficiary state a fact not having any idea about its truth or falsity, and in reckless disregard of the truth." *Symons, supra* at 379. It has also been suggested that the lesson to be learned from this section of the Uniform Commercial Code (Ark. Code Ann. § 5-4-114(2) (Repl. 1990), is that a court should seldom enjoin payment under a letter of credit on the theory that there is fraud in the documents or fraud in the underlying transaction. *See* 2 J. White & R. Summers, *Uniform Commercial Code* § 19-7 (Supp. 1991).

From our consideration of the law and the evidence in this case, we think the trial court erred in enjoining payment under the letter of credit. In the first place, we do not believe appellant's general statement "we have been very satisfied with their work" is sufficient for a finding of fraud. At the time this statement was made, appellant had extended Pearson's contract for building "K" to include buildings "E" and "L", and it seems obvious that appellant's statement was truthful or appellant would not have extended the contract. Also, the testimony shows that the total amount of the contract for building "K" was $458,200.00 and that the back charges which pre-date the statement complained of totalled only approximately $1,944.81. We do not believe the existence of back charges in that small amount supports a finding that appellant committed fraud when it said "we have been very satisfied with their work."

As to the argument that appellant's fraud consisted of billing for work that was outside its contract and other disputed back charges, Robert Pearson III testified his allegation of fraud was that the letter of credit was being called upon because appellant said that based upon "these back charges" they were still owed money, but Pearson testified that as far as "these back charges" are concerned "the majority of them are unacceptable." Pearson

testified appellant was claiming a total of $50,000.00 to $60,000.00 in back charges on a project which totaled over $1.2 million. This is simply a contract dispute relating to back charges which may have to be resolved in litigation. However, as explained in *Dolan, supra*, in the standby letter of credit case "the beneficiary avoids that litigation burden and receives his money promptly" and during the litigation "the beneficiary, not the account party, holds the money."

When we apply the law to the evidence in this case, we think it was clearly erroneous to find that appellant committed fraud that should prevent it from drawing on the letter of credit; therefore, it was error to grant permanent injunctive relief to appellee Pearson and prevent the Bank from honoring the draft drawn on the letter of credit.

Reversed and remanded for any necessary proceedings consistent with this opinion.

CRACRAFT, C.J., and DANIELSON, J., dissent.

WELCH'S LAUNDRY AND CLEANERS *v.* Vera A. CLARK

CA 91-333 832 S.W.2d 283

Court of Appeals of Arkansas
Division II
Opinion delivered June 3, 1992

Bridges, Young, Matthews, Homes & Drake, by: *Michael J. Dennis*, for appellant.

Baim, Gunti, Mouser, DeSimone, & Robinson, by: *William Kirby Mouser*, for appellee.

MELVIN MAYFIELD, Judge. Welch's Laundry and Cleaners has appealed a decision of the Workers' Compensation Commission which awarded Vera A. Clark benefits for injuries suffered in a fight with a co-worker. The Commission held that because the altercation occurred during business hours, on the employer's premises, and as the result of a quarrel having its origin in the employment, the injuries were compensable. Appellant argues on appeal that the Commission erred in finding that there was a causal relationship between the employment and the altercation and in not finding that the claimant was barred from receiving benefits as the aggressor.

The compensability of an injury suffered in an on-the-job assault was explained in *San Antonio Shoes* v. *Beaty*, 28 Ark. App. 201, 771 S.W.2d 802 (1989).

> The general rule applicable here has been restated several times. Injuries resulting from an assault are compensable where the assault is causally related to the employment, but such injuries are not compensable where the assault arises out of purely personal reasons.
>
> In *Westark Specialties et al.* v. *Lindsey*, 259 Ark. 351, 353, 532 S.W.2d 757, 759 (1976), the supreme court

quoted Larson with approval:

> Assaults arise out of the employment either if the risk of assault is increased by the nature or setting of the work, *or if the reason for the assault was a quarrel having its origin in [the] work.* (Emphasis in *Lindsey*.)
>
> The court also said that a "causal connection with the employment may be shown by connecting with the employment the subject matter of the dispute leading to the assault." 259 Ark. at 353, 532 S.W.2d at 759.

28 Ark. App. at 203-04. (Citations omitted.)

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).

Vera A. Clark was employed by Welch's Laundry & Cleaners on April 5, 1990, when she suffered injuries in a fight with a co-worker. There was evidence that Vera Clark and Joanna Sullivan had been friends for many years. Mrs. Clark testified that on April 4 she went home for lunch, became ill, and did not return to work. Mrs. Clark's husband called the employer and reported her illness. According to her testimony, when she returned to work the next day Mrs. Sullivan told her, "All hell broke loose yesterday when you didn't return back to work after lunch." When Mrs. Clark asked why this happened, Mrs. Sullivan started cursing her, and an argument broke out. Mrs. Clark said Mrs. Sullivan kept "picking" at her all morning and after lunch Mrs. Sullivan walked past her, pointed her finger at her, and said "in a very angry tone of voice," that they needed to talk after work. Mrs. Clark said she told Mrs. Sullivan to "go to hell," and Mrs. Sullivan hit her "up side the head." The women were separated by other employees and the manager sent them

both home for the day, but they resumed fighting in the parking lot. Both women were subsequently fired.

The women and their husbands testified that the women had also fought eight years previously in a bar, but the women insisted that they had "patched up" their differences and remained friends. They said they socialized together and had been in no other arguments since the dispute eight years before. In fact, Mrs. Sullivan had been instrumental in getting Mrs. Clark the job at the cleaners.

Jeff Welch, assistant manager at the cleaners, testified that on April 4 when Mrs. Clark did not return to work Mrs. Sullivan told him she had called Mrs. Clark's home and got no answer, even though Mrs. Clark was supposed to be home sick. Welch said Mrs. Sullivan had no authority to check on Mrs. Clark for the business. He also admitted that, after much prodding from Mrs. Sullivan, he had told Mrs. Sullivan that Mrs. Clark's husband had told him that Mrs. Clark had "kicked her [Sullivan's] rear end before and looked like she was going to have to do it again." Welch said the next day, when the women fought, he ran in when he heard Mrs. Clark calling him and saw the women lying in the floor.

Joanna Sullivan testified that on April 4 after lunch she called Mrs. Clark because she was concerned about her health but did not get an answer. She said she told "some of the girls" and Mr. Welch about Mrs. Clark not being at home. She admitted she was upset because, "I was the only one left there expected to do all the work." She denied, however, that she was trying to get Mrs. Clark into trouble. Mrs. Sullivan admitted that the next day she and Mrs. Clark got into an argument over Mrs. Sullivan telling co-workers that Mrs. Clark was not at home the afternoon before when she was supposed to have been sick, but she said she did not curse Mrs. Clark until after lunch when Mrs. Clark started cursing her and calling her a liar. She said she told Mrs. Clark, "Ann, we need to talk after work," to which Mrs. Clark replied, "You go straight to hell, bitch," and shoved her.

John Seymore, a college student who worked afternoons in the laundry, testified that he was standing beside Mrs. Clark when the fight broke out. According to him, Mrs. Sullivan walked by, pointed at Mrs. Clark and said, "I need to talk to you. I want to

talk to you after work," to which Mrs. Clark replied something like, "Go to hell"; then "they both kind of jumped at each other and they started fighting, and they fell into the clothes and they hit a table and then they fell on the floor." He said Jeff Welch came running and "he grabbed one of them and I grabbed the other one and pulled them apart. And that was about it. Jeff told them to go home." When asked which one actually started the fight he replied, "I don't think either one of them really started it. I mean, it was kind of both of them."

The Commission held:

> The greater weight of the evidence indicates that the dispute was over Sullivan's displeasure and subsequent actions concerning claimant's absence from work the afternoon of April 4, 1990. The evidence simply will not support a finding that the altercation had anything to do with their past difficulties.

Appellant argues that the Commission erred in finding that the preponderance of the evidence supported a causal relationship between the employment and the altercation. Appellant cites *Townsend Paneling* v. *Butler*, 247 Ark. 818, 448 S.W.2d 347 (1969), in which it was held that "injuries are not compensable where the assault arises out of purely personal reasons." Appellant maintains that this fracas was the culmination of a long-standing personal animosity between Mrs. Clark and Mrs. Sullivan involving a relationship that was personal, complex, and stormy. Appellant argues that the "barroom fight" apparently remained vivid in the memories of the claimant and her husband; and to the Clarks, "the fight remained the moment of victory to be remembered and potentially relived." Appellant says that these strong feelings had nothing to do with either the claimant's or Mrs. Sullivan's employment at the laundry, and "the spark which ignited the volatile relationship" was not the employment but the claimant's personal words of insult, "bitch" and "go to hell" following closely on warnings of past "whippings" and the prediction of future ones.

We think the testimony will support a finding that Mrs. Sullivan became angry when Mrs. Clark did not return to work after lunch on April 4 because Mr. Welch had already given one worker the afternoon off due to lack of work; that when Mrs.

Clark did not return from lunch that left Mrs. Sullivan to do all the work by herself; and then she called Mrs. Clark's home, allegedly to check on her well-being, and reported to all who would listen that Mrs. Clark was not at home. The next day words were exchanged about Mrs. Clark's absence, cursing started, and the dispute escalated into a physical altercation. However, the dispute, the Commission found, did involve the work.

