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Jerry Leon DODSON *v.* STATE of Arkansas

CA CR 81-66 626 S.W. 2d 624

Court of Appeals of Arkansas
Opinion delivered January 20, 1982
[Rehearing denied February 24, 1982.]

*C. Rabon Martin,* Tulsa, Oklahoma, and *Drew M. Luttrell,* for appellant.

*Steve Clark,* Atty. Gen., by: *Arnold M. Jochums,* Asst. Atty. Gen., for appellee.

LAWSON CLONINGER, Judge. By jury verdict appellant was assessed a prison sentence of three years for possession of a controlled substance, LSD and/or methaqualone, and a five-year sentence for possession of a controlled substance, marijuana, with intent to deliver, the sentences to be served consecutively.

For reversal appellant argues that the State failed to prove venue in Baxter County and that both convictions for possession of controlled substances are predicated upon evidence obtained unlawfully in contravention of the Fourth Amendment to the United States Constitution.

We find no error and the sentences are affirmed.

When the evidence is viewed in the light most favorable to appellee, which we must do on appeal, the record reveals the following. At 7:40 p.m. on January 2, 1981, a search warrant was issued by the judge of the Municipal Court of Baxter County authorizing the search of appellant's trailer residence located south of Mountain Home for marijuana, LSD and amphetamines. Five officers went directly to appellant's residence to serve the warrant but when the officers observed five or six automobiles parked in the yard, in addition to appellant's, they drew back and called for additional officers. At about 8:50 that same evening the warrant was served by nine officers. All the officers were Baxter County deputy sheriffs or policemen of the city of Mountain Home, except for one state police investigator. As the officers approached the trailer, they heard loud music but no voices. One of the officers knocked on the door of the trailer, called out loudly, "Police officers", and after a brief wait and no response from within, pushed open the unlocked door. The warrant was served on appellant, and a search of appellant and the premises produced the drugs

upon which the convictions are based, along with assorted drug paraphernalia.

Appellant's contention that the State failed to establish venue in Baxter County is without merit. Ark. Stat. Ann. § 41-110 (2) (Repl. 1977) provides that the State is not required to prove venue unless evidence is admitted that affirmatively shows that the court lacks venue. It would be unsound to say that the inference of venue from the facts proved in this case is arbitrary. The record is replete with evidence that the trailer searched was in Baxter County: the warrant was issued by the Municipal Judge of Baxter County, and served by Baxter County officers assisted by a state police investigator assigned to investigate drug traffic in Baxter County; the state police investigator marked items found in the search, assigning a case number to the incident, and identified the county as Baxter; the trailer was described in the search warrant and the testimony of officers as being south of Mountain Home, which we take notice as being the seat of Baxter County, some 200 yards east of the intersection of State Highway 5 and State Highway 341.

Uniform Rules of Evidence, Rule 201, provides that a fact may be judicially noticed if it is one not subject to reasonable dispute in that it is generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. In the case of *National Rejectors Industries* v. *Director of Labor,* 1 Ark. App. 163, 613 S.W. 2d 611 (1981) we took judicial notice of the distance between two cities, and we here take notice that the point described is located in Baxter County. There is no suggestion in the record, except for appellant's motion for directed verdict, that any of the incidents referred to in the record occurred anywhere other than in Baxter County. The location of the trailer was described in a way that was certainly and generally known in Baxter County and was capable of ready and reliable determination.

Appellant's motion to suppress the contraband substances found in the search on the grounds that the officers' failure to announce their authority and purpose before

entering contravenes appellant's Fourth Amendment rights was properly overruled for two reasons: The motion was not made timely, and, in the circumstances here, the officers' failure to "knock and announce" did not render the search unreasonable under the Fourth Amendment.

Ark. Rules of Criminal Procedure, Rule 16.2 (b), requires that a written motion to suppress evidence be filed not later than ten days before trial. The trial judge in this case stated that the motion was untimely because it was filed six days before trial. The case had been set for trial six weeks previously without objection from either the State or appellant. In *Parham* v. *State,* 262 Ark. 241, 555 S.W. 2d 943 (1977), the Court held that a motion to suppress which was filed "a day or two" before trial with no cause for the delay was properly denied by the trial court.

Rule 16.2 (b) is reasonable and should be complied with in the absence of good cause. The rule facilitates the orderly procedure of the trial court, and gives the court and the parties an opportunity to study preliminary issues before the trial proper and perhaps dispenses with the necessity for a trial. Appellant offered no good cause for the untimely filing of the motion, and was additionally unable to meet the deadline for briefs ordered by the court before trial. A jury was scheduled to be selected on February 17, 1981, and after a hearing on the untimely motion the parties were ordered to submit briefs on the search issue by February 16, 1981 in order that the trial court could consider them before the selection of a jury. Appellant's briefs were not submitted until the afternoon of February 17, 1981, after the jury had been selected. We hold that appellant did not properly raise the issue of an unreasonable search as required by Rule 16.2 (b).

Ark. Rules of Criminal Procedure, Rule 13.3, outlines the procedure to be followed in the execution of a search warrant, and provides in pertinent part:

> (e) The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of deadly force, against persons, or to effect

> an entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety.

Rule 13.3 contains no "knock and announce" requirement, and appellant asks this court to adopt the theory that the principle is required by the Fourth Amendment.

18 U.S.C. § 3109 provides that a federal officer, executing a search warrant, may break open a door only if "after notice of his authority and purpose," he is denied admittance. Many of the states have enacted a similar statute, and the cases cited by appellant, *Miller* v. *United States,* 357 U.S. 301 (1958), *Sabbath* v. *United States,* 391 U.S. 585 (1968), and *Ker* v. *California,* 374 U.S. 23 (1963), all involve a statute which specifies that law enforcement officers are to knock and announce prior to entry.

In *Miller, supra,* federal officers went to Miller's apartment at 3:45 a.m. without a warrant after a controlled buy of narcotics had been made. An officer knocked on the door, and upon the inquiry from within, "Who's there?" replied in a low voice, "Police." Miller opened the door on an attached door chain and asked the officers what they were doing there, and then attempted to close the door. The officers tore the chain off and entered. The government conceded that the validity of the entry to execute the arrest without a warrant must be tested by criteria identical with those embodied in 18 U.S.C. § 3109.The Court traced the limitations placed by the common law upon the authority of law officers to break the door of a house to effect an arrest. The requirement of the common law was pronounced in 1603 in Semayne's Case, 5 Coke 91, 11 ERC 629, 77 English Reprint 194, to the effect that if the officer breaks into the party's house "he ought to signify the cause of his coming, and to make request to open doors. . ." The Court then observed that the requirement stated in Semayne's Case still obtains, and that it is reflected in 18 U.S.C. § 3109 and in the statutes of a large number of states. The Court recognized without disapproval that some state decisions hold that justification for non-compliance exists in exigent circumstances, as when officers believe they or others may be harmed

or that the person is fleeing or attempting to destroy evidence. The Court, however, said that it was not called upon to decide whether exigent circumstances were present in the case before the Court, but discussed whether, because of facts known to officers, the officers could be justified in being certain the defendant knew they were officers and why they were there.

The government made no claim of circumstances excusing compliance, but argued that compliance with § 3109 was evident. The majority, noting the early hour, no showing that the police were in uniform, and that the answer, "Police" was spoken "in a low voice," concluded that the defendant did not receive the required notice of authority and purpose, but the Fourth Amendment was not mentioned. Two justices dissented, declaring that the requirement of prior notice and authority should not be reduced to an absurdity. The two dissenting justices believed the necessitous circumstances of the case warranted the entry by the officers, and observed that the Court of Appeals was correct in citing the danger of the destruction of the contraband.

In *Sabbath, supra,* the question involved was whether the requirements of § 3109 had been complied with. In that case, the officers opened a closed but locked door to arrest Sabbath, without a warrant and without announcing their purpose or authority. The Court of Appeals had found that the officers did not "break open" the door, and thus were not required by § 3109 to knock and announce. The Supreme Court stated that an unannounced intrusion is no less an intrusion whether officers break down the door, force open a chain locked on a partially opened door, open a locked door by a passkey, or, as in the case before the court, open a closed but unlocked door. The officers contended that compliance was excused because an announcement might have endangered the informant or the officers, but the Supreme Court found that the record revealed no substantial basis for excusing the failure to knock and announce. *Sabbath,* also, was decided on the basis of non-compliance with § 3109, and no constitutional restriction was discussed.

In *Ker, supra,* the United States Supreme Court considered a case arising under a California statute almost identical to 18 U.S.C. § 3109. In that case, state officers, acting upon information they believed to be reliable indicating that Ker was selling marijuana, followed Ker's automobile. After Ker eluded the officers, the officers, without a warrant, obtained a passkey from the building manager of Ker's apartment house. The officers unlocked and opened the door to Ker's apartment, proceeding quietly in order to prevent the destruction of evidence and found Ker sitting in the living room. The California District court of Appeals found that there was probable cause for the arrest, that the entry into the apartment was for the purpose of arrest and was not unlawful; and that the search being incident to the arrest was likewise lawful and its fruits admissible in evidence against Ker. The United States Supreme Court affirmed, holding that the method of entering the apartment did not offend federal constitutional standards of reasonableness.

The Court in *Ker* observed that insofar as violation of a federal statute required the exclusion of evidence in *Miller,* that case is not relevant for state prosecutions, where admissibility is governed by constitutional standards. The Court quoted, without disapproval, a statement expressed by the California court in *People* v. *Maddox,* 46 Cal. 2d 301, 630, 294 Pac. 2d 6, *cert. denied* 352 U.S. 858 (1956), that suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with the knock and announce rule.

In *Ker,* the majority stated as follows:

> While this court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental — i.e., constitutional — criteria established by this court

> have been respected. The States are not thereby precluded from developing workable rules governing arrest, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the states, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain . . .

Mr. Justice Harlan concurred with the four justices voting to affirm the conviction only because he believed a state is free to impose less rigorous restrictions on its police officers than are imposed on federal officers by the Fourth Amendment. He stated that state searches and seizures should be judged by the more flexible concept of "fundamental" fairness.

In *People* v. *Wolgemuth,* 370 N.E. 2d 1067, *cert. denied,* 436 U.S. 908 (Ill. 1977), the Court discussed *Miller, Sabbath,* and *Ker,* and stated:

> By concluding that the United States Supreme Court has not expressly elevated to a constitutional requirement the practice of announcing authority and purpose, we do not mean to devalue its importance. Although the mere failure of police to announce their authority and purpose does not *per se* violate the constitution, it may influence whether the subsequent entry to arrest or search is constitutionally reasonable. The function of the requirement to announce authority and purpose is to notify the person inside of the presence of police and to afford the person an opportunity to respond, so that violence can be averted and privacy protected.

The United States Supreme Court, in *United States* v. *Rabinowitz,* 339 U.S. 56 (1950), stated:

> What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in

> our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.

In the instant case we hold that under the circumstances the officers were justified in making the entry to appellant's trailer as they did. The physical evidence being searched for was particularly susceptible to easy destruction, the hour was reasonable, and the officers knew that appellant had previous felony convictions. The officers knocked and announced that they were police officers, waited, and when there was no response they entered the trailer. The officers were not required to wait until the appellant had an opportunity to destroy the evidence. An element present in this case, and notably absent in *Miller, Sabbath* and *Ker,* was the fact that the officers in this case were armed with a valid search warrant. In *Wolgemuth, supra,* the Court observed:

> The fact that an arrest warrant had been issued distinguishes this case from that in which police executed warrantless entry of a suspect's home. The primary function of the warrant requirement of the Fourth Amendment is to interpose prior to an arrest a neutral magistrate's review of the factual justification for the charges.

Affirmed.

GLAZE, J., concurs.

TOM GLAZE, Judge, concurring. I disagree that 18 U.S.C. § 3109 (1979) is applicable to this case. If it were, I could not agree that the circumstances reflected in the record before us show the officers met the requirements set out in § 3109. Nor do I believe the facts justify noncompliance with such requirements due to exigent circumstances. At this time, Arkansas has not adopted a "knock and announce" requirement, and Rule 13.3 of the Arkansas Rules of Criminal Procedure contains the only procedures dealing with entry that our officers must follow in the execution of a search warrant. There is no argument made that the officers

here did not comply with Rule 13.3. Aside from these arguments dealing with § 3109 and Rule 13.3, appellant failed to timely file a motion to suppress as is required under Rule 16.2 (b) of the Arkansas Rules of Criminal Procedure, and the trial court's decision would have to be affirmed on this point alone in view of *Parham* v. *State,* 264 Ark. 241, 555 S.W. 2d 943 (1977).

ALUMINUM COMPANY OF AMERICA *v.*
Mrs. Willowdean NEAL, Widow, and Guy Anthony NEAL, Dependent Child of Arvis Eugene NEAL, Deceased Employee

CA 80-448 626 S.W. 2d 620

Court of Appeals of Arkansas
Opinion delivered January 20, 1982

*Rose Law Firm, P.A.*, by: *Phillip Carroll* and *Jerry Jones*, for appellant.

*George D. Ellis, P.A.*, for appellees.

TOM GLAZE, Judge. In 1976, the Administrative Law Judge, Gary Shelton, awarded weekly compensation benefits, plus medical and funeral expenses to claimants Wil-

lowdean Neal and Anthony Guy Neal, dependents of deceased Alcoa employee Arvis E. Neal. The claimants' attorney was awarded the maximum attorney's fee on the entire award, payable at the rate of $6.65 per week, for services rendered in connection with the claim. The award was affirmed on appeal to the Full Commission. In addition, Alcoa was ordered to pay the claimant's attorney an additional $100.00 fee.

On March 1, 1979, Act 215 of 1979, compiled as Ark. Stat. Ann. § 81-1332.1 (Supp. 1981), became effective. Act 215 authorized lump sum attorney's fees in Workers' Compensation cases and provided in pertinent part as follows:

> Section 1. The Workers' Compensation Commission is hereby authorized to approve lump sum attorney's fees for legal services rendered in respect of a claim before the Commission. Such lump sum attorney's fees are allowable notwithstanding that the award of compensation to the injured employee is to be paid on an installment basis.
>
> * * *
>
> Section 3. It is hereby found and determined by the General Assembly that the Arkansas Supreme court has invalidated the award of lump sum attorney's fees by the Workers' Compensation Commission where claimant was awarded compensation payable in installments. This has resulted in attorney's fees being paid in minute amounts over a long period of time, and if the claimant dies prior to the attorney's fees being fully covered from the installment payments, the attorney does not receive full compensation for his efforts. Therefore, an emergency is hereby declared to exist, and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from the date of its passage and approval.[1]

[1]Act 215 of 1979 was passed after the Supreme Court decided *United States Fidelity and Guaranty Company* v. *Potter*, 263 Ark. 689, 567 S.W. 2d 104 (1978), wherein the court held the Workers' Compensation Commission had no statutory authority to award lump sum attorney's fees.

On March 10, 1980, claimants' attorney petitioned the Administrative Law Judge for a lump sum attorney's fee pursuant to the foregoing provisions of Act 215. The Administrative Law Judge ruled that the claimants' attorney was entitled to a lump sum benefit. Alcoa appealed to the Full Commission, which affirmed the decision of the Administrative Law Judge and awarded claimants' attorney an additional $100.00 fee.

Alcoa brings this appeal, raising the primary issue of whether Act 215 of 1979 applies to attorney's fees earned and awarded prior to the 1979 Act and are still being paid at a weekly rate.

Attorney's fees in Workers' Compensation cases are provided by statute in Arkansas as a matter of public policy to enable injured workers to obtain the services of an attorney in settlement of controverted claims. Ark. Stat. Ann. § 81-1332 (Supp. 1981); *Aluminum Company of America* v. *Henning*, 260 Ark. 699, 543 S.W. 2d 480 (1976). The amount of the attorney's fee approved by the Commission is determined, within statutorily set maximum limits, by consideration of the nature, length and complexity of the services performed by the attorney, and the benefits resulting therefrom to the compensation beneficiaries.

The amount an individual beneficiary is awarded is computed with reference to a standard annuity table. The table takes into account the life expectancy of the beneficiary and, in the case of a dependent-spouse beneficiary, the probability of remarriage. Prior to the enactment of Act 215, many instances existed where the claimant's attorney received his or her compensation installments on the same schedule benefits were paid the claimant. Since an individual claimant or beneficiary might die or remarry prior to the projected time set forth in the tables, attorneys in these instances would fail to receive full payment for their services. The language in the emergency clause of Act 215, *i.e.*, Section 3, *supra*, clearly reflects that the Arkansas General Assembly enacted Act 215 to remedy this problem.

Appellant, Aluminum Company of America, contends

Act 215 should apply only to attorney's fee awards made subsequent to March 1, 1979, the effective date of the Act. Appellant urges us to apply to the facts before us the general rule that statutes are to be construed as having a prospective operation, unless the purpose and intent of the Legislature to give it retrospective effect is expressly declared or is necessarily implied from the language used. However, this rule does not apply to remedial acts or statutes which do not disturb vested rights or create new obligations. The Supreme Court, in *State ex rel Moose* v. *Kansas City & Memphis Railway and Bridge Company,* 117 Ark. 606, 174 S.W. 248 (1914), stated the established rule applicable to remedial legislation as follows:

> The strict rule of construction contended for does not apply to remedial statutes which do not disturb vested rights, or create new obligations, but only supply a new or more appropriate remedy to enforce an existing right or obligation. These should . . . be given a retrospective effect whenever such seems to have been the intention of the Legislature.

In construing remedial legislation, the courts do so with appropriate regard to the spirit which prompted its enactment, the mischief sought to be abolished and the remedy proposed. *Skelton* v. *B. C. Land Company,* 260 Ark. 122, 539 S.W. 2d 411 (1976). It is also an established rule that remedial legislation shall be liberally construed. *Chicago Mill & Lumber Company* v. *Smith,* 228 Ark. 876, 310 S.W. 2d 803 (1958), and *Schultz* v. *Rector-Phillips-Morse, Inc.,* 261 Ark. 769, 552 S.W. 2d 4 (1977).

We noted earlier the language employed by our General Assembly, contained in the emergency clause to Act 215, which expressly declares the intended remedial effect to be given the Act. No vested right of appellant is disturbed by its retrospective application, nor is any new obligation created. The total amount of the attorney's fee which appellant is obligated to pay was fixed by the Commission in 1976, and that amount will not be changed by requiring appellant to pay appellees' fee in a lump sum, discounted, of course, to present value. Accordingly, we believe the Commission was

correct in its decision to award the lump sum attorney's fee to claimant's counsel.

Appellant raises a second issue, challenging the Commission's award of an additional attorney's fee of $100 to claimants' attorney for his filing this action seeking a lump sum attorney's fee. The Commission based its authority to award such a fee on Act 1227 of 1976 (Extended Session), which in effect provides for an additional fee to the attorney if the claimant prevails on appeal. We fail to see how the claimant benefits or prevails at this stage of the proceedings. Considering the nature of the relief sought, we agree with appellant that it is claimants' attorney who benefits at this point, and it was never contemplated that Act 1227 would be used to award additional attorney's fees under these circumstances. Attorney's fees can only be awarded when the statutes specifically authorize them. *United States Fidelity and Guaranty Company* v. *Potter,* 263 Ark. 689, 567 S.W. 2d 104 (1978). We are unaware of any law which supports the Commission's award of the $100 attorney's fee, and we reverse that part of the Commission's decision with directions to disallow this additional fee.

Affirmed in part and reversed and remanded in part.

Emma J. ROWE *v.* NATIONAL SECURITY FIRE AND CASUALTY COMPANY

CA 81-196 626 S.W. 2d 622

Court of Appeals of Arkansas
Opinion delivered January 20, 1982

*David Solomon,* for appellant.

*Douglas Anderson,* for appellee.

TOM GLAZE, Judge. The issue in this appeal concerns the construction and application of a notice of loss clause contained in a low value dwelling fire insurance policy issued by appellee to appellant. Appellant, a resident of Michigan, purchased the policy to cover a rental house she owned in Helena, Arkansas. While the policy was still in effect, the rental house was totally destroyed by fire on April 29, 1980. On August 11, 1980, 104 days after the fire, appellant notified appellee of her loss, claiming she had no actual knowledge of the fire until this date. Appellee refused to pay because appellant failed to meet the terms of the fire policy which required her to immediately notify appellee after the fire loss and submit a proof of loss within sixty days.

After appellant filed suit, appellee moved for summary judgment, which was granted by the trial court. In granting judgment, the court found the insurance policy required appellant to furnish a written proof of loss within sixty days after the loss occurred, this requirement was reasonable and appellant failed to comply with this policy requirement.

On appeal, appellant contends the trial court erred in granting summary judgment since a genuine issue of a material fact existed. In construing the sixty day notice policy provision, appellant contends she had sixty days from the date she actually acquired knowledge of the fire loss to submit her proof of loss. If so, she argues the material fact that remains to be determined is: When did appellant receive actual notice of the fire.

We believe the position taken by appellant is supported

by the holding in *Concordia Fire Insurance* v. *Waterford,* 145 Ark. 420, 224 S.W. 953 (1920). In *Waterford,* the court was confronted with a casualty loss sustained by the insured, a church, which failed to timely notify the insurance company of the loss because church representatives were unaware of the existence of the insurance policy which had been previously issued that otherwise covered the loss in question. The court discussed the rules governing notice requirements under insurance policies which we believe apply to the facts at bar. In deciding in favor of the insured, the court accepted his contention, stating:

> It will be observed that, from the facts detailed above, neither the preliminary written notice within fifteen days thereafter nor the proof of damage within sixty days thereafter were given or furnished appellant company. This court has held such provisions in policies to be reasonable and conditions precedent to a recovery upon the policy where specified in the policy, as is this, that no suit or action should be maintained thereon unless proofs of loss were made within the time fixed. *Teutonia Insurance Co.* v. *Johnson,* 72 Ark. 484; *Hope Spoke Company* v. *Maryland Casualty Company,* 102 Ark. 1; *Queen of Arkansas Insurance Co.* v. *Laster,* 108 Ark. 261. Appellees contend, however, that they are excused for non-compliance with this provision of the policy because they had no knowledge of the existence of the policy or its terms until more than sixty days after the loss or damage occurred. *The rule contended for by appellees has been applied in accident policies where the insured, and in life policies where the beneficiary, was prevented from complying with the conditions in the policy upon the happening of events or circumstances making it impossible to comply with said conditions, and which circumstances or events were not traceable to the negligence of the insured or beneficiary.* [Emphasis supplied.]

In a later case, *National Mutual Casualty Company* v. *Cypret,* 207 Ark. 11, 179 S.W. 2d 161 (1944), the court held that notice under a liability policy was not required until after the insured "acquired knowledge" that the insured

property, an automobile, was stolen. Since the insured gave notice of loss within sixty days after it was learned the automobile was stolen, the court upheld the insured's recovery for the loss sustained under the insurance policy.

The decisions reached by the courts in *Waterford* and *Cypret* prompt us to conclude the trial court erred in dismissing appellant's action. If appellant, through no fault of her own, did not know her house had burned for more than sixty days after it occurred, she obviously would have been unable to comply with the notice requirement of the policy. Thus, two facts necessary for a decision in this cause have not been presented to or decided by the trial court, *viz.*, when did appellant receive knowledge of the fire loss and whether appellant's failure to comply with the notice requirements contained in the insurance policy was due or traceable to her own negligence. Since these questions have never been decided, we reverse and remand with directions to vacate the trial court's summary judgment and to proceed consistent with this opinion.

Reversed and remanded.

George BRIZENDINE *v.* STATE of Arkansas

CA CR 81-114 627 S.W. 2d 26

Court of Appeals of Arkansas
Opinion delivered January 27, 1982

*Henry C. Morris,* for appellant.

*Steve Clark,* Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

GEORGE K. CRACRAFT, Judge. The appellant, George Brizendine, was found guilty by a jury of the criminal act of delivering a controlled substance in violation of Ark. Stat. Ann. § 82-2617 (Supp. 1981). At the trial the State's only evidence concerning the delivery and sale of the substance was elicited from Trooper B. J. Weaver, a state police officer who worked as an undercover narcotic agent. She testified that on January 18, 1980, an informant took her to a pool hall in DeQueen, Arkansas, where they picked up the appellant. They then went to the appellant's house where he sold Trooper Weaver a brown sack of approximately fifteen lid bags of marijuana for a price of $25. The State's evidence

also showed that a chemical analysis of the substance made by the Arkansas Crime Lab established that the substance sold Trooper Weaver by the appellant was marijuana. At the close of the State's case the appellant moved for a directed verdict of acquittal contending that the officer who made the purchase from him was an accomplice, whose testimony as to the sale and delivery was not corroborated and he was therefore entitled to a directed verdict.

It is well settled that under Ark. Stat. Ann. § 43-216 (Repl. 1977) a criminal conviction cannot be sustained upon the uncorroborated testimony of an accomplice. However, our case law is well established that one who buys a controlled substance is not an accomplice of the person who sells or delivers it. *Sweatt* v. *State,* 251 Ark. 650, 473 S.W. 2d 913 (1971); *Long* v. *State,* 260 Ark. 417, 542 S.W. 2d 742 (1976).

*Sweatt* was decided before the adoption of the present criminal code and *Long* thereafter. Both reached the same conclusion. The basis for those rulings was stated in *Sweatt* as follows:

> The person to whom narcotics are sold is not an accomplice of the defendant who is charged with selling the narcotic. *** The reason for holding that the purchaser is not the accomplice of the seller is that the purchaser, if guilty of any crime, is guilty of a crime distinct from that for which the seller is being prosecuted.

In *Long* it was stated:

> Secondly, under the quoted subsection of the Code, the purchaser in this case was not an accomplice, because his conduct was "inevitably incident" to the commission of the offense charged. That is, there cannot be an unlawful sale of a controlled substance unless someone buys it. It is immaterial that this purchaser may have solicited (which is not involved here, as the buyer was not a police officer), it makes no difference whether the

> buyer solicited the sale or the seller solicited the purchase. The offense is committed in either situation.

It is therefore well settled that the purchaser cannot be charged or convicted of delivery of a controlled substance and therefore is not an accomplice as the buyer and seller do not share the same criminal purpose. *Cate* v. *State,* 270 Ark. 972, 606 S.W. 2d 764 (1980). Entrapment was not an issue in this case.

The appellant further contends that the trial court erred in not submitting to the jury the question of whether or not an undercover police officer was an accomplice to the crime whose testimony had to be corroborated to sustain appellant's conviction. In *Sweatt* v. *State,* supra, the court expressly held that the giving of such an instruction was error as the purchaser was not an accomplice as a matter of law.

While citing no cases in support of his position, appellant argues that this established rule should not be applicable when the purchaser is engaged in law enforcement. He argues that the relationship between the officer's "bust record" and the possibility of promotion prevents him from being a wholly disinterested witness. We are convinced that the clear intent of the criminal code was to effect the opposite result. While both *Sweatt* and *Long* indicate the possibility of criminal responsibility of a purchaser for an offense separate and distinct from that of the seller, our code includes a protective provision respecting police officers in such situations. Ark. Stat. Ann. § 41-502 (Repl. 1977) makes "justification" a defense to prosecution for an offense. Section 41-503 is as follows:

> 1. Conduct which would otherwise constitute an offense is justifiable when it is required or authorized by law or by judicial decree, or *is performed by a public servant or a person acting at his direction in the reasonable exercise or performance of his official powers, duties or functions.*

In the commentary to that section it is pointed out that our

code section as adopted, is a modification of the proposed Oregon code which limited "justification" to conduct "required or authorized by law or judicial decree." Our enactment added the words "or is performed by a public servant or a person acting at his direction in the reasonable exercise or performance of his official powers, duties or functions." The reasons given for that modification were stated as follows:

> For example, no statute explicitly authorizes a law enforcement officer to purchase narcotics as part of an investigation of criminal drug traffic. Consequently, while it is unlikely in the extreme that a policeman would be criminally prosecuted for such conduct, the commission opted to relax the strict requirements imposed by the language "authorized by law or judicial decree."