Appellant's second argument is that the Commission erred in finding that Ark. Code Ann. § 11-9-401(a)(2) (1987) did not bar the benefits. That statute provides:

> However, there shall be no liability for compensation under this chapter where the injury or death from injury was substantially occasioned by intoxication of the injured employee or by willful intention of the injured employee to bring about the injury or death of himself or another.

Appellant contends that Mrs. Clark was the aggressor, or at least a co-aggressor, and thus should not be entitled to benefits. The Commission did not find this to be the case and awarded benefits. We think there is substantial evidence to support that decision.

Affirmed.

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

ARKANSAS BLUE CROSS & BLUE SHIELD, INC. *v.* Paul FOERSTER

CA 91-340 832 S.W.2d 280

Court of Appeals of Arkansas
Division I
Opinion delivered June 3, 1992

Matthews, Campbell & Rhoads, P.A., by: *George R. Rhoads*, for appellant.

Jim Johnson and *Tim Morris*, for appellee.

JUDITH ROGERS, Judge. Arkansas Blue Cross & Blue Shield appeals from a judgment in which it was held liable for the payment of medical expenses incurred by appellee, Paul Foerster, after the termination of his policy under a group plan of insurance. Presenting two issues for reversal, appellant contends that the trial court erred by not correcting an error of law made in a preliminary ruling, and that the court erred in ruling that coverage continued after the cancellation of the insurance con-

tract due to the non-payment of premiums. We agree with appellant's assertion that the policy does not extent coverage for expenses incurred after the termination of the policy. Therefore, we reverse.

In November of 1984, appellee's wife began working at Farmers and Merchants Bank in Rogers, Arkansas. As an employee, she was entitled to participate in a plan of group insurance offered by the bank under a policy issued by appellant. Appellee became an insured member of the plan by virtue of his wife's having selected the option of family coverage. In early April of 1985, appellee sustained a work-related injury to his back. Shortly thereafter, on May 16th, appellee's wife quit her job and obtained employment at another local bank. The insurance contract in this case provides that premiums were to be paid in advance on a monthly basis, and that the member's contract would terminate as of the last day of the month for which premiums had been collected. Since appellee's wife was no longer employed by the bank, her name was not included in the group billing statement for June, and consequently no premium was remitted. Thus, the last premium payment received by appellant on behalf of appellee was for the month of May. Also under the contract, members of the plan were afforded the privilege of continuing coverage as an individual subscriber upon the termination of employment, if application for conversion is made within thirty-one days. However, no application for conversion was requested in this case. According to the stated terms of the contract, the policy was terminated, effective June 1, 1985.

As noted previously, appellee injured his back in April, and he received treatment for this injury both before and after the policy was terminated. Initially, appellee's family physician recommended treatment at a physical therapy clinic and, in addition, appellee was also seen by a chiropractor. By August, when his condition had not improved, he was referred to a specialist, and that September, he underwent surgery for the repair of a herniated disc.

A dispute arose between the parties as to the extent of appellee's coverage under the policy, which eventually led to the filing of this lawsuit by appellee. The conflict primarily involved the question of appellant's liability for post-termination benefits.

Early on in the case, both parties moved for summary judgment. By order of June 1, 1987, the trial judge ruled that appellant continued to be liable for all medical expenses reasonably related to appellee's back injury, despite the cancellation of the contract, because the injury had occurred during the life of the policy. The trial judge also determined, however, that certain questions of fact remained, and those issues, which are not relevant here, were bound over for trial. A bench trial was held in July of 1989, at which time the court was presided over by a different judge. In a letter opinion, dated, April 2, 1991, the trial judge expressed the view that, based on his interpretation of the contract, he did not consider appellant liable for expenses related to the injury which were incurred after the termination of the contract. Nevertheless, he declined to depart from the previous judge's decision on that issue, and judgment was entered in favor of appellee in the sum of $7,039. Appellant then filed a motion for a new trial, asking the court to reconsider its decision not to alter the previous ruling on the question of post-termination liability. The motion was denied.

The principal issue in this appeal is whether or not appellant is responsible for the payment of benefits for expenses incurred when the policy was no longer in effect. The courts that have dealt with this question have generally drawn a distinction between "medical expense" policies on one hand, as opposed to "accident" or "illness" insurance policies on the other. *Mote* v. *State Farm Mut. Auto. Ins. Co.*, 550 N.E.2d 1354 (Ind. Ct. App. 1990); *Ewalt* v. *Mereen-Johnson Machine Co.*, 414 N.W.2d 28 (S.D. 1987); *Auto-Owners Ins. Co.* v. *Blue Cross & Blue Shield*, 349 N.W.2d 238 (Mich. 1984); *Wulffenstein* v. *Deseret Mut. Benefit Ass'n.*, 611 P.2d 360 (Utah 1980); *Blue Cross of Florida, Inc.* v. *Dysart*, 340 So. 2d 970 (Fla. Dist. Ct. App. 1977); *Bartulis* v. *Metropolitan Life Ins. Co.*, 218 N.E.2d 225 (Ill. 1966). *See also* Annot., 66 A.L.R.3d 1205 (1975). This distinction is grounded on the differing risks these policies are intended to insure against. *Auto-Owners Ins. Co.* v. *Blue Cross & Blue Shield*, *supra*. It is said that if the policy is an accident or illness policy, the insured risk is considered the accident or illness itself. Conversely, if a policy provides coverage for expenses or charges, it is the incurring of expenses which is considered the contingency that gives rise to the insurer's liability. *See Wulffenstein* v. *Deseret Mut. Benefit. Ass'n*, *supra*. Thus, when an insurance

policy insures against accidental injury, the insured's right to receive benefits is considered "vested" upon the occurrence of the accident, and termination of the insurance policy does not affect the insurer's liability or its duty to pay benefits for related medical expenses incurred after the termination of the policy. *Mote* v. *State Farm Mut. Auto. Ins. Co.*, *supra*. However, when a policy insures against the incurrence of medical expenses, the benefits cease when the policy is terminated and the insurer is not responsible for expenses which arise after termination. *Id*; *Ewalt* v. *Mereen-Johnson Machine Co.*, *supra*. Ultimately, the result in these cases depends on the construction of the particular insurance policy in question.

Here, the policy is referred to as a "Comprehensive Major Medical Contract." It includes the following pertinent terms:

> ARTICLE XII. OTHER PROVISIONS
>
> . . . .
>
> D. The premium rates initially effective shall be shown in the Group Master Contract, *and continuance of coverage hereunder shall be contingent upon the receipt of the premiums* by the Plan at the Home Office of the Plan in Little Rock, Arkansas.
>
> I. Upon termination of employment you may continue coverage as an individual subscriber. To do this you must apply to us within 31 days of termination. Upon conversion rates and benefits may be substantially different. *If you fail to convert, all benefits shall cease as of the last day for which premiums have been collected.*
>
> . . .
>
> M. *Upon termination of this contract, all benefits, except charges incurred prior to termination, shall cease.*

Further reading of the policy discloses that coverage is described in terms of "expenses," "charges," and "services," such that it is evident that the insured risk was the *expense* related to treatment that is received, and not the underlying accident or a described illness. Based on the above-quoted provisions, it is also apparent that continuing coverage is contingent upon the payment of

premiums, and that the entitlement to benefits ceases in the event that the policy is terminated when premiums are not paid. All of these considerations lead us to the conclusion that appellant is not responsible for the payment of benefits for medical expenses incurred after the policy was canceled. As the Florida Appellate Court said in *Blue Cross of Florida, Inc.* v. *Dysart*, *supra*:

> We think the trial court erred. While the court's rationale may, in proper instances, be applicable to an accident and health policy, it is not applicable to hospitalization and medical expense policies which afford benefits only during the time of coverage. Here, coverage was provided to the plaintiff as a Blue Cross/Blue Shield group subscriber. Continuation of that coverage was to be furnished in consideration of payment in advance of the rates applicable for the type and extent of coverage specified in the contract. Thus, it appears that coverage, to be effective, is dependent upon continued payment of premiums by the subscriber. It seems, therefore, axiomatic that upon termination of the contracts and cessation of premium payments the only coverage available is that stipulated in the contracts. We note the lack of any stipulated postterminations benefits in the contract in this case.

Dysart, 340 So. 2d at 972.

In support of the judgment, appellee makes the argument that the language of the policy is ambiguous and that the terms should be strictly construed so as to provide coverage. We discern no ambiguity, however. We think that the language of the policy is unmistakably clear that liability is predicated on the incurrence of expenses, and that the express terms of the contract dictate that liability for such expenses cease upon the termination of the contract. Therefore, it is unnecessary to resort to the rules of construction and the policy will not be interpreted to bind the insurer to a risk that it plainly excluded and for which it was not paid. *Baskette* v. *Union Life Ins. Co.*, 9 Ark. App. 34, 652 S.W.2d 635 (1983). Appellee also advances the argument that the termination of the policy was ineffective in that appellant did not give notice of the cancellation. However, the policy contains no provision mandating that members be given notice of the termi-

nation of the contract. Consequently, notice was not required. *See Clapp* v. *Sun Life Assurance Co.*, 204 Ark. 672, 163 S.W.2d 537 (1942).