It is clear from this commentary that our legislature fully recognized the effectiveness of the undercover agent in combating such offenses which, by their very nature, are committed in surroundings of secrecy. As stated by Justice George Rose Smith in *Sweatt,* a contrary view would make it more difficult for the State to secure convictions for the unlawful sale of drugs, untaxed liquor or other articles which cannot be lawfully sold. We have no inclination to adopt a rule so manifestly unsound.

Affirmed.

David L. WILLIAMS *v.* STATE of Arkansas

CA CR 81-112 627 S.W. 2d 28

Court of Appeals of Arkansas
Opinion delivered January 27, 1982

*William R. Simpson, Jr.,* Public Defender, by: *Jim Petty,* Deputy Public Defender, for appellant.

*Steve Clark,* Atty. Gen., by: *Arnold M. Jochums,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. Appellant challenges his burglary and theft of property convictions on appeal, raising one issue: The trial court erred in not granting his motion to suppress evidence obtained as a result of an illegal search and seizure. Appellant does not contend that the police officers lacked probable cause to place him under arrest.

Appellant relies on the cases of *Arkansas* v. *Sanders,* 442 U.S. 753 (1979) and *Robbins* v. *California,* 450 U.S. 1039, 69 L. Ed. 2d 768, 101 S. Ct. 2841 (1981). He contends two pillow cases seized from the vehicle he was driving when arrested

were closed, opaque containers, and, as such, a warrant was required before the officers could search the vehicle and pillow cases. Appellant argues further that the search was unlawful because the search was not contemporaneous with the arrest but was conducted after the officers took the vehicle from the scene of arrest to the police station. The pillow cases were located within the vehicle on its rear seat and floor board. They contained items which were later identified by the owner as having been stolen from her home.

Any question concerning the search of appellant's vehicle which may have arisen out of the lawful arrest of appellant and the subsequent search of his vehicle has been laid to rest by the United States Supreme Court's holding in *New York* v. *Belton,* 450 U.S. 1028, 69 L. Ed. 2d 768, 101 S. Ct. 2860 (1981). In *Belton,* the Court forged a "bright line" rule for police officers to follow in determining the proper scope of a search of an automobile seized incident to a lawful custodial arrest of its occupant. The Court stated the rule as follows:

> Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within "the area into which an arrestee might reach in order to grab a weapon or evidentiary item." *Chimel, supra,* at 763, 23 L. Ed. 2d 685, 89 S. Ct. 2034. In order to establish the workable rule this category of cases requires, we read *Chimel's* definition of the limits of the area that may be searched in light of that generalization. Accordingly, *we 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,* for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. *United States* v.

> *Robinson, supra, Draper* v. *United States,* 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329. 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. [Footnotes omitted and emphasis supplied.]

Applying the rule in *Belton* to the facts at bar, the two pillow cases seized by the officers were within the automobile and reach of appellant. Although the pillow cases may have been closed, appellant was under lawful custodial arrest and under the "bright line" rule, the officers were justified in opening and examining the contents of the pillow cases.

As mentioned earlier, the search took place at the police station after appellant was taken into custody, and appellant argues his Fourth Amendment rights were violated because the warrantless search was not incident to his arrest. His argument is without merit.

In *Chambers* v. *Maroney,* 399 U.S. 42 (1970), the Court held police may conduct a warrantless search of an automobile taken to a police station where: (1) the occupants of the vehicle were in lawful custody, (2) an immediate search of the vehicle would have been constitutionally permissible at the time and place of arrest, (3) it was not unreasonable to take the automobile to the police station before making the search, and (4) probable cause for the search still existed after the automobile was taken to the police station.

automobile at the time and place of appellant's arrest. The officers testified they removed the automobile to the station to search it because traffic conditions were extremely heavy. They stated further that appellant's vehicle and that of one of the officers were positioned where they caused congestion at a four-way intersection. We believe the officers' decision to tow appellant's vehicle to the police station for the search was reasonable under the circumstances.

Affirmed.

Eva Margaret GLOVER *v.* Clarence Marvin GLOVER

CA 81-130 627 S.W. 2d 30

Court of Appeals of Arkansas
Opinion delivered January 27, 1982
[Supplemental Opinion on Denial of Rehearing March 10, 1982.*]

*Reed Williamson, Kay L. Matthews,* and *H. N. Means, III,* for appellant.

*David Hale* and *Phillip W. Ragsdale,* for appellee.

TOM GLAZE, Judge. This is a divorce case. The issues raised on appeal are limited to the trial court's order dividing the parties' property. In February, 1980, the trial court granted appellee a divorce and gave him custody of the parties' children. The court then awarded each party certain personal property and recognized their joint indebtedness to appellant's parents in the sum of $16,300, but it held in abeyance, awarding any interest the parties owned in their home, furniture, farm equipment, cattle and the John H. Glover & Son partnership.

The court requested additional information and appraisals before disposing of the parties' rights in the above

*628 S.W. 2d 882.

items. One material piece of evidence requested by the court was what pay-off amount Farmers Home Administration (F.H.A.) would accept to release the parties' home from a mortgage it held in connection with a loan given the Glover partnership. The partnership was comprised of appellant, appellee and his parents.

In March, 1980, after receiving the requested information, the court, by letter to the parties' respective counsel, found: (1) appellant had a marital property interest in the Glover partnership and was entitled to a one-fourth share; (2) the partnership had a negative net worth of $5,494.12; (3) the parties had a marital interest in their home which was appraised at $48,000; and (4) the F.H.A. would require payment of $48,000 before it would release the parties' home from the mortgage securing the partnership debt.

After making its findings, the court, by letter, invited appellant's attorneys to submit any objection they had concerning any documents or information used by the court to support its findings. Until appellant's attorneys had an opportunity to respond, the court withheld deciding how to dispose of the parties' interests in the partnership and their home. Counsel for appellant did file a motion noting appellant's objections. The court set a hearing on appellant's motion for July 9, 1980.

After the hearing in July, the court signed and entered its order in October, 1980. The order awarded the parties their interests in the previously unawarded property set out in the court's order entered in February, 1980. It is the October order from which appellant appeals. She challenges the court's findings, which in essence required the following: (1) the parties' home is to be sold and the net proceeds from the sale are to be used to pay the F.H.A. partnership debt; (2) any remaining sale proceeds must then be applied to liquidate the $16,300 debt owed appellant's parents; and (3) appellee is awarded all the parties' interest in the partnership, and he must assume its debts.

The October, 1980, order was prepared pursuant to findings set forth in the trial judge's letter dated September 9, 1980, to the parties' attorneys. The court set forth in its letter how it computed the partnership's net worth and the

values it used in deriving that figure. The court found the partnership had a negative net worth of $1,698.83, or $3,795.29 less than it found in March, 1980. The court also noted in its September letter what it did not consider when calculating net worth, *viz.*, certain accounts payable which the court ruled were not properly introduced into evidence. On appeal, appellant claims the trial court erred in computing the partnership's net worth and in ordering the proceeds from the sale of the parties' home to be used to liquidate the partnership debt owed to F.H.A. We agree with appellant on both issues.

First, we hold the trial court clearly erred when it ordered appellant's one-half interest in the parties' marital home to be applied to the net worth of the Glover partnership, a business in which she had only a one-fourth interest. The court compounded its error when it awarded the appellant's one-fourth interest in the partnership to appellee. The court's action in this respect contravenes the provisions of Ark. Stat. Ann. § 34-1214 (Repl. 1979), which requires all marital property to be distributed one-half to each party, unless the court finds such a division to be inequitable. A court may, under certain conditions specified in § 34-1214, distribute marital property in a different manner, but its reasons must be recited in the court's order. Here, the court failed to provide any reasons in its order indicating the bases for depriving appellant of her marital property interest in the Glover partnership.

There is nothing in the record which shows appellant received anything in return for the partnership interest taken from her by the court, and we believe it would be inequitable under the facts before us to permit her interest to be given to appellee. Since we review the cause *de novo,* we find the appellant's one-fourth interest in the Glover partnership should be reinstated to her.

Although we find no error in the court's decision directing the parties' home sold, we find the court is without authority in this cause to require the sale proceeds to be used to pay the F.H.A. loan. Since F.H.A. maintains a mortgage against the home, any proceeds from the sale of the home will certainly be subject to the rights retained by F.H.A. In

the event of a sale, appellant would then be in the position of asserting her rights against the Glover partnership if F.H.A. acquired any or all the net proceeds from the sale. For this reason and others discussed below, we believe the furtherance of justice requires us to remand this cause to the trial court so it can determine whether the parties' home should still be sold in view of this court's decision concerning the parties' rights and interests relating to the partnership and its F.H.A. debt.

The trial court rendered its final decision in this case over one year ago, and the economy and circumstances of the parties have changed. The trial court is in a much better vantage to decide the disposition of the parties' home. Appellant requests this court to remand with instructions she be given a "changing order" giving her a lien on the partnership assets if the home is sold and the sale proceeds are applied to the F.H.A. loan. She cites no legal authority by which such a lien can be imposed. Although an equitable lien can be impressed under certain circumstances, we fail to find they exist.[1] While we decline appellant's request to direct a lien be imposed, appellant possesses other legal remedies upon which she can rely to protect her marital interests in the partnership and home.

Our findings and directions on remand make it unnecessary for us in this appeal to discuss any errors made by the court in computing the net worth of the partnership. Suffice it to say, the trial court failed to credit appellant with the $48,000 payment it projected would be made on the F.H.A. partnership debt after the sale of the parties' home. This failure by the trial court caused it to erroneously find the partnership possessed a negative net worth, which was one of the reasons given by the court in one of its letters to counsel for its giving appellee the appellant's marital one-fourth interest.

In conclusion, we recognize that the trial court ordered the marital debt owed appellant's parents to be paid from the

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[1]The court, in *Lowrey* v. *Lowrey*, 251 Ark. 613, 473 S.W. 2d 431 (1971), held it was error to impress an equitable lien upon property as security for a loan where the evidence does not show an agreement to give the lender a loan or that the loan was acquired through trickery or fraud.

net proceeds after the sale of the home. While the court may have authority to direct such payment, the court may decide to modify its order when it decides the disposition of the parties' rights in their home. Therefore, we remand this cause directing the trial court to also consider whether any modification is necessary in its order requiring payment of this marital debt, especially if the parties' home is not sold. In doing so, we in no way intend to affect the parties' or creditors' rights relative to the debt, including those legal rights or remedies available to them in other proceedings which may arise as a result of the indebtedness.

We reverse and remand with directions to the trial court to proceed consistent with the findings and conclusions set forth in this opinion.

Reversed and remanded.

Supplemental Opinion on Denial of Rehearing
delivered March 10, 1982

628 S.W. 2d 882

PER CURIAM. We deny appellee's petition for rehearing. In doing so, we note appellee's concern that this Court failed to consider point four in his brief. This point or issue argued by appellee was considered and found without merit.

Appellee argued that this appeal should be dismissed because of appellant's failure to file a statement of points coincidental with the filing of her notice of appeal. Appellee failed to raise this issue by a motion to dismiss. Rather, he urged this point for affirmance after appellant filed her brief. The brief contained all three issues she intended to argue on appeal.

Appellant submitted an abstract of record which was sufficient to review all errors she assigned on appeal, and therefore, we were in a position to decide each argument on its merits. If appellee was dissatisfied with the abstract of record, he could have easily submitted a supplemental

abstract. We are unable to perceive how appellee was prejudiced by appellant's failure to file a statement of points at the time the notice of appeal was filed. See *Pine Bluff National Bank* v. *Parker,* 253 Ark. 966, 490 S.W. 2d 457 (1973).

Barry HUGHES *v.* STATE of Arkansas

CA CR 81-78 627 S.W. 2d 33

Court of Appeals of Arkansas
Opinion delivered January 27, 1982

*Bill E. Ross,* Public Defender, for appellant.

*Steve Clark,* Atty. Gen., by: *Victra L. Fewell,* Asst. Atty. Gen., for appellee.

PER CURIAM. Appellant's court-appointed attorney has filed a motion for attorney's fee for which we allow $450.00.

Reimbursement is also sought for the expense of reproducing the required copies of appellant's abstract and brief. The only fund from which this court could allow payment of this expense is our limited appropriation for the payment of court-appointed attorneys. Rule 11 (g) of the Rules of the Supreme Court and Court of Appeals provides:

> When an indigent appellant is represented by appointed counsel or a public defender, his attorney may have the abstracts and briefs printed by submitting the double-spaced typewritten manuscript to the Attorney General not later than the due date of the brief.

The copies for which reimbursement is sought would have been made by the Attorney General if the above rule had been followed and the motion for reimbursement is therefore denied.

We call attention to Rule 11 (a) which requires the appellant, in a criminal case where the State is the appellee, to file 17 copies of his abstract and brief and submit proof of service of two additional copies on the Attorney General. When the appellant proceeds under Rule 11 (g), we suggest that the original brief be filed with the clerk and two copies served on the Attorney General with the request that the additional copies be made and filed by that office. It would then be proper to seek allowance by us of the reproduction cost of the two copies served on the Attorney General.

Dale Monroe CRISTEE, Jr. *v.* STATE of Arkansas

CA CR 81-90 627 S.W. 2d 34

Court of Appeals of Arkansas
Opinion delivered January 27, 1982

*Sam Hugh Park,* for appellant.

*Steve Clark,* Atty. Gen., by: *Victra L. Fewell,* Asst. Atty. Gen., for appellee.

PER CURIAM. Appellant's court-appointed attorney has filed a motion asking for an attorney's fee for services rendered in the appeal of the above matter and we allow the sum of $400.00.

The decision in this case was rendered on November 4, 1981, and the motion for attorney's fee was not filed until January 8, 1982. It has been necessary for the court to find the briefs and review this matter in order to determine the fee.

In the future, motions for attorney's fee should be filed in this court in time for them to be considered at the time the case is considered on its merits.

William A. DAVIS *v.* C & M TRACTOR COMPANY and TRI-STATE INSURANCE COMPANY

CA 81-61 627 S.W. 2d 561

Court of Appeals of Arkansas
Opinion delivered February 3, 1982
[Rehearing denied March 3, 1982.]

*Henry N. Means, III,* for appellant.

*Wright, Lindsey & Jennings,* for appellees.

GEORGE K. CRACRAFT, Judge. This is an appeal by William A. Davis from a decision of the Arkansas Workers' Compensation Commission denying him benefits under the Arkansas Workers' Compensation Act. The appellant contended that he was involved in a one vehicle accident on April 18, 1978, that the accident resulting in his injury was due to an unknown cause and that as a result of that accident he was totally disabled. The Commission found from a preponderance of the evidence that the claimant's accidental injury was substantially caused by his intoxication and denied him benefits under Ark. Stat. Ann. § 81-1305 (Repl. 1976).

In this appeal the appellant maintains (1) that the Commission erred in receiving into evidence the alcohol analysis made of a blood sample taken on the day of the accident, (2) that there was no substantial evidence to support the finding that appellant's injury was substantially occasioned by his own intoxication and (3) that the appellee-employer was estopped by his prior knowledge of the appellant's drinking habits to raise the defense of his intoxication. We address these points of error in the order in which they were advanced and cite only that evidence which is deemed necessary for an understanding of our holding with respect to each such point.

I.

Prior to the conclusion of the hearing before the Administrative Law Judge the appellee offered in evidence the results of a blood test made of a sample of appellant's blood which showed an alcohol blood level in excess of .238. The appellant objected to its introduction on the ground that the report was "unverified and did not show the time the sample was taken and was incompetent evidence of intoxication at the time of the accident." No objection as to the chain of custody of the sample, the manner in which the tests were made or any other matter in connection with the blood test was stated. At that time the parties indicated that a deposition was "being set up" in which the objectionable deficiency could be explored by counsel. The Administrative Law Judge inquired as to whether the deposition of the

"technician at Rebsamen Hospital or whoever made the laboratory tests was to be taken." The appellant's counsel responded "No," indicating that he desired only the deposition of a doctor at that hospital.

The deposition of Dr. Janet Hale was subsequently taken at Rebsamen Hospital in which she testified that the blood sample was drawn by her on the date of the accident "immediately after appellant's arrival at the hospital," and that the alcohol blood level was shown to be .238, a level at which one could certainly be intoxicated and manifesting signs of impaired depth perception and reflex, sedation and sleep. She stated that the alcohol level would make it dangerous for the average person to drive the vehicle because of these impairments. The test was not made at the Rebsamen Hospital but in an outside laboratory. Although the record did not reflect the time the sample was taken Dr. Hale testified positively from her own memory that it was taken "shortly after his arrival at the hospital." The report introduced into evidence and from which Dr. Hale testified was part of appellant's medical records at the hospital.

In *Holstein* v. *Quality Excelsior Coal Co.*, 230 Ark. 758, 324 S.W. 2d 529 (1959) and *Rhea* v. *M-K Grocer Co.*, 236 Ark. 615, 370 S.W. 2d 33 (1963), our court upheld an expert's statement of opinion based on a patient's medical history and hospital records stating that these documents were "undoubtedly admissible under the statutes governing compensation cases. Ark. Stat. Ann. § 81-1323 et seq. (1947)."

Appellant further contends, however, that the record is insufficient to show that the test was properly conducted as neither the technician making the test nor anyone else handling the sample was subjected to cross-examination. In *St. Paul Ins. Co.* v. *Touzin*, 267 Ark. 539, 592 S.W. 2d 448 (1980), the court discussed fully the admissibility of such test in the following analysis:

> The Court of Appeals, for two reasons, was mistaken in holding that the insurance carrier had not laid a sufficient foundation for the introduction of the results of the blood-alcohol test.

First, the compensation law provides that the Commission is not bound by technical rules of evidence or procedure, but may 'conduct the hearing in a manner as will best ascertain the rights of the parties.' § 81-1327, *supra*. Professor Larson discusses at length the cases construing such provisions in workers' compensation statutes. He concludes that the fact finders are expected to adhere to basic rules of fair play, such as recognizing the right of cross-examination and the necessity of having all the evidence in the record. On the other hand, a compensation commission undoubtedly has expertise much superior to that of a jury in weighing the testimony and should therefore be left to determine the probative value of hearsay testimony and other proof that might not be admissible in a court of law. Larson, Workmen's Compensation Law, §§ 79.00 and 79.80 — 79.84 (1976). The admissibility of the blood-alcohol test falls in the latter category.

Here the Commission, with the leeway conferred by the compensation law, certainly conducted the hearing in such a manner as to best ascertain the rights of the parties. Only four persons had any part in the blood-alcohol test: Officer Bailey, who ordered it, a licensed physician, a registered nurse, and an experienced technologist whose qualifications were shown. All four testified and were cross examined. The machine had been approved and was constantly kept in proper calibration. The Commission was fully justified in finding that the test results had probative value.

Second, the testimony would have been admissible even under the more strict rules that prevail in a court of law. The statutes regulating blood-alcohol tests are primarily intended for criminal cases, but they are pertinent when such a test is used in civil litigation. *Newton* v. *Clark,* 266 Ark. 237, 582 S.W. 2d 955 (1979). Even in criminal cases, however, substantial compliance with the statute and with Health Department rules is all that is demanded. *Munn* v. *State,* 257 Ark. 1057, 521 S.W. 2d 535 (1975).

In this opinion the court placed reliance on the expertise of the Commission in determining the probative value of such evidence and limits restriction on the admission of such evidence by the expectation that the Commission will adhere to basic rules of fair play and that substantial compliance with the statutes is all that is required. The record shows that the Administrative Law Judge did adhere to those principles in the case now under review. The appellant was afforded the opportunity to depose and cross-examine any persons connected with that blood test and was specifically afforded that opportunity with respect to the technician who performed it. He declined that offer and elected to depose only the doctor who drew the blood sample. Under the circumstances reflected in this record we find no error in the admission and consideration by the Commission of the blood test in question.

II.

Appellant contends that the finding of the Commission that his injury was substantially occasioned by his intoxication is not supported by substantial evidence. We do not agree.

Ark. Stat. Ann. § 81-1305 (1976) provides in part as follows:

> [T]here shall be no liability for compensation under this Act [§§ 81-1301 — 81-1349] where the injury or death from injury was substantially occasioned by intoxication of the injured employee . . . .

The testimony makes it clear that the appellant consumed large amounts of alcohol each day and had followed that pattern daily for at least the past fifteen years. He was injured in a one vehicle accident on a highway leading to his home with which he was quite familiar. The police officer who investigated the accident found him lying unconscious, on his back on the floorboard of the truck. He found a fifth of whiskey lying on the floorboard on the driver's side of the truck which had been approximately three-quarters consumed. The bottle was not broken and was capped and there

were several old beer cans in the back of the vehicle. The tow truck operator testified that he smelled alcohol in the cab of the appellant's truck and saw the fifth of whiskey referred to above. The police officer testified that he smelled alcohol on the appellant's breath and that he did not find any wet marks on the seat of the vehicle which would indicate that the liquor had been spilled. The ambulance driver testified that he smelled liquor at the scene of the accident.

The officers testified that the vehicle was damaged on its right front. There were no skid marks or marks found on the asphalt pavement. The tire marks in the grass and in the ditch were in a straight line. There were no marks indicating a swerving which would follow a blowout prior to the truck leaving the pavement. The tow truck operator, who also ran a tire store, testified that the right front tire was weak and had blown out prior to the accident. However, an expert testified that upon inspecting the tire it was his opinion that the damage to the wall of the tire did not cause the accident but resulted from the accident. He testified that a small hole in the tire did not cause a blowout. Immediately after the accident the appellant was taken to the Rebsamen Hospital in Little Rock where a blood sample was taken which upon testing proved that his blood-alcohol level was .238 which as previously stated indicated a high degree of intoxication. The Administrative Law Judge and the Workers' Compensation Commission both found that this evidence preponderated heavily in favor of the finding that the claimant's accidental injury was substantially caused by his intoxication.

This court on appeal is required to review the evidence in the light most favorable to the findings of the Commission and to give the testimony its strongest probative value in favor of the order of that Commission. The burden of proof is on the appellant's employer to show by a preponderance of the evidence that the appellant's injury was substantially occasioned by intoxication, and it is the function of this court to determine whether there is any substantial evidence to support the Commission's finding. The Commission was the fact finding agency and it was justified in finding that the appellant's injury was sub-

stantially caused by his intoxication. *Country Pride et al* v. *Holly,* 3 Ark. App. 216, opinion delivered November 25, 1981.

The appellant further maintains that even if the finding of the commission that the injury was substantially caused by appellant's intoxication be sustained, we should hold the employer estopped by his acquiescence to assert that defense. In support of that position he cites *Larson Workmen's Compensation Law* § 34.35 and cases cited in that work holding that an employer may be estopped to raise the defense of intoxication if he helped to cause the episode, participated in it or with knowledge of the intoxication permitted his employee to continue to work in that condition. We see no merit to this contention as applied to the facts before us for review.

The employer testified that while he was aware that appellant drank intoxicants on a regular basis and had done so for the past fifteen years, he had no knowledge of how much he drank and had never seen him so influenced by alcohol that he could not perform his duties satisfactorily or drive and control a vehicle. He had no knowledge that appellant was intoxicated on the date of the accident or at the time the accident occurred. Reviewing the testimony most favorable to the finding of the Commission, the Commission could, and did find that the employer did not know that appellant was intoxicated on the date of the accident and had no knowledge of his having previously consumed alcohol to such an extent as to affect his driving or ability to perform fully all of his duties satisfactorily. There was no evidence that the employer participated in any drinking sprees or that he knowingly permitted the appellant to continue to work in an intoxicated condition. Mere knowledge of his propensity to consume alcohol does not, in our opinion, estop the employer from raising the defense of intoxication under the circumstances presented by this record.

Affirmed.

MAYFIELD, C.J., concurs.

CORBIN, J., dissents.

Joe LASLEY *v.* BANK OF NORTHEAST ARKANSAS

CA 81-208 627 S.W. 2d 261

Court of Appeals of Arkansas
Opinion delivered February 3, 1982

*Penix, Penix & Mixon,* for appellant.

*Henry & Walden,* for appellee.

GEORGE K. CRACRAFT, Judge. This is an appeal from a judgment of the trial court dismissing the complaint of the appellant, Joe Lasley, against the appellee, Bank of Northeast Arkansas. In the trial court the parties waived a jury and submitted the matter to the court on the pleadings and a stipulation of facts. No oral testimony was offered.

The complaint of the appellant alleges that on the 24th of May, 1978, he entered into an agreement with DEARC Steel Products under which he was to purchase from DEARC, and DEARC was to construct, certain grain storage bins upon his property. It was alleged that the agreement was contingent upon the appellant's acquiring the approval of a loan from the Agricultural Stabilization and Conservation Service. It alleged further that the plaintiff drew a check on its account in the First National Bank of Conway in the amount of $2,863.50 payable to the Bank of Northeast Arkansas for the purpose of placing this money in the hands of a third party until the financing arrangements had been completed. The ASCA Office did not approve the loan. The complaint further alleged that upon failure to obtain the necessary approval the appellant made demand upon the appellee for the return of the money, and prays judgment against the appellee for the unlawful conversion of the deposit. Attached to the complaint was a copy of the check in question made payable to the appellee and containing a notation "for DEARC Steel Products, hold for ASCS approval."

The appellee answered denying all of those allegations and asserting that it was a holder in due course of the check, was not a party to any agreement between DEARC Steel Products and had no notice of any such agreement. It further contended that the check was negotiated for value, denied that the writings set out on the check were restrictions which applied to it and prayed that the plaintiff's complaint be dismissed.

The stipulation of facts set out the proposed purchase and sale between the appellant and appellee, that it was contingent upon the approval of the loan from the ASCS, that the Bank of Northeast Arkansas was never a party to this agreement, had no knowledge of and was never informed of said agreement. It was further stipulated that the appellant issued the check drawn on the First National Bank of Conway payable to the Bank of Northeast Arkansas and delivered the check to DEARC's representative "without any agreement or knowledge by the Bank of Northeast Arkansas." It further stated that the check was presented to the appellee Bank by DEARC Steel with directions to deposit that check in its account. The check was deposited into the account of DEARC Steel Products and was honored by the First National Bank of Conway on which it was drawn. The parties stipulated that the ASCS approval was never obtained. They further stipulated that DEARC presented the check to the Bank of Northeast Arkansas for deposit to the account of DEARC, it was handed to the bank for that purpose and the proceeds thereof were credited to the checking account of DEARC Steel. DEARC dispersed all of the funds in checks drawn by it on that account. It was further stipulated that the appellee Bank never listed the proceeds of the check in its assets but gave immediate credit to DEARC, who received all of the proceeds therefrom. They stipulated that at all times in issue the appellant was in no way indebted to the Bank of Northeast Arkansas, and that appellee Bank was not notified until October 15, 1978 of any irregularity in the handling of the check.

It was further agreed that it was a "very common occurrence" for depositors of checking accounts to present to the Bank of Northeast Arkansas for deposit in their accounts checks made payable to the bank, that this was done in this case, and was pursuant to a "very common occurrence in the banking business."

The theory of recovery advanced in the complaint of the plaintiff — that the check in question was made payable to the Bank of Northeast Arkansas for the purpose of placing the proceeds in the hands of a third party until the financial arrangements with ASCS had been completed — was based

on a well established exception to our rule that a general deposit of monies in a bank merely creates the relationship of a debtor and creditor between the bank and the depositor. However, if the money is placed in a bank for the purpose of safekeeping or on an understanding that the bank shall act as bailee or deliver the money under certain circumstances or to apply it to special purposes, or where the deposit is made under circumstances such as to give rise to a necessary implication that it was for such purposes, the deposit is a special deposit and the bank is merely an agent or bailee with no right to use, dispose or permit a disposition of the deposit except pursuant to the terms of the agreement. *Covey* v. *Cannon,* 104 Ark. 550, 149 S.W. 514 (1912).