In sum, based upon our review of the record and the insurance policy in this case, we hold that appellant is not liable for posttermination benefits. Because reversal is required on this point, we need not address appellant's alternative ground for reversal of the judgment.

Reversed.

JENNINGS, J., agrees.

COOPER, J., concurs in the result.

A & P's HOLE-IN-ONE, INC. *v.* Sherry MOSKOP

CA 91-292 832 S.W.2d 860

Court of Appeals of Arkansas
Division II
Opinion delivered June 10, 1992

T.B. Patterson, Jr., for appellant.

No response.

GEORGE K. CRACRAFT, Judge. A & P's Hole-In-One, Inc., appeals from an order of the Pulaski County Chancery Court dismissing its complaint, which sought from Sherry Moskop, president of A & P, a full accounting, payment for all unaccounted-for corporate funds, and damages for harm to its reputation and goodwill. We find sufficient merit in one point raised to warrant reversal and remand for further proceedings.

Appellant, A & P's Hole-In-One, Inc. (the corporation), brought this action in the chancery court of Pulaski County against appellee, Sherry Moskop. In October 1988, appellee and

Vernon O. Parker formed the appellant corporation. Pursuant to an agreement between appellee and Parker, Parker advanced the sum of $40,000.00 to be deposited in the corporation account that was to represent a $20,000.00 contribution from each of them. Each would then own equal interests in the corporation. Parker's advance made on behalf of appellee was evidenced by a note payable in monthly installments and secured by a lien on her fifty percent of the corporation stock. According to their written agreement, all checks drawn on the corporate bank account would be signed by both appellee and Parker. The evidence reflects that Parker delivered his check for $40,000.00 to appellee, and she executed the note and security agreement. Parker advanced an additional $10,000.00 of his own funds into the corporate account before the business opened in March 1989.

The corporation engaged in the operation of a miniature golf course. In connection with this operation, the corporation also had a number of coin-operated video games from which it received one-half of all amounts collected. Appellee admitted that she was the president of the corporation and was the person that operated it. Appellee testified that her husband assisted her on occasion but "did what I told him." She admitted that Vernon Parker still worked full-time at his regular job even though he helped out in the evenings.

There was no dispute that appellee kept those company records designed to reflect all receipts and expenditures. According to the testimony, the cash register tapes and other documents showing receipts and disbursements were to be entered in the voucher book on a daily basis. Until mid-April 1989, the records were kept on the company premises. At appellee's suggestion, they were moved to her home and kept there.

At the end of the first six months' operation, appellee went on vacation, leaving operation of the business to Parker. Parker's suspicions were aroused when he discovered that, although the checkbook showed a balance of $7,000.00, a check for the lease payment was not honored because the bank balance was actually less than $300.00. In September 1989, appellee ceased to operate the business and transferred all of her interest in it to Parker in cancellation of the $20,000.00 note given at the time the corporation was formed. It was then learned that, although they

had agreed that all checks would be signed by both Parker and appellee, a number of checks had been written by appellee without Parker's signature or authorization. It was also learned that the account had been opened with an initial deposit of only $38,530.00. From the bank records, he also learned that some checks had been written on the company account to stores, shops, and suppliers for which he had not authorized payment. There was no explanation on the checks indicating for what purpose the payments were being made. Some of the checks were payable to members of appellee's family, and some, in substantial amounts, to appellee personally or to cash. There were canceled checks payable to her husband in excess of $3,000.00, for which there was no explanation.

Parker was able to locate some cash register receipts and other records in a box in the company office. Some others were delivered to him by appellee's husband. Parker never received tapes covering a two- or three-week period. The voucher book was not returned to the corporation, although demand had been made. It was learned from the owners of the video machines that they had paid the corporation over $3,500.00 as its share of the profits on those machines. From information available to the appellant corporation, Parker was able to partially reconstruct its financial affairs. Parker's figures showed that at least $81,206.04 had been received by the corporation, but the bank records and canceled checks would only account for $66,052.70 of that amount. The balance remained unexplained. In addition, the corporation began receiving complaints from a number of suppliers that bills rendered to the corporation had not been paid. Parker advanced an additional $3,500.00 from his personal funds to the corporation to pay those unpaid bills.

Appellee testified that without records she was unable to state the purpose for a number of those checks written to herself, her husband, or places such as Wal-Mart, Sam's, and Family Home Center. She testified that some of the checks payable to her brother were for his labor in construction of the miniature golf course. She testified that she was unaware of the total amount of money that had been received by the corporation, the total amounts disbursed, or the purpose of many disbursements.

At the conclusion of the hearing, the court made the

following announcement:

> As for setting the amount of damages, I'd have to have some specific amount. I can't just award some speculative amount of damages. Quite frankly, in this situation, I'm not certain that it's possible to arrive at a specific amount, at least from the way it appears from here, lacking a more thorough bookkeeping system and method of keeping receipts and records of revenue and so forth. It's just impossible to tell. And that, of course, affects the ability of [appellee] to give an accounting. You say you don't have the books and records; she says she doesn't have the books and records. I don't know how an accounting can be given.
>
> In these cases the person who is asking for relief, the plaintiff, which would be [the corporation], has the burden of proving what we call a preponderance of the evidence. That means that you just have to have the weight of evidence on your side. And I can't say that given the uncertainty of the testimony and the exhibits and the evidence that's been offered that burden has been met.
>
> I don't think things were done the way they should have been done, but I know of no way that I can give you the relief that you asked for. That's going to be my ruling and I'll prepare the order.

From the entry of an order dismissing the complaint with prejudice comes this appeal.

The appellant corporation's complaint alleged, *inter alia*, that it had suffered damage to its reputation and goodwill in the community as a result of appellee's conduct. Appellant offered no evidence as to the amount of any such damages. A party seeking damages has the burden of proving his claim, and if no proof is presented to the trial court that enables it to fix damages in dollars and cents, the trial court cannot award damages. *McCorkle* v. *Valley Forge Insurance Co.*, 11 Ark. App. 41, 665 S.W.2d 898 (1984). We agree with the chancellor that the appellant corporation failed to prove the amount of its actual damages for harm to its reputation and goodwill.

However, we agree with the appellant corporation that the chancellor improperly placed the burden of proof on the corpora-

tion on the issue of accounting for the corporation's property, and that the chancellor erred in dismissing that portion of the complaint seeking reimbursement for corporate funds not properly accounted for.

An accounting is an equitable remedy designed to provide a means for compelling one, who because of a confidential or trust relationship has been entrusted with property of another, to render an account of his actions and for the recovery of any balance found to be due. 1 Am. Jur. 2d *Accounts and Accountings* § 45 (1962). An officer or director of a corporation occupies a fiduciary relation to her corporation. This relation is predicated on the fact that she has voluntarily accepted a position of trust and has assumed the control of the property of others, and as such, occupies a fiduciary relationship to the corporation and its stockholders. *Taylor* v. *Terry*, 279 Ark. 97, 649 S.W.2d 392 (1983); *see also Raines* v. *Toney*, 228 Ark. 1170, 313 S.W.2d 802 (1958); *Hornor* v. *New South Oil Mill*, 130 Ark. 551, 197 S.W. 1163 (1917); *Nedry* v. *Vaile*, 109 Ark. 584, 160 S.W. 880 (1913). The existence of a fiduciary relationship bestows equitable jurisdiction for a suit for an accounting. *Walters-Southland Institute* v. *Walker*, 217 Ark. 602, 232 S.W.2d 448 (1950). The duty to account has been specifically applied to corporate officers who control a corporate enterprise and its funds. *See id.*; *Red Bud Realty Co.* v. *South*, 96 Ark. 281, 299, 131 S.W. 340 (1910).

Here, appellee admitted that she managed and controlled the corporation's financial records. It was admitted that, although Parker's signature was to be required on all checks drawn on the corporate accounts, appellee had opened the account in such a way as not to require his signature or a prior authorization of her expenditures. She issued all checks on her own signature and upon her sole authorization. There was evidence that some of the checks were written to her own order and there were checks written for substantial amounts to her husband. None of those checks bore any indication of their purpose, authorization, or connection with the corporation's business. There were a number of other checks for substantial sums payable to shops and merchants. Those checks also gave no indication of their purpose or connection with the corporation or why they had been paid from corporate funds. From the information available to appellant corporation, it was established that there was a discrepancy

between the amount of money known to have been paid to the corporation and that which passed through its bank accounts, but the exact amount of unauthorized disbursements was unknown.

Under the facts and circumstances reflected by this record, we conclude that it was error for the chancellor not to grant appellant's prayer for an accounting. The chancellor based his denial in part upon appellant's inability to prove the discrepancies. However, the burden of proving that the accounts had been properly handled should have been placed on the fiduciary rather than the corporation. In *Red Bud Realty Co.* v. *South*, *supra*, on facts not entirely unlike those present here, the court explained the duty of a corporate officer, who is entrusted with corporate funds, to account for those funds:

> The dealings of a trustee with the trust property are narrowly scrutinized by courts of equity. If impugned, they cannot stand unless characterized by the utmost good faith and candor. And the burden is upon the trustee to show their entire fairness. Where the duty of the trustee or agent requires it, he must keep true, regular and accurate accounts of all his transactions, both of receipts and disbursements, and should render a full and complete statement, supported by proper vouchers. As is said in the case of *Landis* v. *Scott*, 32 Pa. St. 495: "If he does not, every presumption of fact is against him. He cannot impose upon his principal, or *cestui que trust*, the obligation to prove that he has actually received what he might have received," or that he has not expended what he claims to have paid out. If he does not keep clear, distinct and accurate accounts, with proper vouchers, "all presumptions are against him, and doubts are taken adversely to him." [Citations omitted.]

Red Bud Realty Co., 96 Ark. at 299, 131 S.W. at 348 (1910).

It is apparent from the chancellor's comments that he was swayed to some extent by the fact that neither appellee nor appellant now had the voucher book or a complete set of company records and ledgers. However, it was appellee's duty to keep and maintain these records of the corporation's affairs. She is now in no position to complain or contend that the duty is on the appellant to reconstruct the records of her administration. The

degree of difficulty in preparing a fiduciary account should not foreclose the need of it in an appropriate case. As stated in *Red Bud Realty Co.* v. *South*, *supra*, if appellee does not have the proper records, then every presumption must be taken adversely to her.

The decree of the chancellor is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

DANIELSON and ROGERS, JJ., agree.

Linda DAY *v.* CENTRAL DAY CARE, INC. and Rockwood Insurance Company

CA 91-352 833 S.W.2d 783

Court of Appeals of Arkansas
Division I
Opinion delivered June 10, 1992
[Rehearing denied July 8, 1992.]

L. David Stubbs, for appellant.

Howell, Price, Trice, Basham & Hope, P.A., by: *Carey E. Basham*, for appellees.

JAMES R. COOPER, Judge. The appellant in this workers' compensation case was employed by the appellee on December 18, 1989, when she was injured. The appellant filed a claim for benefits which, after a hearing, was denied on a finding that the appellant did not sustain an injury arising out of and in the course of her employment. From that decision, comes this appeal. We affirm.

The facts of this case can be simply stated. The appellant had been employed by the appellee for approximately two years. In addition to her secretarial duties, the appellant ran errands in her personal vehicle at the direction of her employer. On December 18, 1989, the appellant was directed by the appellee to drop off some material at a CPA firm across town. After dropping off

these materials, and while en route back to the appellee's premises, the appellant stopped by a florist to pick up an order which she had placed for herself earlier by telephone. The florist shop was located on the direct route between the CPA's office and the appellee's place of business on Highway 165. In turning off Highway 165 to the florist, the appellant deviated a distance of 30 to 40 feet. The appellant slipped on some ice and fractured her left ankle while returning to her vehicle carrying a poinsettia.

For reversal, the appellant argued that the Commission erred in failing to apply the "dual purpose" trip doctrine; she contends that application of that doctrine would compel a conclusion that her injury arose out of and in the course of her employment.

The appellant correctly states that the dual purpose doctrine has often been applied in Arkansas. *See, e.g., Martin* v. *Lavender Radio & Supply*, 228 Ark. 85, 305 S.W.2d 845 (1957); *Rankin* v. *Rankin Construction Co.*, 12 Ark. App. 1, 669 S.W.2d 911 (1984). In *Rankin, supra*, we stated that the dual purpose doctrine provides that an injury is within the course of employment if it is sustained during a trip which serves both a business and a personal purpose, if the trip involves the performance of a service for the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal journey. *Id.* at 2-3, *quoting* 1 Larson, *Workmen's Compensation Law* § 18.00 (1982). Likewise, we stated in *Rankin* that the "decisive test" in determining whether the risks of travel are also the risks of the employment is whether "it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils." *Rankin*, 12 Ark. App. at 3, *quoting Marks' Dependents* v. *Gray*, 251 N.Y. 90, 167 N.E. 181 (1929).

The appellant contends that, because it was the employer's errand at the CPA office that "sent her forth," she was therefore, as a matter of law, acting within the course and scope of her employment at the time of her injury under the test enunciated in *Marks' Dependents, supra.* We do not agree. The appellant's argument overlooks the fact that the dual purpose doctrine is merely one exception to the "going and coming" rule, which ordinarily precludes recovery for an injury sustained while

the employee is going to or returning from his place of employment. *See generally Woodard* v. *White Spot Cafe*, 30 Ark. App. 221, 785 S.W.2d 54 (1990). However, a determination that a trip falls within the "dual purpose" exception to the going and coming rule does not end the inquiry; instead, the dual purpose doctrine merely serves to label the overall trip as either business or personal; deviations from the main purpose require a separate inquiry. *See* 1 Larson, *The Law of Workmen's Compensation* § 19.10 (1991).

In cases such as the case at bar, where the denial of relief is based on the claimant's failure to prove entitlement by the preponderance of the evidence, the substantial evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Weller* v. *Darling Store Fixtures*, 38 Ark. App. 95, 828 S.W.2d 858 (1992). Here, the Commission based its denial of relief on its finding that the appellant was engaged in a totally personal errand at the time she was injured. We think it significant that the Commission also stated that the risk of slipping on ice while stopped to engage in a personal errand was not a risk of the appellant's employment. It has been stated that "if the risks of the deviation itself are operative in producing the accident, this in itself will weigh heavily on the side of non-compensability." 1 Larson, *supra*, at § 19.61. Given that the appellant in the case at bar had completed her employer's errand and was returning to work in her vehicle, we think that the Commission could properly find that slipping on ice was a risk of the deviation, rather than of the employment. In light of the Commission's finding to that effect, we cannot say that its opinion does not provide a substantial basis for the denial of relief.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

David Lynn FOSTER *v.* STATE of Arkansas

CA CR 91-201 832 S.W.2d 293

Court of Appeals of Arkansas
Division I
Opinion delivered June 10, 1992

Eugene B. Hale, Jr., for appellant.

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

JAMES R. COOPER, Judge. The appellant, David Lynn Foster, was convicted of conspiracy to commit capital felony murder, a violation of Ark. Code Ann. § 5-3-401 (1987). He was arrested on November 18, 1989, and was charged with the offense on November 21, 1989. Because he was not tried until December

10, 1990, he argues that he was denied the right to a speedy trial. We find no error, and we affirm.

Arkansas Rule of Criminal Procedure 28.1(c) provides that a defendant is entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2. Rule 28.2 states that the time begins running from the date the charge is filed, or if he is held in custody, from the date of the arrest. It is undisputed that the time for a speedy trial began running on November 18 when the appellant was arrested. To comply with the speedy trial rules, he should have been tried by November 18, 1990; however, his trial was twenty-two days after that date. The docket reflects the following pertinent dates:

November 18, 1989:	Arrested and taken into custody.
November 21, 1989:	Charged with conspiracy to commit capital felony murder.
October 3, 1990:	Failed to appear for a hearing and an alias warrant was ordered.
October 17, 1990:	Placed in custody at the County Jail at the Hempstead County Courthouse, in Hope, Arkansas.
November 16, 1990:	The trial court entered an order continuing the case and reset for January 8, 1991. (The order states that the period resulting from this continuance is excluded but stated no reason for the continuance to January 8.)
November 21, 1990:	Appeared in court and was told pre-trial was set for December 5, 1990, and trial was set for December 10, 1990.
November 28, 1990:	Filed motion for probable cause hearing.
December 5, 1990:	Made a motion to dismiss for lack of speedy trial; motion was denied.

December 10, 1990: Appeared with counsel prior to his jury trial, and renewed his motion to dismiss for lack of speedy trial. The court again denied appellant's motion.

Once the defendant has proved that he was tried after the speedy trial deadline, the State has the burden of showing that any delay was the result of the appellant's conduct or was otherwise legally justified. *McConaughy* v. *State*, 301 Ark. 446, 784 S.W.2d 768 (1990); *Johnson* v. *State*, 27 Ark. App. 217, 769 S.W.2d 37 (1989). Rule 28.3 sets forth certain periods which are excludable when computing the time for trial. Rule 28.3(e) states that the period of delay resulting from the absence or unavailability of the defendant is excludable. The appellant failed to appear for a hearing which was set for October 3, 1990, and an alias warrant was issued. He was arrested and placed into custody on October 17, 1990. The parties agreed that this fourteen day period is excluded from the computation of the time for a speedy trial.

The State correctly points out that it was required to bring the appellant to trial by November 18, 1990. As that day was a Sunday, the speedy trial period ran until the end of the next day, November 19, 1990. Thus, according to Ark. R. Crim. P. 1.4, November 18 is not included as part of the period. Consequently, the appellant was tried seven days after expiration of the time for a speedy trial.

From this period, we also subtract twelve days for the period from November 28, 1990, when the appellant filed his motion for probable cause, to December 10, 1990, when the trial started. The period that a pretrial motion is pending is excludable under Ark. R. Crim. P. 28.3(a). Though the State argues that seven days should be excluded for consideration of this motion, from November 28 to December 5 when the trial court denied the appellant's motion to dismiss, the record does not show that the motion for probable cause was ruled upon until the trial started. When the twelve-day period is subtracted, the result is that the case was tried within the time for a speedy trial.