It is axiomatic that one cannot be held liable as an escrow agent or trustee unless he has expressly, or by necessary implication, agreed to act as such and is aware of the terms under which the deposit has been made and the conditions upon which it may be released. The stipulation of facts in this case falls far short of bringing that exception into play. The stipulation does not show that the bank agreed that the check was to be held by it for the purpose of furthering a transaction between appellant and DEARC or that it had notice of any special facts concerning the check which would place it on notice of any such agreement. The stipulation expressly states that the appellee-bank was never a party to, had no knowledge of, nor was ever informed of such an agreement between the parties to that check. The stipulation is silent as to the purpose for which the check was issued or what use the parties intended should be made of it.

The appellant contends further that the notation placed on the check "for DEARC Steel Products, hold for ASCS approval" was sufficient to place the bank on inquiry as to the reason the check was delivered to it and that it was bound by all knowledge that such an inquiry would have disclosed. Even if the notation had that effect, there is nothing in the stipulation of the parties showing that such an inquiry would have disclosed a restriction upon the deposit or that it was intended to be held by the bank for any other special purpose.

We also note from the stipulation that it was a common occurrence, not only in appellee-bank but the banking business as a whole, for such a check to be deposited to the account of DEARC Steel Products.

While no cases from our own courts have been brought to our attention, we find the proper rule to be that when a case is submitted to the court solely upon an agreed statement of fact the burden is on the party seeking to recover to show his right from the facts agreed upon and he should not be heard to claim that there are other facts which the court should or may presume. 83 C.J.S. 67, *Stipulations* § 25.

We affirm.

Olen SETTERS *v.* STATE of Arkansas

CA CR 81-24 627 S.W. 2d 263

Court of Appeals of Arkansas
Opinion delivered February 3, 1982

*Tom J. Keith,* Public Defender, for appellant.

*Steve Clark,* Atty. Gen., by: *Victra L. Fewell,* Asst. Atty.

Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant was found guilty of the sale of a controlled substance, LSD, and sentenced to prison for ten years. The sole issue on this appeal is whether it was error for the trial court to permit the introduction of evidence of other crimes and acts. We find no error and we affirm.

At 12:45 a.m. on June 19, 1980 an undercover state police investigator, Dale Best, and an informer went to appellant's home. The informer told appellant that Officer Best wanted to purchase marijuana and appellant sold Best one ounce of marijuana for $20.00. Best then told appellant that he wanted to purchase some LSD, and appellant said he could obtain the LSD from another person for $5.00 per dosage unit. Best at that time made tentative arrangements to purchase four more ounces of marijuana. Best and appellant agreed to meet later the same day to consummate the purchase of LSD.

At 10:30 that night, the two met on the west side of the square in Bentonville. Appellant was a passenger in a car driven by Wanda Martin, a co-defendant. Best asked appellant if he had the LSD, and appellant said yes, but that the price would be $7.00 per dosage unit. Appellant fumbled between the driver and the passenger sides of the car and then asked Martin where the acid was. Martin opened her purse, took out the LSD, and handed it to appellant who handed it to Best. Best and appellant made further arrangements to meet the next day for the purchase of the four ounces of marijuana previously discussed. Cross examination revealed that Best and appellant met the next day according to their arrangement, at which time appellant told Best that he had learned Best was a narcotics officer.

Uniform Rules of Evidence, Rule 404(b) provides that evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he conformed therewith, but may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 403 provides that, although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury.

Rule 404 (b) is basically a restatement of case law stated and followed by the Arkansas Supreme Court. In *Alford* v. *State,* 223 Ark. 330, 266 S.W. 2d 804 (1954), the court said:

> No one doubts the fundamental rule of exclusion, which forbids the prosecution from proving the commission of one crime by proof of the commission of another. The State is not permitted to adduce evidence of other offenses for the purpose of persuading the jury that the accused is a criminal and is therefore likely to be guilty of the charge under investigation. In short, proof of other crimes is never admitted when its only relevancy is to show that the prisoner is a man of bad character, addicted to crime.

Another principle of law applicable to this case states that if other conduct of the accused is independently relevant to the main issue, in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal, that conduct may be admissible with a proper cautionary instruction by the court. In *Alford* v. *State* the court, quoting from *State* v. *Dulaney,* 87 Ark. 17, 112 S.W. 158 (1908), stated:

> While the principle is usually spoken of as being an exception to the general rule, yet, as a matter of fact, it is not an exception; for it is not proof of other crimes as crimes, but merely evidence of other acts which are from their nature competent as showing knowledge, intent, or design, although they may be crimes, which is admitted. In other words, the fact that evidence shows the defendant was guilty of another crime does not prevent it being admissible when otherwise it would be competent on the issue under trial.

In *Autrey* v. *State,* 113 Ark. 347, 168 S.W. 556 (1914) the state was permitted to introduce evidence that a hog had

been killed at about the same time a steer was stolen, the offense for which Autrey was being tried, as bearing on the question of intent and because it was part of the same transaction. In *Starr* v. *State,* 165 Ark. 511, 265 S.W. 54 (1924) the appellant was charged with being in possession of morphine and the state was permitted to show that she was also in possession of cocaine. The court ruled that possession of a quantity of cocaine at the same time has some tendency to show what the purpose was in having the morphine in her possession. In *Price* v. *State,* 268 Ark. 535, 597 S.W. 2d 598 (1980) appellant was charged with the theft of an automobile, and the state was allowed to introduce into evidence a telephone conversation appellant had with a police informant in which appellant admitted involvement in other car thefts. Appellant argued that the other car theft references were irrelevant and prejudicial. The court held that the evidence had independent relevance and that its relevance was not substantially outweighed by the danger of unfair prejudice. Those are issues, the court said, which the trial judge has wide discretion in deciding, and he will not be reversed unless he has abused such discretion.

In the case before the court it was not error for the trial court to permit the introduction of evidence of other crimes and acts of appellant. Appellant is in no position to complain about the testimony concerning his last meeting with Officer Best. That testimony was elicited on cross examination, and if error, it was invited by the appellant. All the other meetings and transactions between appellant and Officer Best occurred during a 22-hour period and the acts which occurred at those meetings were so interrelated by time and substance as to form one transaction: at the first meeting appellant sold Officer Best one ounce of marijuana and agreed to meet later for delivery of LSD and four additional ounces of marijuana; and at the second meeting the LSD was delivered as agreed, except for the price, and a definite appointment was then made for a second delivery of marijuana.

In *Young* v. *State,* 269 Ark. 12, 598 S.W. 2d 74 (1980) the court held admissible the testimony of an undercover agent that, at the time he purchased Phencyclidine (PCP) from the

appellant, the appellant told him he had already sold 30 hits of PCP that night. The court ruled that evidence of other criminal activity is admissible under the *res gestae* exception to the general rule to establish the facts and circumstances surrounding the alleged commission of the offense.

The other acts of appellant Setters were admissible to rebut the inference that appellant had been entrapped. An effort was made by appellant to show that Officer Best had sent the information to appellant's home on previous occasions "to try to get Mr. Setters to sell him something."

Appellant also implied that he might have only handed the LSD to Officer Best in behalf of the female driver of the automobile. Upon cross examination the following exchange took place between appellant's counsel and Officer Best:

Q. Did you — alright, what did you say?

A. I asked if he had the stuff and he said yes.

Q. Okay. And that's when Wanda Sue Martin dug it out of her purse and handed it to him and he handed it to you?

A. He asked where it was and she produced it and handed it to him and he handed it to me.

Q. And you then, you gave him $42.00?

A. Yes, sir.

Q. Do you know what he did with that?

A. No, sir.

Q. You didn't know whether he handed it to her or kept it or what?

The other contacts Officer Best had with appellant were relevant to prove appellant's intent, Rule 404 (b), *supra,* and

the fact that appellant's acts would also be independent crimes does not render them inadmissible. The trial judge had wide discretion in deciding the relevancy of the other crimes and acts of appellant and in deciding whether the relevance was substantially outweighed by the danger of unfair prejudice to appellant. *Price* v. *State, supra.* There was no abuse of discretioin.

Affirmed.

COOPER, CORBIN and GLAZE, JJ., dissent.

Sandra HAMBY *v.* William F. EVERETT, Director of Labor, and DILLARD'S DEPARTMENT STORE

E 81-192 627 S.W. 2d 266

Court of Appeals of Arkansas
Opinion delivered February 3, 1982

Appellant, *pro se.*

*Thelma Lorenzo,* for appellee.

DONALD L. CORBIN, Judge. Appellant has appealed from a decision of the Arkansas Employment Security Board of Review which held that she was disqualified from receiving benefits. We affirm.

Appellant was employed in the collection department at Dillard's Department Store. Her job was to contact delinquent accounts by telephone and attempt collection of these accounts. Dillard's discharged the appellant for making unauthorized long-distance telephone calls which was in violation of company policy. Appellant's application for employment benefits was denied by the agency under Section 5 (b) (1) of the Arkansas Employment Security Act [Ark. Stat. Ann. § 81-1106 (b) (1) (Repl. 1976)]. Appellant appealed the decision to the Appeal Tribunal which held that there was insufficient evidence presented to indicate a deliberate or willful act against the best interest of the employer by the claimant. The Appeal Tribunal held she was discharged for reasons other than misconduct in connection with her work.

The employer appealed the decision of the Appeal Tribunal to the Board of Review. The Board of Review reversed the decision of the Appeal Tribunal and held that appellant was disqualified under 5 (b) (2) of the Arkansas Employment Security Act [Ark. Stat. Ann. § 81-1106 (b) (2) (Repl. 1976)] which provides as follows:

> If he is discharged from his last work for misconduct in connection with the work on account of dishonesty, drinking on the job, reporting for work while under the influence of intoxicants, or willful violation of the rules or customs of the employer pertaining to the safety of fellow employees or company property, he shall be disqualified from the date of filing his claim until he shall have ten (10) weeks of employment in each of which he shall have earned wages equal to at least his weekly benefit amount.

The Board of Review made the following finding

regarding appellant's misconduct:

> The Board of Review finds that the claimant was discharged for misconduct in connection with the work. The unauthorized use of the telephone to make personal calls can be interpreted as a willful violation of company rules, and theft of property, telephone usage. The employer has proof by telephone records to whom the calls were made and the claimant's statement that she was using these family, relatives and friends in her work cannot be accepted in this case.

The issue on appeal is whether there is substantial evidence to support the decision of the Board of Review that appellee is disqualified from receiving benefits due to misconduct. Ark. Stat. Ann. § 81-1107 (d); *Harris* v. *Daniels,* 263 Ark. 897, 567 S.W. 2d 954 (1978); *Stagecoach Motel* v. *Krause,* 267 Ark. 1093, 593 S.W. 2d 495 (1980).

In *Stagecoach Motel* v. *Krause, supra,* this court stated the following regarding misconduct:

> The general rule is that misconduct (within the meaning of the Unemployment Compensation Act excluding from its benefits an employee discharged for misconduct) must be an act of wanton or wilful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of the standard of behavior which the employer has a right to expect of his employees.

We hold that there is substantial evidence to support the Board of Review's decision. The Board of Review obviously rejected appellant's claim that the telephone calls were in connection with her employment. While we are sympathetic with the argument advanced by the dissent that credibility should be determined at the administrative hearing level, we believe this is a matter which is best addressed by the Legislature and not the courts.

Affirmed.

GLAZE and COOPER, JJ., dissent.

TOM GLAZE, Judge, dissenting. I dissent. The Appeal Tribunal awarded benefits to appellant, and the Board of Review later reversed and denied benefits. In awarding benefits, the Appeal Tribunal obviously believed claimant's testimony, but in denying benefits, the Board clearly chose to disbelieve her testimony. The difference between the Appeal Tribunal proceedings here and that conducted by the Board was the Tribunal observed the demeanor of the witnesses who testified. Although the Board is authorized to take testimony and other evidence, it did not do so in this case. As was true in this appeal to the Board of Review, it is usual procedure for the Board to limit its review to the exact record and evidence which was previously presented to the Appeal Tribunal below. In cases where the ultimate determination as to benefits hinges entirely upon the degree of credibility to be accorded testimony of interested witnesses, I believe the Appeal Tribunal's credibility findings should be entitled to special weight. See K. Davis, *Administrative Law of the Seventies,* § 10.04 (1976).

I recognize that our court and the Supreme Court have consistently held, routinely and without comment, that credibility of witnesses and the weight to be accorded their testimony are matters to be resolved by the Board of Review and the Workers' Compensation Commission. *Daniels* v. *Hillcrest Homes, Inc.,* 268 Ark. 516, 594 S.W. 2d 64 (Ark. App. 1980); *Arkansas Coal Company* v. *Steele,* 237 Ark. 727, 375 S.W. 2d 673 (1974). How this rule on review has become so well established is a real conundrum. Anyone who reflects a moment on the application of this rule becomes immediately aware that a Board or Commission which reviews a cold record on appeal is in a poor position to weigh the credibility of any witness. It would make as much sense for our court to decide credibility issues in cases appealed to us from either the Employment Security Board of Review or the Workers' Compensation Commission. Of course, we have never done so.

Most any law school graduate is aware that our Court reviews chancery cases *de novo.* However, where credibility

issues arise, we will not reverse the findings of the chancellor unless they are clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of the witnesses. *Drewry* v. *Drewry,* 3 Ark. App. 97, 622 S.W. 2d 206 (1981).

Until comparatively recently, the courts in most jurisdictions, including Arkansas, have limited their review only to the findings of the administrative boards and commissions. See 3 A. Larson, *The Law of Workmen's Compensation,* § 80.12 (1976). More recently, however, Professor Davis in his treatise recognized that a reviewing court which is in doubt about whether the findings are supported by substantial evidence may properly take into account, for what it seems to be worth, the fact that an experienced hearing officer who saw and heard the witnesses made the findings that he did. 2 K. Davis, *Administrative Law Treatise,* § 10.04 (1958); see also, 2 Am. Jur. 2d, *Administrative Law,* § 690 (1962).

Idaho is one of a number of states where the courts have parted with the longstanding general rule which blindly requires reviewing courts to ignore the findings made by administrative hearing officers. The Idaho Supreme court has adopted the view that it is not bound by the Idaho Industrial Commission's findings when the Commission does not hear and see the witnesses. See *Mata* v. *Broadmore Homes,* 95 Idaho 873, 522 P. 2d 586 (1974), and *Clay* v. *Crooks Industries,* 96 Idaho 378, 529 P. 2d 774 (1974). Similar views to that expressed by the Idaho court have been adopted in other jurisdictions when courts have reviewed administrative board or commission decisions on appeal. See *Redding* v. *Cobia Boat Company,* 389 So. 2d 1003 (Fla. 1980); *Powell* v. *Industrial Commission,* 4 Ariz. App. 172, 418 P. 2d 602 (1966); *Universal Cyclops Corporation* v. *Workmen's Compensation Appeal Board,* 9 Pa. 176, 305 A. 2d 757 (1973). I should note, in passing, the courts in Florida and Pennsylvania apparently followed the traditional or general rule until their respective legislatures modified their state laws dealing with the review of workers' compensation cases.

In Arkansas, our statutory law provides that the findings of the Board of Review as to the facts shall be conclusive. Ark. Stat. Ann. § 81-1107 (d) (7) (Supp. 1981). However, when the Board reviews the decision of an Appeal Tribunal, it may do so on the evidence previously submitted to the Tribunal or it may direct additional evidence be submitted. Ark. Stat. Ann. § 81-1107 (d) (3) and (4) (Repl. 1976). There is nothing in our law which precludes or prohibits the Board from seeing and hearing witnesses, especially if credibility is an issue.

These same conclusions are true when reviewing our Workers' Compensation laws. For example, Ark. Stat. Ann. § 81-1325 (Supp. 1981) provides, in effect, that the findings of fact made by the Commission, within its power, shall be conclusive and binding on our court on appeal. When the Commission reviews a decision made by an Administrative Law Judge, it does so by reviewing the evidence previously submitted to the judge, and if it deems advisable, the Commission may hear the parties, their representatives and witnesses. Ark. Stat. Ann. § 81-1323 (b) (Repl. 1976).

In sum, our Employment Security Board of Review and Workers' Compensation Commission are authorized on the review of cases to call and hear witnesses. When the primary or sole issue on appeal becomes one of credibility of the witnesses, I believe the findings of the Board or Commission should not be binding on our courts unless that Board or Commission heard or saw the witnesses. In cases where they fail to call and hear the witnesses, I would adopt the rule that special weight should be given the findings of the hearing examiner who observed the demeanor of the witnesses. I believe the statutory procedures which outline this court's role of review in Employment Security and Workers' Compensation cases permit us to require such a rule. At the least, I feel the Arkansas General Assembly should adopt a law which appropriately modifies our review in cases where credibility of witnesses appears to be the sole or primary question. Meanwhile, I would reverse this cause because the Board failed to hear and see the witnesses, and the Appeal Tribunal was in a superior position to decide this case.

I am authorized to state that Judge COOPER joins in this dissent.

Moses L. JOHNSON *v.* Catherine COLEMAN

CA 81-199 627 S.W. 2d 565

Court of Appeals of Arkansas
Opinion delivered February 3, 1982
[Rehearing denied March 3, 1982.]

*L. T. Simes, III, Esquire,* for appellant.

*Sharp & Morledge, P.A.,* for appellee.

TOM GLAZE, Judge. Appellant argues four points for reversal, all of which arise from pre-trial motions. The trial court ruled against appellant on each motion, and after hearing the cause on its merits, the court entered judgment in favor of appellee. Appellant does not challenge the merits of the case on appeal.

The chronological sequence and manner in which this case developed for trial are important:

(1) On July 10, 1980, appellee filed her complaint and later amended it on August 6, 1980, after appellant filed a motion to make more definite and certain.

(2) On November 18, 1980, appellant filed an answer and counterclaim.

(3) By a notice dated January 15, 1981, the court set the case for pre-trial on February 9, 1981. Appellant's counsel, by letter, notified the court that he had a conflict on February 9, 1981, and requested this cause to be continued.

(4) On the pre-trial date, the court set this cause for a non-jury trial on February 24, 1981, and this court's

clerk duly notified the respective parties' counsel of the trial date.

(5) By letter to the court dated February 16, 1981, appellant's counsel acknowledged receipt of the trial date of February 24, 1981, and requested a continuance due to another conflict he had on the scheduled trial date and because he intended to move for a default judgment since appellee failed to file an answer to his counterclaim filed on November 18, 1980.

(6) By letter to the court dated February 18, 1981, appellee's counsel acknowledged receipt of the February 16 letter mailed by appellant's attorney. In the February 18 letter, counsel for appellee notified the court that he had been unaware of any response filed by the appellant since he had never been served with either an answer or counterclaim. He further advised the court he would file an answer and prepare for trial on February 24 or February 23 if this latter date would help avoid the conflict appellant's attorney noted in his earlier letter.

(7) On February 23, 1981, the parties and their counsel appeared in court and appellee's counsel announced he was ready for trial. Appellant's counsel objected, stating:

(a) He had never waived a jury trial;

(b) He was entitled to a default judgment on appellant's counterclaim against appellee;

(c) He was entitled to a continuance; and

(d) He was not properly or sufficiently notified of the February 23 trial date.

The court ruled adversely to appellant on each point raised prior to trial, and these are the four issues presented by appellant on appeal. We believe the court ruled correctly on each of the four pre-trial objections and motions.

First, the record is clear that appellant never complied with Rule 38 of the Arkansas Rules of Civil Procedure, which sets forth the requirements for demanding a jury trial. There is no doubt that appellant received notice of the February 24 trial date which was set by the court at the February 9 pre-trial conference. No demand for a jury was ever made by appellant until February 23 or over seven months after this action was first commenced.

Appellant's counsel argues that a local rule or custom followed by the courts in the judicial district in which this case was pending permitted him to request a jury at the pre-trial conference. Since he was absent from the pre-trial conference, he argues his absence somehow eliminated his need for demand a jury trial. We cannot agree. There is nothing in the record that substantiates counsel's contention that a local rule or custom concerning jury demand exists, but even if it did, we still find no evidence that counsel ever attempted to request a jury by any manner whatsoever prior to February 23. It is counsel's duty to pursue his client's cause through all its stages. *Pennington's Ex'rs.* v. *Yell,* 11 Ark. 212 (1850). This duty is rightfully imposed on counsel since a party is bound by the acts or omissions of his attorney. *O'Leary* v. *Commercial National Bank of Little Rock,* 1 Ark. App. 266, 614 S.W. 2d 682 (1981).

Appellant next contends that he was never notified by the court as to the February 23 trial date. The notice he received set the cause for trial on February 24, a date on which he had a conflict. Appellant advances the argument that the trial notice was insufficient and the case was not fully developed nor ready for trial on February 23. For these reasons, appellant suggests the court abused its discretion in denying appellant's motion for a continuance.

Since appellant's counsel had notified the court that he had a conflict on February 24, attorney for appellee said that he agreed to a setting on February 23, which would accommodate and permit appellant's counsel to attend the trial. Apparently, counsel for appellant never agreed to try the case on either date but did appear with his client on February 23.

Whether a motion for continuance should be granted is addressed to the discretion of the trial judge, and his decision will not be overturned unless that discretion is manifestly abused. *Rawhide Farms, Inc.* v. *Darby,* 267 Ark. 776, 589 S.W. 2d 210 (1979). Moreover, the Supreme Court has held that such a ruling will not be disturbed on appeal unless there is evidence that the trial judge acted arbitrarily or capriciously. *Bolden* v. *Carter,* 269 Ark. 391, 602 S.W. 2d 640 (1980). From the facts before us, we cannot agree the trial judge manifestly abused his discretion or that he acted arbitrarily.

Appellant's counsel notified the court by letter that he would not attend pre-trial conference on January 15, 1981, due to a conflict. He did not send a representative, and from the record, counsel took no further action in this cause until February 16, 1981, sometime after the court's clerk notified him of the February 24, 1981, trial. Again, by letter dated February 16, appellant's counsel advised the court he could not attend the February 24 trial date because he had another trial date. We cannot agree, as counsel for appellant seems to suggest, that a trial court is obliged to remove a case from its trial docket merely because an attorney writes a letter advising the trial judge that the attorney is unable to attend the date of hearing or trial. No motion for continuance was ever filed prior to the February 23 trial nor is there anything in the record which reflects appellant requested a hearing concerning a postponement for any reason.

Here, the reasons offered by appellant's counsel were known to him in advance of the February 23 or 24 trial dates. If scheduling conflicts, incomplete discovery or unavailable witnesses would prevent him from trying this case, he could have easily filed a timely motion stating the reasons for a continuance and requesting a hearing to dispose of the motion. In this connection, an attorney's conflicts which cause delays in preparing and presenting a case for trial are matters which should be considered by the trial court. However, an attorney's trial schedule conflicts and convenience must be subject to the convenience of the trial court in setting its trial or hearing docket. *Burrows* v. *Forrest City,* 260 Ark. 712, 543 S.W. 2d 488 (1976). From the record before

us, we simply do not believe it reflects the trial judge erred in denying appellant's motion for continuance.

Finally, we consider appellant's contention that the court erred in not awarding him a default judgment on his counterclaim. Our holding in *Hensley* v. *Brown,* 2 Ark. App. 175, 617 S.W. 2d 867 (1981), is applicable to the facts presented here. In *Hensley,* we said:

> So while we agree with the appellants that the granting of a default judgment on the issue of liability is not a matter of discretion where no answer or other pleading is timely filed, this does not mean that the trial court was in error in this case. If the appellee's allegation with regard to the mailing of his answer were believed, then the failure of the post office to deliver the letters would constitute excusable neglect, unavoidable casualty, or other just cause. The record does not show why the court denied the appellants' motion for default but it is their burden to demonstrate that the court was in error.

Counsel for appellee told the court that appellant's answer and counterclaim had never been served on him. The trial court accepted this as an explanation for appellee's failure to file a timely answer. Obviously the trial court believed the post office failed to deliver the pleadings filed by appellant. If the court erred, it was appellant's burden to prove it, and appellant failed to meet that burden.

For the foregoing reasons, we affirm the trial court's decision in all respects. Additionally, appellee requests costs for abstracting the pleadings in this cause. The request will be granted since these pleadings were obviously necessary for us to consider the points raised by appellant in this appeal.

Affirmed.

CITY OF HUMPHREY et al *v.* Charles WOODWARD

CA 81-315 628 S.W. 2d 574

Court of Appeals of Arkansas
Opinion delivered February 3, 1982
[Supplemental Opinion on Denial of Rehearing March 17, 1982.]

*Jerry G. James,* Ark. Insurance Dept., for appellants.

*J. R. Buzbee,* of *Givens & Buzbee,* for appellee.

TOM GLAZE, Judge. This is a Workers' Compensation case wherein (1) appellant contends the Commission erred in finding appellant controverted disability benefits, and (2) appellee contends, on cross-appeal, the Commission erred in not finding appellee permanently totally disabled.

Concerning appellee's argument on cross-appeal, we believe this court's holding in *Sunbeam Corp.* v. *Bates,* 271 Ark. 385, 609 S.W. 2d 102 (Ark. App. 1980), is dispositive of the issue raised by appellee here. In *Sunbeam,* we held the claimant was entitled to benefits "so long as he remains totally disabled." In the instant case, the Commission, based on substantial medical evidence, found appellee "currently totally disabled" and awarded him benefits indefinitely. The medical testimony obviously was conflicting on whether appellee was either permanently partially or totally disabled or currently totally disabled. We have held that the resolution of such a conflict is a question of fact for the Commission. *Jones* v. *Scheduled Skyways, Inc.,* 1 Ark. App. 44, 612 S.W. 2d 333 (1981).

It is settled law that we must affirm if we find any substantial evidence to support the Commission's ruling. *Jones* v. *Scheduled Skyways, Inc., supra.* A review of the record reflects the evidence is more than sufficient to support the "limited or restricted" total disability finding and award made by the Commission. Therefore, in accordance with our decision in *Sunbeam* and the rules on review to which we are bound, we find no merit in the argument urged by appellee in his cross-appeal.

Next, we consider appellant's contention that it never controverted any disability benefits awarded by the Commission over a 30% anatomical rating. Appellant argues: (1) that it agreed to pay appellee permanent partial disability equivalent to 30% to the body as a whole, which represents the highest anatomical rating received by appellant; and (2) that it was entitled to have a complete vocational rehabilitation evaluation performed on appellee before any hearings were conducted on the issue of permanent total or partial disability.

At oral argument, appellant studiously and correctly recognized that the progress of the instant case also tracked the development of law in the Workers' Compensation field as it pertained to vocational rehabilitation and total disability awards. No doubt, this period of development of law regarding rehabilitation and total disability benefits made it difficult for appellant to decide how to proceed in the payment of benefits to the appellee. For instance, now when we speak of total disability, such benefits may be denominated further in terms of "current" total, "limited" total or total disability benefits "until such time as total disability ceases." See *Sunbeam Corp.* v. *Bates, supra.* Obviously, in making such an award, the Commission remains hopeful that the claimant's disability is not permanent and that he will eventually return to work.

Vocational rehabilitation is another area in workers' compensation cases which has changed. Although the Commission's own decisions, cited by appellant, indicate the Commission decided it had a duty to direct a full investigation into the vocational rehabilitation of a claimant, the Arkansas General Assembly, in 1979, restricted or limited such an investigation or inquiry if the claimant so chose.[1] To this effect, the Arkansas General Assembly passed Act 253 of 1979, compiled as Ark. Stat. Ann. § 81-1310 (f) (Supp. 1979), which provides:

> (f) Rehabilitation. . . . The employee shall not be required to enter any program of vocational rehabilitation against his consent. A request for such program, if elected by the claimant, must be filed with the Commission prior to a determination of the amount of permanent disability benefits payable to such employee.