The appellant also argues that the trial judge erred in failing to make written entries as to excludable periods, nor did he

provide for any exceptional circumstances necessitating the delays. Failure to make written entries, required by Rule 28.3(i), is not, in itself, reversible error. *McConaughy*, *supra*; *Henson* v. *State*, 38 Ark. App. 155, 832 S.W.2d 269 (1992). Furthermore, the showing of exceptional circumstances applies only to cases where the delay results from "congestion of the trial docket." Here, there is no evidence the case was continued due to docket congestion. Therefore, we find no error, and we affirm.

Affirmed.

JENNINGS and MAYFIELD, JJ., agree.

Sandra Gale REEDER *v.* RHEEM MANUFACTURING COMPANY and National Union Fire Insurance Company of Pittsburgh, Pennsylvania

CA 91-273 832 S.W.2d 505

Court of Appeals of Arkansas
En Banc
Opinion delivered June 10, 1992
[Rehearing denied July 8, 1992.]

Eddie H. Walker, Jr. and *Melissa E. Smith*, for appellant.

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

JOHN E. JENNINGS, Judge. Sandra Reeder sustained a compensable injury to her right wrist, carpel tunnel syndrome, while employed by Rheem Manufacturing Company. She underwent a surgical procedure known as a carpal tunnel release. Her healing period was found to have ended by September 1, 1989. Dr. Kenneth Rosensweig, the orthopaedic surgeon chosen by appellee, estimated Reeder's permanent anatomical impairment at six percent; Dr. Munir Zufari, a vascular surgeon, estimated it at fifteen percent.

Reeder's claim for permanent partial disability was denied first by the administrative law judge and then by the full Commission on a two-one vote. The contention on appeal is that the Commission misinterpreted Ark. Code Ann. § 11-9-704(c) (Supp. 1991). We agree and reverse. The code section at issue provides:

> (c) EVIDENCE AND CONSTRUCTION. (1) At the hearing the claimant and the employer may each present evidence in respect of the claim and may be represented by any person authorized in writing for such purpose. The evidence may include verified medical reports which shall be accorded such weight as may be warranted from all the evidence of the case. *Any determi-*

nation of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings.

(2) When deciding any issue, administrative law judges and the commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence.

(3) Administrative law judges, the commission, and any reviewing courts shall construe the provisions of this chapter liberally, in accordance with the chapter's remedial purposes.

(4) In determining whether a party has met the burden of proof on an issue, administrative law judges and the commission shall weigh the evidence impartially and without giving the benefit of the doubt to any party.

(Emphasis added).

The issue in the case at bar is the meaning of the italicized sentence. The Commission's opinion states:

> [T]he purpose of § 704(c)(1) is to promote objectivity and encourage consistency in physicians' assessment of whether permanent impairment exists, and if so, the extent of that impairment. While the claimant contends that subjective complaints are acceptable criteria in the American Medical Association's Guides to the Evaluation of Permanent Impairment, we note as respondent points out that those guides had been published prior to the legislative enactment of § 11-9-704(c)(4). Had the General Assembly desired to make those guides the basis for an award of permanent impairment they could have done so. However, the General Assembly chose not to make the guides the basis for an award of permanent impairment.

The Commission then found that the fifteen percent permanent anatomical disability rating given by Dr. Zufari and the six percent anatomical rating given by Dr. Rosensweig were entitled to no consideration because the ratings did not comply with the statute's requirement that they be supported by "objective and

measurable physical findings." The Commission saw no ambiguity in the statute and applied the general rule that words are given their ordinary meaning and statutes are applied as written. *Bolden* v. *Watt*, 290 Ark. 343, 719 S.W.2d 428 (1986). We do not agree that the statute is so clear. There is no legislative history for us to turn to and neither party contends that this language appears in any other state's workers' compensation law.

It is apparent that the word "determination" as used in the statute might refer either to a determination of impairment made by a doctor or to one made by the Commission. The Commission took the view that unless the doctor's opinion as to permanent impairment was expressly based on objective and measurable physical findings, it was unworthy of consideration. We think that the word "determination" as used in the statute refers to the Commission's determination of physical impairment. The statute prohibits such a determination unless the record contains supporting "objective and measurable physical or mental findings." Our view is closer to the position taken by the dissenting commissioner: "The statute precludes an award for permanent disability only when it would be based solely on subjective findings."

It is a familiar rule that workers' compensation statutes are to be liberally construed in accordance with the law's remedial purposes. *Farm Air Corp.* v. *Reader*, 11 Ark. App. 72, 666 S.W.2d 717 (1984). This rule of construction has now been codified. Ark. Code Ann. § 11-9-704(c)(3). In interpreting an act it is permissible to examine its title. *Morely* v. *Capital Transp. Co.*, 217 Ark. 583, 232 S.W.2d 641 (1950); *Roscoe* v. *Water & Sewer Improvement Dist. No. 1*, 216 Ark. 109, 224 S.W.2d 356 (1949). Parts of statutes relating to the same subject matter must be read in the light of each other. *State* v. *Hannah*, 131 Ark. 129, 198 S.W. 881 (1917); *see also Lybrand* v. *Wafford*, 174 Ark. 298, 296 S.W. 729 (1927).

The title of Ark. Code Ann. § 11-9-704(c), "EVIDENCE AND CONSTRUCTION", obviously refers to functions of the Commission. Doctors are not charged with the duties of taking evidence or construing statutes. Similarly, when the verb "to determine" is used elsewhere in subsection (c), it refers to determinations made by the Commission. Ark. Code Ann. § 11-

9-704(c)(2) and (4).

Clearly, the Commission is not bound by medical opinion, *Mosley* v. *McGehee Sch. Dist.*, 36 Ark. App. 11, 816 S.W.2d 891 (1991), although it may not arbitrarily disregard the testimony of any witness. *Wade* v. *Mr. C. Cavenaugh's*, 25 Ark. App. 237, 756 S.W.2d 923 (1988). It is also entitled to examine the basis for a doctor's opinion, like that of any other expert, in deciding the weight to which that opinion is entitled. *See Ishie* v. *Kelly*, 302 Ark. 112, 788 S.W.2d 225 (1990). The statute at issue, however, does not require that the Commission automatically reject a doctor's opinion as to permanent impairment merely because the doctor has used American Medical Association guides as a basis for opinion or because the doctor himself describes the bases for his opinion as "subjective."

Dr. Rosensweig originally estimated that Reeder had a six percent permanent partial disability to the body as a whole as a result of the carpal tunnel syndrome. On deposition he testified:

> Compression of the median nerve can be documented by neurologic testing. I believe that it has been shown if you do a surgical release of the volar carpal ligament to decompress the tunnel to alleviate the pressure on the nerve, this gets rid of the numbness and tingling, but does not address the swelling of the tendons that initiated the problem. I do not believe surgical release gives 100% recovery ordinarily. I believe the reasons why 100% recovery is not obtained may include irreversible injury to the median nerve, patient's response to the surgery, motivation to recover from an injury, and perhaps other factors. I have found individuals may obtain good results from carpal tunnel releases but then go back to a similar type of repetitive action job and again experience pain and swelling.

After receiving a letter from appellee's counsel, Rosensweig wrote:

> Therefore, per your request, I should modify the impairment rating to zero impairment of the right upper extremity secondary to carpal tunnel syndrome, based on the lack of objective impairment, i.e., loss of range of motion, loss of

> body parts, etc. . . .
>
> You have referred to an Arkansas law and provision as far as guidelines in providing this information. It would be greatly appreciated if you could forward me copies of the rules and regulations in providing impairment ratings that you are looking for so I can be more efficient in the future.

Dr. Rosensweig performed a Phalen's test, described in his testimony as "where you bend the wrist down in a position where it can kink the median nerve. If you hold it down there for a minute and it recreates the pain and numbness, then that would be a positive Phalen's. If you hold the hand down for a period of time and it doesn't create any recurrence of symptoms, then it is a negative Phalen's." He also measured Reeder's grip strength by asking the claimant to grab his fingers as opposed to using a "grip dynamometer." He described her grip strength as "adequate but less than what I would expect."

Dr. Rosensweig described these tests as "subjective" and the Commission treated that description as conclusive. But it is the function of the Commission and the courts to decide what is an objective finding within the meaning of the law. Certainly there is a subjective component to both the Phalen's test and the "grip strength" test, but both are clinically observable and capable of measurement. They are similar in nature to a range of motion examination, which we have recently held is sufficiently objective to satisfy the statute. *Taco Bell* v. *Finley*, 38 Ark. App. 11, 826 S.W.2d 313 (1992). Results of tests similar to the Phalen's test (Fabere and Laseque's) have been recognized as constituting "objective findings". *Keck* v. *Bowen*, 651 F. Supp. 1160 (W.D. Pa. 1987).

Our holding in the case at bar is only that Ark. Code Ann. § 11-9-704(c)(1) does not require that either the opinion of Dr. Zufari or Dr. Rosensweig be disregarded by the Commission and that, under the facts of this case, the statute does not bar an award for permanent disability. We reverse and remand this case to the Commission for further proceedings consistent with this opinion.

Reversed and remanded.

Lonnie JEWELL *v.* STATE of Arkansas

CA CR 91-74 832 S.W.2d 856

Court of Appeals of Arkansas
En Banc
Opinion delivered June 10, 1992

Young, Patton & Patton, by: *Damon Young*, for appellant.