Subsequent to the passage of Act 253 of 1979, our court decided the case of *Hunter Wasson Pulpwood* v. *Banks,* 270 Ark. 404, 605 S.W. 2d 753 (Ark. App. 1980). In *Banks,* the employer and its insurance carrier argued the Commission

[1]Appellant cites two cases decided by the Commission in 1978 and 1979 which reflect the Commission's interest to actively pursue the question of rehabilitation in certain cases. Although these opinions are not binding on this court in this appeal, these cases do provide an interesting background history to the enactment of Act 253 of 1979.

erred in finding total disability without the benefit of the rehabilitation evaluation evidence. As is true in the facts at bar, the claimant in *Banks* initially agreed to an evaluation or rehabilitation but later concluded the pain due to his injury precluded such participation. Our court affirmed the Commission's finding that the claimant was totally and permanently disabled even though the rehabilitation evaluation was never provided as requested by the employer.

The record before us reflects that appellant at no time agreed to pay permanent partial benefits which would exceed a 30% anatomical rating. Yet, the Commission awarded appellee current total benefits or, in other words, an award which will not cease until some undetermined time in the future. Based on the 30% rating, appellee was only assured of receiving weekly benefits for approximately two and one half years.[2]

In accordance with our holding in *Hunter Wasson Pulpwood* v. *Banks, supra,* appellee was entitled to reject an evaluation or rehabilitation and to pursue a hearing on whether he was permanently and totally disabled. Although the Commission disagreed with appellee's claim for permanent total benefits, it did find that he is totally disabled at this time, a finding the Commission was authorized to make under *Sunbeam Corp.* v. *Bates, supra,* if substantial evidence was in the record to support it. Dr. C. Winston Brown reported that he believed appellee "presently" was totally disabled, and Dr. Stephen D. Holt stated appellee was a significantly impaired man with a very poor prognosis of returning to work.

We believe there is substantial evidence to support the current total disability benefits awarded appellee as well as to support the Commission's finding against appellant on the controversion issue. We affirm.

Affirmed.

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

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[2]Under the 30% rating, appellee would have received benefits until July 25, 1981.

Supplemental Opinion on Denial of Rehearing
delivered March 17, 1982

PER CURIAM. Appellant's motion for rehearing is denied. In our decision, among other things, we concluded appellee was entitled to reject an evaluation. *Hunter Wasson Pulpwood* v. *Banks,* 270 Ark. 404, 605 S.W. 2d 753 (Ark. App. 1980). On this point, we would add simply that our holding in this case is limited to the facts presented which we find are comparable to those found in *Banks.*

Francis E. BOURLAND and Shelby J. BOURLAND, Husband and Wife *v.* TITLE INSURANCE COMPANY OF MINNESOTA

CA 81-220 627 S.W. 2d 567

Court of Appeals of Arkansas
Opinion delivered February 10, 1982

*George H. Bailey,* for appellants.

*Gill, Skokos, Simpson, Buford & Owen,* for appellee.

GEORGE K. CRACRAFT, Judge. Appellants, Francis E. Bourland and Shelby J. Bourland, bring this appeal from a summary judgment which dismissed their claim against appellee, Title Insurance Company of Minnesota, upon finding that there were no material issues of fact to be determined and that the loss for which they made claim was expressly excluded from coverage under a provision of the policy of title insurance which did not insure against defects "created, suffered, assumed or agreed to by the insured." Appellants contend that there were material issues of fact to

be determined and that the court erred in granting summary judgment. We agree.

An understanding of our decision requires a resume of the factual background leading up to the proceedings from which this appeal arises. In 1970, Vera Jones and Russell R. Jones, the owners as tenants by the entirety of 39 acres of land in Pope County, executed and delivered two deeds to their son, Russell J. Jones. One deed conveying a tract containing 22 acres was duly recorded and is not involved here. The second deed, which is the subject of this litigation, conveyed a 17 acre tract referred to as the "home place" but was not recorded until January 27, 1977.

In 1975 Vera Jones, then a widow, brought an action against her son, Russell, seeking to cancel and set aside both deeds as clouds on her title. The deed to the "home place" was then still unrecorded. By a decree dated January 27, 1977, the chancery court dismissed her complaint and on that same day the deed to the "home place" was filed for record by Russell. The decree of the chancery court was subsequently affirmed in an unpublished opinion of the Supreme Court, delivered on May 22, 1978. The appellant, Shelby Bourland, also a child of Vera Jones, testified on behalf of her mother in those proceedings.

During the first week in June 1978 Vera Jones executed a deed to the appellants purporting to convey to them her interest in the "home place." The deed was prepared by an attorney for Vance Abstract Company, an agent of appellee, and executed in its offices. On June 15, 1978 appellee through its agent issued its policy of title insurance to appellants insuring their title against defects. Although the deed executed in favor of Russell in 1970 and the decree determining it valid had then been of record for eighteen months, neither was shown as an exception in the policy.

In 1979 an attack was made on appellants' title, the exact nature of which is not fully disclosed by the record. When appellee refused to defend their title appellants brought this action to recover their loss resulting from the prior deed to Russell. In their original complaint they

contended that they had no knowledge of the prior deed and had relied upon appellee to make a proper search of their title. By subsequent amendment they admitted that they had knowledge of the deed but denied knowing that it had been recorded or that Russell was then making any claim under it.

The appellee answered, denying all allegations of the complaint and affirmatively pleaded an exclusion in the policy as to defects "created, suffered, assumed or agreed to by the insured," and subsequently filed its motion for summary judgment with supporting documents. In its order granting the motion for summary judgment the trial court stated:

> [T]he court . . . finds that there is no genuine issue as to any material facts; that the plaintiffs had actual knowledge of a certain deed from the plaintiff's, Shelby Bourland, mother and father to her son, Russell R. Jones; in fact, the validity of said deed had previously been determined in the case of *Vera Jones* v. *Russell R. Jones,* Pope Chancery No. E-75-487, Arkansas Supreme Court No. 77-270; the plaintiff, Shelby Bourland, had testified on behalf of her mother in that trial during which she acknowledged that she had known of the deed for a year prior to the trial date in January of 1977; therefore the plaintiffs knew about the said deed and having such knowledge had a new deed from Vera Jones prepared in plaintiff's favor, and the plaintiffs had the defendant's title policy issued thereby actually or inferentially *agreeing* to or *suffering* the existence of the defect in title of which the plaintiffs now complain. The plaintiff's knowledge in these circumstances can not be overlooked by this court in holding that plaintiff *agreed to or suffered* the first deed within the meaning of the exclusions provided in paragraph 3 (a), which provides as follows:
>
> > Exclusions from Coverage — The following matters are expressly excluded from coverage of this policy — (3) defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant; . . . .

Appellants appeal from that order insisting that the court erred in finding that there were no material issues of fact to be determined.

In our review of summary judgments the principles of law which we follow are well established. The appellee has the burden of demonstrating that there was no genuine issue of fact for trial and any evidence submitted in support of its motion must be viewed most favorably to the party who resists that motion. A summary judgment is to be granted only when there is no genuine issue as to any material fact and when, even though facts are in dispute, reasonable and fair minded men could only draw one conclusion from them. The object of summary judgment proceedings is not to try the issues but determine if there are issues to be tried. *Hendricks, Administrator* v. *Burton,* 1 Ark. App. 159, 613 S.W. 2d 609 (1981); *Dodrill* v. *Ark. Democrat Co.,* 265 Ark. 628, 590 S.W. 2d 840 (1979); *Ashley* v. *Eisele,* 247 Ark. 281, 445 S.W. 2d 76 (1969).

The motion for summary judgment was submitted to the court on a copy of the transcript in the prior chancery case containing appellants' testimony in that case, depositions of appellants taken by appellee and appellants' counter-affidavits. The transcript disclosed that at the time that case was tried the appellant Shelby Bourland had been aware of the existence of the deed to Russell for at least a year. However, she testified that the deed had never been recorded; that her brother, Russell, had told her he would not do so, and had indicated to her that the deed was "no good." The deed had not been recorded at that time.

In the depositions and counter-affidavits appellants stated that prior to the issuance of the deed from Vera Jones to the appellants Russell had told them that as far as he was concerned the property belonged to his mother and "if she wanted to sign it over to us, she could as it was her property." Shelby Bourland stated that she did not know the outcome of the prior suit, had not heard the testimony of any other witness, and as far as she was concerned "Russell was tearing up the deed." Both appellants averred that their purpose in going to Vance Abstract Company was to obtain a title

search and were relying on Vance Abstract Company to determine whether the deed from Vera Jones to appellants would effectively convey title.

This evidence viewed in the light most favorable to the appellants shows that her knowledge at the time of the prior suit was only of the existence of an unrecorded deed which she had been told would not be recorded and was "no good." She had no knowledge that Russell had subsequently recorded it or recanted his denial of claim under the deed and ordered a title search by appellee's agent in order to determine the state of the title Vera Jones was conveying to them.

The purpose of title insurance is to protect a transferee of real estate from loss through defects clouding his title. The issuance of the policy is predicated upon an examination of the public records as to the insured title for when a person seeks title insurance he expects to obtain a professional title search and opinion as to the condition of his title. Accordingly the insurer had a duty to search the records for clouds and other defects before issuing its policy. *McLaughlin* v. *Attorneys Title Guaranty Funds, Inc.*, 61 Ill. App. 3d 911, 378 N.E. 2d 355 (1978); *Lawyers Title Insurance Corp.* v. *Research Loan & Investment Corp.*, 8th Cir. 1966, 361 F. 2d 764.

At the time appellee's agent issued the policy of title insurance it had at least constructive knowledge of the recorded deed and of the chancery court decree determining its validity. Appellant denied knowledge of either fact. Mere knowledge of a defect in one's insured title is not, in and of itself, a defense to an action on the policy unless that knowledge not possessed by the insurer is willfully withheld. Whether appellant's testimony as to the extent of her knowledge and belief or reliance upon the abstractor is true or false is a question of fact which cannot be properly determined by summary motion.

We find the trial court's finding that appellants had actually or inferentially "agreed to" or suffered the defect within the meaning of the exclusion to be erroneous for the

same reason. The reported cases dealing with this exclusion are uniform in holding that the word "suffered" is synonymous with "permit" and implies a power in the insured to prohibit the act giving rise to the defect. *Feldman* v. *Urban Commercial, Inc.,* 87 N.J. Super. 391, 209 A. 2d 640 (1965); *Arizona Title Insurance & Trust Co.* v. *Smith,* 21 Ariz. App. 371, 519 P. 2d 860 (1974); *First National Bank & Trust Co. of Port Chester* v. *New York Title Insurance Co.,* 171 Misc. 854, 12 N.Y.S. 2d 703. When the evidence is viewed in the proper light it is clear that appellant had nothing to do with the execution or recording of the deed and had no power to prohibit it.

The cases uniformly declare that the words "agreed to" connote "contracted." *Arizona Title Insurance & Trust Co.* v. *Smith,* supra; *Fish* v. *Fish,* 307 S.W. 2d 46 (Mo. App. 1957). The evidence properly viewed does not indicate that appellants agreed to the defect in their title but steadfastly denied knowledge of it.

The appellants further argue in support of the summary judgment that the quoted limitation in the policy precludes coverage where the loss to the insured results from his own intentional misconduct or illegal and inequitable conduct, relying upon *Ginger* v. *American Title Ins. Co.,* 29 Mich. App. 279, 185 N.W. 2d 54 (1970), and *Feldman* v. *Urban Commercial, Incorporated,* supra, and other cases discussed in 87 ALR 3d, 515 at 521. These cases hold generally that where the insured deals or participates in an unconscionable scheme which results in a successful attack upon an insured title coverage is denied under an exclusion of defects "created, suffered, assumed or agreed to" by the insured because the consequences are brought about by the acts of the insured and thus *created or suffered* by him.

The culpability of this appellant's intent in the transaction is a question of fact and was improperly disposed of on summary motion. Though there existed circumstances under which a trier of fact might properly find that appellant and her mother engaged in a scheme to defeat either the title of her brother or the rights of the insurer, her assertion that her actions were totally innocent of any such

intent created a material issue of fact for the court to determine which should not have been disposed of summarily.

Appellants advance other points for reversal based upon the action of the trial court in denying their motion to set aside the summary judgment on supplemented supporting documents. In view of our decision on the initial action of the court we do not address these points.

Reversed and remanded.

THOMAS JEFFERSON INSURANCE COMPANY
*v.* STUTTGART HOME CENTER, INC., Bobby
MOTEN and Pearl Scaife MOTEN

CA 81-238 627 S.W. 2d 571

Court of Appeals of Arkansas
Opinion delivered February 10, 1982

*Bridges, Young, Matthews, Holmes & Drake,* for appellant.

*Norman M. Smith,* for appellees.

DONALD L. CORBIN, Judge. Appellant, Thomas Jefferson Insurance Company, appeals a decision by the Circuit Court of Jefferson County which ruled that the appellees, Bobby Moten and his wife, Pearl Scaife Moten, were entitled to recover from the appellant for the loss of their furniture

plus attorney fees and costs. We affirm in part and reverse in part.

In July, 1978, the Motens purchased furniture under a conditional sales contract from the Stuttgart Home Center to furnish their apartment. Simultaneously, they purchased a policy of insurance from appellant, with a loss payable clause in favor of Stuttgart Home Center, to cover loss or damage to the furniture.

In August, 1979, while the Motens were away from their residence, the apartment was entered and the furniture insured by appellant was severely damaged. In February, 1980, Stuttgart Home Center filed suit against the Motens for default on the conditional sales contract. The Motens brought appellant into the suit as a third-party defendant, contending that appellant had been notified of the loss but had refused to pay under the policy.

At trial, appellant contended that the insurance policy did not provide coverage for this loss suffered by the Motens. The provision in dispute under the insurance policy provided as follows:

> Coverage: The Master Policy covers direct loss or damage by:
>
> . . . .
>
> (e) Burglary from within a building or room (of which there must be visible evidence of forcible entry).

The trial court made the following findings of fact:

> That the third-party plaintiffs did prove by a preponderance of the evidence, that a burglary of their apartment had in fact occurred and that there was visible evidence of a forcible entry into said apartment; the screen to the window immediately above the kitchen sink had been removed and was found in the backyard of the third-party plaintiff's apartment, a

> window over the sink was unfastened, property was missing from the apartment and a number of flower pots had been knocked into the kitchen sink, and the rear door of the apartment had been opened.