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

ELIZABETH W. DANIELSON, Judge. On November 25, 1988, appellant Lonnie Jewell shot Jerry Smith and James Dickson, killing Smith and wounding Dickson. Appellant contended at trial that he shot the victims in self-defense. He was tried by a jury convicted of manslaughter and attempted first degree murder. He was sentenced to six years in the Arkansas Department of Correction and fined $10,000 on the manslaughter conviction and $15,000 on the attempted first degree murder conviction. Appellant appeals from his manslaughter conviction. We find no error and affirm.

The testimony reflects that on November 25, 1988, Smith and Dickson came uninvited to appellant's home. Several other people who were friends of appellant were also present. There was evidence of longstanding problems between appellant and Smith, including the fact that Smith had some years ago shot and killed appellant's cousin and had twice pulled a gun on appellant. Appellant testified that when Smith and Dickson began to discuss the people they had killed while in prison, appellant decided that it was time for them to leave. Appellant contended that when he came out of his house with his gun, he got into a struggle with Dickson. Appellant testified that as they were struggling, he saw Smith getting up from a lawn chair and pointing a gun at him. Appellant shot Smith in the head, killing him. Dickson turned and attempted to run away. Appellant fired a shot in his direction and injured him.

Appellant first contends that the trial court erred in refusing to grant a mistrial when the prosecutor referred to an extrajudicial statement made by appellant which the trial court had ruled to be inadmissible. When police officers first arrived to investigate the shooting, appellant stated "I shot the son-of-a-bitch." The trial court ruled that the statement made by the appellant to the officers when they arrived was inadmissible. During cross-examination of appellant, the prosecutor asked, "You told Paul Jewell that you shot the son-of-a-bitch, and shot his friend that came up with him, did you not?" Appellant moved for a mistrial, which was denied. The jury was admonished to disregard the question. During closing argument, the prosecutor stated: "We

didn't hear what . . . Mr. Lonnie Jewell said, but he said something." Again, appellant moved for a mistrial, which was denied, and the jury was admonished to disregard the statement. Appellant contends these statements by the prosecution clearly prejudiced him and that the court's failure to grant a mistrial is reversible error.

A mistrial is to be granted only where any possible prejudice cannot be removed by an admonition to the jury. *Porter* v. *State*, 308 Ark. 137, 823 S.W.2d 846 (1992). The trial court is granted a wide latitude of discretion in granting and denying a motion for mistrial, and the trial court's decision will not be reversed absent an abuse of that discretion or manifest prejudice to the complaining party. *Davasher* v. *State*, 308 Ark. 154, 823 S.W.2d 863 (1992), citing *Brown* v. *State*, 259 Ark. 464, 534 S.W.2d 207 (1976). Since appellant admitted he shot and killed Smith, the only possible objectionable part of the prosecutor's question is the reference to appellant calling Smith a son-of-a-bitch. There was testimony by many witnesses, including appellant, establishing a strong enmity between appellant and Smith. Considering this testimony, we do not think appellant was prejudiced by an indication that he used profanity in describing the man who had twice pulled a gun on him. Additionally, the jury was admonished to disregard the statements. Any error resulting from the prosecutor's improper reference to appellant's statement was harmless error. The trial court did not abuse its discretion in denying the motion for mistrial.

Appellant's second contention is that the trial court erred in refusing to give appellant's requested jury instruction that the degree of force used in self-defense is presumed reasonable when a person is in his own home. Instead, the trial court submitted to the jury AMCI 4105. Appellant argues that when Ark. Code Ann. § 5-2-614 and § 5-2-620 are read together, it is clear that the legislature intended that a different standard should apply in determining whether a belief or response is reasonable when a person is in his home.

In *Clark* v. *State*, 15 Ark. App. 393, 695 S.W.2d 396 (1985), the court found pertinent to this issue the commentary that follows AMCI 4105 and 4106. That comment provides:

The Committee believes that the presumption set forth in

> Ark. Stat Ann. § 41-507.1 [now codified at Ark. Code Ann. § 5-2-620] in favor of a person defending himself in his home has no effect. If evidence is introduced to trigger the presumption, that same evidence supports the existence of the defense. Under Ark. Stat. Ann. § 41-110(1)(a) and (3) [Ark. Code Ann. § 5-1-111] and § 41-115(c) [Ark. Code Ann. § 5-1-102] the prosecution has the burden to prove as an element of its case the negation of any defense beyond a reasonable doubt. A presumption running in the defendant's favor which may be defeated by clear and convincing evidence by the state, but which also supports a defense which ultimately must be overcome by the state by evidence beyond a reasonable doubt, is of no effect.

The court in *Clark* found that "[i]nasmuch as the jury was instructed pursuant to AMCI 4105 which required the State to overcome appellant's reliance on self-defense of his person by a standard of beyond a reasonable doubt, we cannot say the trial court erred in refusing to instruct the jury upon Ark. Stat. Ann. § 41-507.1 [Ark. Code Ann. § 5-2-620]." Likewise, we find that the trial court did not err in instructing the jury pursuant to AMCI 4105 and refusing appellant's proffered instruction.

Appellant's final contention is that the trial court erred in failing to properly define "reasonable belief." The trial court instructed the jury that "[r]easonably believes or reasonable belief means the belief that an ordinary, prudent man would form under the circumstances in question and not one recklessly or negligently formed," which is the definition given by AMCI 4105. Appellant argues that this definition would allow the jury to find him guilty even if it believed facts that would require a finding of not guilty, since a finding that appellant acted negligently or recklessly would not support a conviction for first degree or second degree murder or manslaughter.

Appellant concedes that for him to prevail on this point, this court would have to overrule its previous decision in *Kendrick* v. *State*, 6 Ark. App. 427, 644 S.W.2d 297 (1982). When faced with an argument similar to appellant's, the court in *Kendrick* stated that "[t]o accept appellant's instruction and interpretation of § 41-514 [Ark. Code Ann. § 5-2-614] would render meaningless the requirement of reasonableness found in the basic code

justification provisions. This is obviously the reason the committee responsible for our criminal jury instructions deemed it unnecessary to draft one based upon § 41-514 [Ark. Code Ann. § 5-2-614]." We decline to overrule our holding in *Kendrick.*

Affirmed.

COOPER and MAYFIELD, JJ., dissent.

MELVIN MAYFIELD, Judge, dissenting. I think the judgment in this case should be reversed and the case remanded for a new trial. This is an appeal from a conviction for manslaughter. Appellant contended he shot the victim in self-defense. The appendix filed by appellant (his brief was filed while that system was in effect) shows that prior to the presentation of testimony the appellant asked the trial court to suppress a statement the appellant was alleged to have made in response to a question asked at the scene by a police officer before the appellant had been given any *Miranda* warning. The statement sought to be suppressed was, "I shot the son-of-a-bitch." The trial judge granted the appellant's request.

After the appellant testified on direct examination, the prosecuting attorney, on cross-examination, stated to appellant, "You told Paul Jewell that you shot that son-of-a-bitch, and shot his friend that came up with him, did you not?" Appellant's objection was sustained, but the prosecutor said to the judge, in the presence of the jury, "This is cross-examination," and asked, "Your Honor, let me show you *Harris* v. *New York.*" At that point the appellant moved for a mistrial, and the judge, after pointing out that there has been a previous ruling on the admissibility of the statement, stated to appellant's counsel, "Your motion for a mistrial is denied. I will admonish the jury to disregard the statement."

After the testimony was concluded, the prosecuting attorney in his argument to the jury referred to the arrival of the police at the appellant's house after the shooting and said:

> When they got there, Sgt. Jones saw Mr. Jewell sitting on his front porch, staring at the lifeless body of Jerry Lynn Smith. We didn't hear what Mr. Jewell, Mr. Lonnie Jewell said, but he said something.

At that point appellant's counsel approached the bench and objected to the judge that the prosecutor had commented on evidence excluded by the court and again moved for a mistrial. The trial judge sustained the objection and again admonished the jury to disregard the statement of the prosecutor to which the appellant had objected.

The majority opinion states that because there was testimony establishing "a strong enmity" between the appellant and the victim "we do not think appellant was prejudiced by an indication that he used profanity in describing the man who had twice pulled a gun on him." And the opinion states, "Additionally, the jury was admonished to disregard the statements."

In all due respect, I think the majority's reasoning is naive. There was evidence that the two men who came to the appellant's house were not welcome. One of them had been convicted for killing appellant's cousin, and both of them had assaulted and threatened the appellant. The appellant admitted shooting one of these men, but he contended that he did it in self-defense. The jury was instructed that self-defense would not apply unless appellant used "only such force as was reasonably believed to be necessary." It is obvious to me that a statement by appellant that he shot that "son-of-a-bitch" would tend to cause a juror to question whether the appellant "reasonably believed" the shooting was necessary or whether appellant simply wanted to shoot the "son-of-a-bitch."

It is also quite obvious to me that the prosecuting attorney thought that it would be helpful to his case if the jury heard evidence that appellant had said he shot that "son-of-a-bitch." Otherwise, the prosecutor would not have violated the court's pretrial ruling that evidence of such statement was not admissible. I also note that the prosecutor *did not ask* the appellant on cross-examination what he had said at the scene but *said* to appellant, "You told Paul Jewell that you shot that son-of-a-bitch . . . did you not?" And then, after the court had ruled for a second time that the statement was not admissible, the prosecutor referred to it in argument to the jury. To me, it is hard to believe that the prosecutor's actions did not hurt appellant's self-defense contention.

At oral argument, the state cited *Harris* v. *New York*, 401

U.S. 222 (1971), as authority for the proposition that the trial court was incorrect in holding the statement inadmissible. This contention was based upon the argument that appellant's statement was made to Paul Jewell, a relative of appellant's, who was a constable but not in the district where the shooting occurred and the statement was allegedly made. However, I do not think that helps the state's case. The fact remains the prosecutor violated the trial court's ruling not once but twice. It was clearly deliberate and clearly prejudicial.

In *Long* v. *State*, 260 Ark. 417, 542 S.W.2d 742 (1976), the court said:

> We consider the prosecutor's statement to have been decidedly improper and manifestly prejudicial. . . . We have frequently found it necessary to award a new trial because of counsel's overzealousness in arguing to the jury matters of fact not supported by the proof.

260 Ark. at 419-419A. In *Mays* v. *State*, 264 Ark. 353, 571 S.W.2d 429 (1978), in holding that a mistrial motion should have been granted, the court said:

> We have repeatedly said that a prosecuting attorney acts in *quasi* judicial capacity and that it is his duty to use all fair, honorable, reasonable and lawful means to secure a conviction of the guilty in a fair and impartial trial. However, the desire to obtain a conviction is never proper inducement for a prosecutor to include in his closing argument anything except the evidence in the case and legitimately deducible conclusions that may be made from the law applicable to a case.

264 Ark. at 355-56. In *Timmons* v. *State*, 286 Ark. 42, 688 S.W.2d 944 (1985), it was agreed at a pretrial conference that a witness could not connect the chain of custody about materials she had examined, but during the trial the witness was called by the state and the court sustained the defense objection to the witness testifying. A request for mistrial was denied. During closing argument the state's attorney said the defense had objected to the testimony of the witness and the court instructed the jury not to consider the reference by the state's attorney about a witness who did not testify. Our supreme court held it was

prejudicial for the state to call a witness when it was known the witness could not give "valid relevant testimony" and then argue to the jury that the defendant had prevented the jury from hearing the testimony of that witness. The court held that it was "quite clear that this conduct was prejudicial" and said:

> We have long held that a prosecuting attorney should not be tempted to appeal to prejudices, pervert testimony, or make statements to the jury which, whether true or not, have not been proved.

286 Ark. at 43-44. A concurring opinion stated that the trial court's admonition did not cure the error because it "was so deliberate and flagrant it could not be cured except by mistrial." *Id.* at 47.

I dissent from the affirmance of the trial court's judgment in the instant case.

COOPER, J., joins in this dissent.

Charles Joseph McARDELL *v.* STATE of Arkansas

CA CR 91-250 833 S.W.2d 786

Court of Appeals of Arkansas
Division I
Opinion delivered June 10, 1992

Marianne L. Chaney, Deputy Public Defender, for appellant.

Winston Bryant, Att'y Gen., by: *Melissa K. Rust*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Charles Joseph McArdell ws convicted of the rape of one of his stepdaughters and sexual abuse in the first degree of another stepdaughter. He was sentenced to twenty years and six years, respectively, in the Arkansas Department of Correction, to be served consecutively. On appeal he argues that the trial court erred in (1) not granting his motion to sever the two charges; (2) not declaring a mistrial; (3) holding that the younger girl was competent to testify; and (4) refusing his motion for production of a transcript of a previous trial which ended in a mistrial. We relate only those facts which are necessary to our decision.

Appellant first argues that the trial court erred in not granting his motion to sever the offenses. Ark. R. Crim. P. 22.2 provides:

> (a) Whenever two (2) or more offenses have been joined for trial solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan, the defendant shall have a right to severance of the offenses.
>
> (b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), shall grant a severance of offenses:
>
> (i) if before trial, it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense; or

(ii) if during trial, upon consent of the defendant, it is deemed necessary to achieve a fair determination of the defendant's guilt or innocence of each offense.

When offenses are based on the same conduct or a series of acts connected together or constituting parts of a single scheme or plan, they may be joined for trial. *See Henry* v. *State*, 278 Ark. 478, 647 S.W.2d 419 (1983); *Ruiz* v. *State*, 273 Ark. 94, 617 S.W.2d 6 (1981); *Rubio* v. *State*, 18 Ark. App. 277, 715 S.W.2d 214 (1986). There are circumstances under which separate crimes committed upon different individuals close in time may constitute a single scheme or plan within the meaning of Ark. R. Crim. P. 22.2. *James* v. *State*, 11 Ark. App. 1, 665 S.W.2d 883 (1984). The decision to join or sever offenses is within the discretion of the trial court, and we will not reverse absent an abuse of discretion. *Rubio* v. *State*, *supra*.

In *Starks* v. *State*, 33 Ark. App. 165, 804 S.W.2d 728 (1991), the appellant had been charged with one count of rape and one count of incest, both committed on his minor stepdaughter over a two year period. The charge of rape was reduced at trial to sexual abuse in the first degree and appellant was convicted of both charges. On appeal we affirmed the trial court's denial of severance and stated that there was an "adequate indication that the two offenses were part of a single scheme or plan." 33 Ark. App. at 167.

In *James* v. *State*, *supra*, the appellant was accused of engaging in sexual activity with his seven-year-old daughter and his fifteen-year-old adopted daughter on the same day. We cited *Ruiz* v. *State*, *supra*, for the holding that there are circumstances under which separate crimes committed upon different individuals close in time may constitute a single scheme or plan within the meaning of Ark. R. Crim. P. 22.2(a). 11 Ark. App. at 5.

Appellant accurately points out that the information in this case alleged two offenses against two separate victims over a period of eighteen months. He argues that rape is not a continuing offense, but is a single event, and that two instances of rape can result in two convictions. *Tarry* v. *State*, 289 Ark. 193, 710 S.W.2d 202 (1986). Appellant takes the position that since the charges against him did not result from one criminal episode and it was charged that there were two separate victims, it was unfair

to require him to be tried on both charges at the same time.

Appellee responds that these offenses comprised a common scheme: the victims are sisters, step-daughters of the appellant; the sexual conduct all occurred in the home of the appellant and the victims; and that contact continued over a period of eighteen months.

Under these circumstances we cannot say that the trial court abused its discretion in refusing to sever the offenses. These acts constituted a continuing course of conduct which, in effect, constituted a single scheme or plan.

Appellant's next argument is that the court erred in refusing to declare a mistrial because a prosecution witness, the girls' mother, remained in the courtroom after the witnesses had been excluded under the "Rule." Arkansas Rule of Evidence 615 provides that at the request of a party the witnesses shall be excluded from the courtroom so they cannot hear the testimony of the other witnesses. Appellant argues that because the mother of the victims remained in the courtroom and heard the testimony of her daughters before she testified, "error should have been presumed and the mistrial should have been granted." We cannot agree.

A mistrial is a drastic remedy and should be granted only when justice cannot be accomplished by continuing the trial. *Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986); *Williams* v. *State*, 17 Ark. App. 173, 705 S.W.2d 896 (1986). The granting of a mistrial rests within the discretion of the trial judge. *Novak* v. *State*, 287 Ark. 271, 698 S.W.2d 499 (1985); *Clinkscale* v. *State*, 13 Ark. App. 149, 680 S.W.2d 728 (1984).

Arkansas Rule of Evidence 616 provides:

> Notwithstanding any provision to the contrary, in any criminal prosecution, the victim of a crime, *and in the event that the victim of a crime is a minor child under eighteen (18) years of age, that minor victim's parents* . . . shall have the right to be present during any hearing, deposition, or trial of the offense [Emphasis added.]

The judge did not commit error by refusing to declare a mistrial.

Appellant also argues that the trial court erred in holding

that one of the victims was competent to testify. At the time of the trial this girl was nine years old. In ruling on one of the State's pretrial motions the judge said he found the girl to be "of average maturity and rather articulate . . . reliable and credible."

Arkansas Rule of Evidence 601 provides that "every person is competent to be a witness except as otherwise provided in these rules." The question of the competency of a witness to testify is a matter lying within the sound discretion of the trial court and, in the absence of clear abuse, the appellate court will not reverse on appeal. *Jackson* v. *State*, 290 Ark. 375, 720 S.W.2d 282 (1986). In *Kitchen* v. *State*, 271 Ark. 1, 607 S.W.2d 345 (1980), the Arkansas Supreme Court stated:

> Appellant correctly perceives that the common law tests of competency of a witness in a criminal case in Arkansas have been clearly established. They are: the ability to understand the obligation of an oath and to comprehend the obligation imposed by it; an understanding of the consequences of false swearing; and the ability to receive accurate impressions and to retain them, to the extent that the capacity exists to transmit to the fact finder a reasonable statement of what was seen, felt or heard.

271 Ark. at 10. *See also Chambers* v. *State*, 275 Ark. 177, 628 S.W.2d 306 (1982).

The issue of competency of a witness is one in which the trial judge's evaluation is particularly important due to the opportunity he is afforded to observe the witness and the testimony. *Clifton* v. *State*, 289 Ark. 63, 709 S.W.2d 63 (1986).

> As long as the record is one upon which the trial judge could find a moral awareness of the obligation to tell the truth and an ability to observe, remember, and relate facts, we will not hold there has been a manifest error or abuse of discretion in allowing the testimony.

289 Ark. at 65. In a child rape case, the matter of the competency of the child is primarily for the judge to decide, as he is better able than this court to judge the child's intelligence and understanding of the necessity for telling the truth. *Jackson*, *supra*. *See also*, *Needham* v. *State*, 215 Ark. 935, 224 S.W.2d 785 (1949).

Appellant argues, however, that because of several inconsistencies in the girl's testimony the court should have found her incompetent to testify. Appellant points out three particular instances in which the girl's trial testimony varied somewhat from her testimony at the motion hearings; however, it is the jury's job to resolve any contradictions, conflicts, or inconsistencies in a witness's testimony, *Franklin* v. *State*, 308 Ark. 539, 825 S.W.2d 263 (1992); *Abdullah* v. *State*, 301 Ark. 235, 783 S.W.2d 58 (1990).

Appellant's next argument is based on the trial court's denial of his request for a transcript of his previous trial, which ended in mistrial. On February 11, 1991, appellant filed a motion requesting the transcript and a hearing was held on the motion on February 15. The prosecutor argued that if the court granted appellant's motion, it would further delay the trial, and the court denied the motion.

Appellant relies on *Britt* v. *North Carolina*, 404 U.S. 226 (1971), in which the United States Supreme Court held that "the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal." 404 U.S. at 227. The Court also stated:

> In prior cases involving an indigent defendant's claim of right to a free transcript, this Court has identified two factors that are relevant to the determination of need: (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript.
>
> Our cases have consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a showing of need tailored to the facts of the particular case. . . . [E]ven in the absence of specific allegations it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to the defendant in at least two ways: as a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution witnesses.

404 U.S. at 227-28. Nevertheless, the United States Supreme

Court affirmed the denial of the transcript to Britt because the second trial was before the same judge, with the same counsel and the same court reporter, and the two trials were only a month apart. Moreover, the Court stated that the trials took place in a small town where the court reporter was a good friend of all the local lawyers and would have read back to counsel his notes of the mistrial, well in advance of the second trial, if counsel had simply made an informal request. 404 U.S. at 228-29.

Appellant argues that, in his case, the judge presiding at the trial which resulted in a mistrial was not the same judge who presided over the trial from which this appeal is brought; there was a lapse of four months between the mistrial and the subsequent trial; and the court denied his motion on the basis of lack of benefit to the appellant which, he argues, was flatly rejected in *Britt*. We note, however, that the appellant had the same counsel at both trials; the trials were *only* four months apart; defense counsel had ample opportunity to cross examine and impeach the witnesses; and there is no evidence that appellant suffered any prejudice in not having the transcript of the mistrial. Furthermore, appellant could have requested the transcript immediately following the mistrial without causing any delay in the retrial. Since he waited until five days before the retrial was to begin to request the transcript, we cannot say it was error to refuse the request for the transcript.

Affirmed.

COOPER and JENNINGS, JJ., agree.

RICELAND FOODS, INC. *v.* DIRECTOR OF LABOR
and Alfred Crenshaw

E 91-119 832 S.W.2d 295

Court of Appeals of Arkansas
Division I
Opinion delivered June 10, 1992

Ramsay, Bridgforth, Harrelson & Starling, by: *Spencer F. Robinson*, for appellant.

Ronald A. Calkins, for appellee.

MELVIN MAYFIELD, Judge. In this unemployment compensation case the employer has appealed a decision of the Arkansas Board of Review holding that appellee Alfred Crenshaw was discharged from his last work for reasons other than misconduct connected with the work.

In response to the Drug-Free Workplace Act of 1988 (41 U.S.C. §§ 701-707 (1988)), the employer developed a Fitness for Work Policy concerning the use and possession of drugs and alcohol and the means by which to detect their use and possession by its employees. The policy stated:

> AS A CONDITION OF YOUR EMPLOYMENT WITH RICELAND FOODS, INC., OR ONE OF ITS AFFILIATED GRAIN DRIERS, YOU MUST AGREE TO ABIDE BY THE FOLLOWING POLICY. ANY EMPLOYEE WHO DOES NOT AGREE TO ABIDE BY THE FOLLOWING POLICY SHOULD IMMEDIATELY NOTIFY THE COMPANY OF HIS INTENT TO TERMINATE HIS EMPLOYMENT.

Section 9 of the Company Policy provided:

> *All hourly and salaried employees will be required to submit to routine scheduled examinations and testing.* Persons determined to be in violation of this policy or who refuse to submit to an examination will be removed from the work site and may be discharged.

On May 5, 1989, appellee Crenshaw consented to that policy by signing a form entitled "Drug-Free Certification" which stated:

> I, Alfred Crenshaw, have read and understand Riceland Foods, Incorporated and its Affiliated Grain Driers "Fitness For Work" Policy, and do hereby agree to abide by this Policy as long as I remain employed by Riceland Foods, Incorporated or an Affiliated Grain Drier. Also, by signing below, I am stating that I have received a personal copy of this Policy.
>
> I further certify that I am now drug-free, and will remain so for as long as I am employed by Riceland Foods, Incorporated or an Affiliated Grain Drier.

On July 6, 1989, Crenshaw was discharged when he refused to

submit to the test.

The Appeal Tribunal reversed a decision of the Agency which denied benefits. The Board of Review affirmed the Appeal Tribunal. On appeal to this court the employer argues that the decision of the Board of Review is not supported by substantial evidence. Appellant argues Crenshaw was discharged because he willfully and knowingly disregarded a legitimate interest of his employer, and deliberately disregarded a standard of behavior which his employer had a right to expect of him. Appellant contends a deliberate violation of the employer's rules is sufficient to constitute misconduct.

Ark. Code Ann. § 11-10-514(a)(1)(Supp. 1991) provides: "If so found by the director, an individual shall be disqualified for benefits if he is discharged from his last work for misconduct in connection with the work." As we explained in *Exson* v. *Everett, Director*, 9 Ark. App. 177, 656 S.W.2d 711 (1983):

> In order for an employee's action to constitute misconduct so as to disqualify him, the action must be a deliberate violation of the employer's rules, an act of wanton or willful disregard of the employer's best interests, or a disregard of the standard of behavior which the employer has a right to expect of his employees.

9 Ark. App. at 179.

Here the evidence shows that Crenshaw received a copy of the Fitness for Work Policy and signed a form agreeing to abide by that policy. He testified he had read the policy; that he signed the agreement and certification; that he understood Section 9 would apply to all employees; and that he never had any discussion with Mr. Holloway, the employer's manager, about the policy. Crenshaw testified further that he never had any intention of ever taking "that test" and the only reason he signed "that thing" was because Mr. Holloway told him, if he didn't sign it, it was automatic dismissal.

It is well established that the findings of fact by the Board of Review are deemed conclusive if they are supported by substantial evidence. *Shipley Baking Co.* v. *Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986). However, as we said in *Shipley*: "We

are not at liberty to ignore our responsibility to determine whether the standard of review has been met." 17 Ark. App. at 74.

After reviewing the evidence in the present case we cannot conclude the Board's finding is supported by substantial evidence. The Board's decision stated, and the appellees in this case admit, that there are no provisions concerning drug testing in the Drug-Free Workplace Act; but the Board held, and the appellees argue, that the appellant's action in this case was encouraged by provisions in the Act which require a certification that contractors with the federal government must certify they have a drug-free workplace. Thus, the appellees argue that the Board was correct in considering the prohibitions of the Fourth Amendment of the United States Constitution in making its decision. Now the opinion of the Board concedes, and the appellees admit, that these constitutional protections would not apply if Crenshaw consented to the drug testing policy. *See Alexander* v. *State*, 255 Ark. 155, 499 S.W.2d 849 (1973). But it is argued that Crenshaw's consent was given under duress and cannot be considered voluntary. It is contended that in determining whether consent was voluntary, the vulnerable state of the person consenting must be considered. As authority, appellees cite *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). We do not think that case is applicable because our supreme court held in *Ellis* v. *First National Bank of Fordyce*, 163 Ark. 471, 260 S.W. 714 (1924), that it is not duress to threaten to do that which a party has a legal right to do; and in *Griffin* v. *Erickson*, 277 Ark. 433, 642 S.W.2d 308 (1982), the court said: "Generally, a contract of employment for an indefinite term is a 'contract at will' and may be terminated by either party." 277 Ark. at 436-37. The court in *Griffin* also said that its cases have adhered to the principal that either party has an absolute right to terminate the relationship and concluded:

> It is quite clear, therefore, that in the absence of some alteration of the basic employment relationship, an employee for an indefinite term is subject to dismissal at any time without cause.

277 Ark. at 437.

There is no evidence in the instant case that Crenshaw was

employed for a definite term or that there was any alteration of the basic employment relationship.

Thus, we cannot agree there is substantial evidence to support the holding that Crenshaw's agreement to be tested was obtained under duress.

Reversed and remanded for the Board to enter an order denying appellee Crenshaw's claim for unemployment compensation.

COOPER and JENNINGS, JJ., agree.

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