The Stuttgart Home Center, Inc. and the Motens stipulated that the Home Center would recover the balance due under the conditional sales contract. The Court awarded judgment to the Motens for $2,675.00 plus 12 percent penalty and attorney fees in the amount of $998.66 plus their costs expended.

For reversal, appellant first argues that the trial court erroneously equated the acts of vandalism with burglary and, in effect, rewrote the insurance policy contract to provide coverage when none existed. We disagree.

In *Northland Bottling Co.* v. *Farmers Mutual Automobile Ins. Co.,* 3 Wis. 2d 326, 88 N.W. 2d 363 (1958), the Wisconsin Supreme Court dealt with a loss due to vandalism under a burglary policy. The policy in *Northland* defined burglary as the felonious abstraction of property or attempt thereat, occasioned by actual force or violence and provided coverage when loss or damage was occasioned by burglary or attempted burglary.

In holding that the policy terms were ambiguous, the court in *Northland* stated as follows:

> The property on which plaintiff claims a loss was damaged or destroyed during an admitted burglary. The occasion, the cause, of the offender's presence in plaintiff's plant and office was to commit the burglary. We consider that his purpose in entering the premises was the occasion and the cause, under the terms of the policy, of what he did there, senseless and wanton as much of it appears to be. . . . This is not to say that an insurer could not choose words excluding coverage for vandalism committed in the course of a burglary and not reasonably calculated to aid the purpose of abstracting property. In our opinion it has not done so here.

In the present case, the insurance policy does not define the term "burglary". Under these circumstances, we believe it is appropriate to refer to the applicable criminal statute on burglary.

In *Central Surety Fire Corp.* v. *Williams,* 213 Ark. 600, 211 S.W. 2d 891 (1948), the Arkansas Supreme Court looked to the criminal statutes on larceny in determining if a policy provided coverage. See also *Massachusetts Fire and Marine Ins. Co.* v. *Cagle,* 214 Ark. 189, 214 S.W. 2d 909 (1948).

Burglary is defined by our criminal code in Ark. Stat. Ann. § 41-2002 (Repl. 1977) as follows:

> Burglary. — (1) A person commits burglary if he enters or remains unlawfully in an occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment.

The evidence overwhelmingly points to a violation of our burglary statute. The apartment was entered unlawfully and was an occupiable structure. Clearly there was ample evidence that an offense was committed that was punishable by imprisonment, i.e., furniture valued in excess of $2,500 was destroyed and money and valuables were stolen.

Appellant did not choose to define burglary in its insurance policy with appellees, and we believe it would be unconscionable to allow appellant to now define the coverage after the loss has occurred. The trial court's finding that the Motens sustained their loss as a direct result of the burglary is not clearly erroneous (clearly against the preponderance of the evidence). Rule 52, Arkansas Rules of Civil Procedure.

Appellant also argues that the trial court erred in holding that the Motens proved by a preponderance of the evidence that there was visible evidence of a forcible entry into their apartment.

In *Western Casualty & Surety Co.* v. *Smith-Caldwell Drug Store, Inc.,* 256 Ark. 196, 506 S.W. 2d 116 (1974), the

Arkansas Supreme Court recognized the validity of these policy requirements stating:

> The rationale for recognizing as valid the asserted exclusion of coverage is to prevent liability for "inside jobs" and to protect the insurer from fraud. 10 Couch on Insurance, § 42:129 (2d Ed. 1962). The cases are uniform in holding that where there are no visible marks or signs of force or violence at the place of entry or at the place of exit, then the unambiguous exclusionary language is controlling. (citations omitted).

In *Western Casualty & Surety Co.* v. *Smith-Caldwell Drug Store, Inc., supra,* the insurance company had issued an open stock burglary policy to the insured. In that case, the policy required that a burglary be committed by a "felonious entry therein by actual force and violence, of which force and violence there are visible marks made by tools, explosives, electricity or chemicals upon, or physical damage to, the exterior of the premises at the place of such entry, or . . ." that similar visible signs of force and violence exist as to the "interior of the premises at the place of exit." The Arkansas Supreme Court stated, "There was *no evidence* of force or violence on the exterior of the premises . . . . " (Emphasis ours.)

Appellant has cited us numerous cases from other jurisdictions which have denied coverage under similar provisions. See 99 A.L.R. 2d 129 (1965) for a discussion of cases dealing with these provisions. It is interesting to note that many of the provisions are quite specific as to the types of marks which are required under the policies. See *Western Casualty & Surety Co.* v. *Smith-Caldwell Drug Store, Inc., supra.*

The policy in the present case requires "visible evidence of forcible entry". Specific types of visible evidence are not required under the policy. Certainly the evidence in this case presented a close question as to whether the Motens proved visible evidence of a forcible entry. In reviewing the sufficiency of the evidence on appeal to support the decision of a trial judge sitting as a jury, we consider the evidence in the

light most favorable to the appellee and affirm unless the trial court's decision is clearly erroneous. Rule 52, A.R.C.P. *Orsby* v. *McGee,* 271 Ark. 268, 608 S.W. 2d 22 (1980); *Taylor* v. *Richardson Construction Co.,* 266 Ark. 447, 585 S.W. 2d 934 (1979). There was sufficient evidence presented at trial to support the trial court's finding that there was visible evidence of a forcible entry into the Moten's apartment and we cannot say that finding is clearly erroneous.

Finally, appellant argues that the court erred in awarding attorney fees to appellees without notice or an opportunity for the appellant to be heard. Since the record does not reflect that appellant was given an opportunity to be heard on the issue, we are reversing and remanding solely for a hearing on the award of attorney fees. See *Union Central Life Ins. Co.* v. *Mendenhall,* 183 Ark. 25, 34 S.W. 2d 1078 (1931).

Affirmed in part, reversed in part.

MAYFIELD, C.J., and COOPER, J., concur.

CRACRAFT, J., dissents.

MELVIN MAYFIELD, Chief Judge, concurring. I agree that this matter should be remanded to give the appellant an opportunity to be heard on the attorney's fee award.

It is not necessary to have a hearing in every case and a court may apply its own general knowledge to the facts in evidence in determining the amount of attorney's fees. *Valley Oil Co.* v. *Ready,* 131 Ark. 531, 199 S.W. 2d 915 (1917); *Mercantile-Commerce Bank & Trust Co.* v. *Southeast Arkansas Levee Dist.,* 106 F. 2d 966, 973 (8th Cir. 1939). But I do agree that a party must be afforded an opportunity to be heard on the question.

COOPER, J., joins in this concurrence.

GEORGE K. CRACRAFT, Judge, dissenting. I fully agree with the majority opinion that the trial court correctly found that the loss sustained by appellees was the result of a

burglary. I further agree that the policy provision that limits coverage for burglary to those "of which there must be visible evidence of forcible entry" is a valid limitation. I disagree with the majority only on their conclusion that the finding of the trial court that there was visible evidence of forcible entry was not clearly erroneous.

In my review of the testimony I have been unable to find even a scintilla of evidence supporting that finding. To the contrary, while there was no testimony tending to show evidence of forcible entry, there was affirmative evidence that no such evidence was found. The police officer investigating the crime stated without equivocation " . . . in my investigation I did *not* find any visible evidence of forcible entry into the premises."

All witnesses concluded that entry into the apartment was made through a kitchen window from which a screen had been removed. There was no evidence that the screen had been cut or otherwise forced. There was no evidence that the window had been forced open or that it had been locked when the appellees departed.

In my opinion the appellees did prove that they were the victims of a burglary, but failed to prove or offer evidence tending to show that the burglary was accomplished by forcible entry. In my opinion, failure to show evidence of forcible entry excluded the loss from coverage under the wording of the policy.

I respectfully dissent.

# WHOLESALE OIL COMPANY *v.* T. B. & L. FARM SUPPLY, INC.

CA 81-218 628 S.W. 2d 22

Court of Appeals of Arkansas
Opinion delivered February 17, 1982

*W. B. Guthrie, Jr., Ltd.,* by: *Robert M. Abney,* for appellant.

*Joe N. Peacock,* for appellee.

MELVIN MAYFIELD, Chief Judge. Seven years ago in *DeSoto, Inc.* v. *Crow,* 257 Ark. 882, 520 S.W. 2d 307 (1975), the Arkansas Supreme Court set aside a judgment entered against a garnishee on its failure to answer a writ of garnishment. The court said the writ merely advised the garnishee to appear and answer questions propounded and to be propounded but did not contain language sufficient to give notice that the failure to answer could result in a judgment against the garnishee.

Today we are asked to require a trial court to enter judgment against a garnishee who was served with a writ containing the same defect which existed in the writ in the *DeSoto* case.

The request must be denied. Even if we were inclined to grant it, the Supreme Court — only a few days ago — clearly

indicated that it would not retreat from its holding in *DeSoto*. See *Tucker* v. *Johnson*, 275 Ark. 61, 628 S.W. 2d 281 (1982).

The order of the trial court is affirmed.

Darrell W. BARNES *v.* STATE of Arkansas

CA CR 81-53 628 S.W. 2d 334

Court of Appeals of Arkansas
Opinion delivered February 17, 1982
[Rehearing denied March 17, 1982.]

*Tiner & Easterling,* by: *Charles R. Easterling,* for appellant.

*Steve Clark,* Atty. Gen., by: *Arnold M. Jochums,* Asst. Atty. Gen., for appellee.

MELVIN MAYFIELD, Chief Judge. Darrell Barnes was found guilty of battery in the second degree and was sentenced to three years in the Department of Correction. Gary Foster, a codefendant, was found not guilty.

The evidence, viewed in support of the verdict, can be summarized as follows:

Barnes and Foster were involved in an altercation at a nightclub outside Trumann, Arkansas, during the early

morning hours of April 5, 1980. Barnes had been in a fight inside the club which the club manager had broken up by hitting Barnes with a "regular night stick." The manager and the bouncer then ejected Barnes from the club. Outside, the bouncer and Barnes got into a fight and while this fight was going on, in response to a call by the manager, a deputy sheriff drove up. He was in uniform, with a badge, and wearing a gun. When he drove up in a police car with lights on the fighting stopped.

Foster, who had picked up the bouncer's "stick" which had been dropped when the bouncer and Barnes started fighting, was standing against a wall with a ring of fifteen or twenty people around him. The deputy sheriff asked what was going on and the manager pointed to Foster and said he was giving them a lot of trouble. The deputy told Foster to get in the sheriff department's car and Foster refused. The deputy then noticed Foster working his hand up to the top of the "stick" he was holding and told him to drop it and when he didn't the deputy hit him over the head with his flashlight.

Barnes then grabbed the deputy from behind and this led to the eventual result of Barnes' getting the deputy's flashlight and knocking him to the ground with it. Barnes hit the deputy three or four times with at least one blow coming while the deputy was on the ground with Barnes standing astraddle of him. Barnes got the deputy's gun, swung it around at the crowd, and took off around the building. The deputy was taken to a Jonesboro hospital in an ambulance, received eight stitches, and was then transferred to a hospital in Memphis. He had a hematoma and a concussion; was in the hospital seven days; and was off work about six weeks.

Barnes' first two points for reversal are that the trial court excluded evidence of events that preceded the altercation with the deputy sheriff and that the court commented on evidence concerning those events.

*Exclusion of Evidence*

It is appellant's contention that what happened inside

the club and what happened outside constituted one ongoing episode, was part of the res gestae, and would have better enabled the jury to understand appellant's mental state and the reasonableness of his belief that he was in danger of great bodily harm. The short answer is that there *was* evidence introduced about what occurred inside the club. And while there was some limitation on the details, we cannot find any proffered evidence excluded which could have made any difference to the jury. Even relevant evidence may be excluded under Rule 403 of the Arkansas Uniform Rules of Evidence if its probative value is substantially outweighed by undue delay or waste of time. We do not find the court committed error in the exclusion of evidence.

*Comment on the Evidence*

During cross-examination of the club manager the court sustained an objection to a question about events inside the club. Despite that ruling, questions were asked and answered about those events. When the next witness testified, there was another question asked about the events and in sustaining the objection the court said: "The court is going to sustain the objection for the same reasons indicated to the last witness which got out of hand . . . . " A motion for mistrial (out of the hearing of the jury) was then made by defense counsel on the ground that the court had suggested counsel had done something improper. After the motion was denied the court told the jury:

> Ladies and gentlemen, I might give you this one further admonition. The Court perhaps in choice of words said it may have got out of hand. I am not attempting to lay or fix any blame on the part of defense counsel or the prosecution. The Court is responsible for conducting and controlling the trial and the admissibility of evidence and testimony. The Court let it go a little further than it felt like it should have into relevant matters a moment ago. I am not pointing any blame at anybody other than myself.

At this point another motion for mistrial was made (out of the hearing of the jury). This motion was based on the

proposition that the court had made a comment on the evidence. The appellant's brief sets out the above and simply says:

> We submit that the Court's statement was a comment on the evidence and a mistrial should have been granted. Article 7 § 23, Constitution of Arkansas. See also *McMillan* v. *State,* 229 Ark. 249 (1958).

We do not think the court made a comment on the evidence. The facts in the case cited by appellant are certainly not similar to those in the instant case. The jury was admonished in the words of AMCI 101 (f) that the judge had not intended by anything he had done or said to intimate or suggest what they should find to be the facts. We do not agree that appellant's motion for mistrial should have been granted. See *Brown & Bettis* v. *State,* 259 Ark. 464, 471, 534 S.W. 2d 207 (1976).

*Jury Instructions*

The appellant contends the court erred in modifying AMCI 4105 on justification by adding the following language:

> A person may not use physical force or deadly physical force to resist a lawful or unlawful arrest by a person who is known, or reasonably appears, to be a law enforcement officer.

This language comes from Ark. Stat. Ann. § 41-512 (Repl. 1977). In his brief the appellant says the above statute does not deprive one of the defense of justification if the law enforcement officer uses excessive force in making an arrest. In the Commentary to the statute it is said:

> Section 41-512 adopts the "no sock" principle discouraging physical resistance of an arresting officer. As pointed out by the *Commentary to Proposed Oregon Code § 32*: "[O]rderly procedure dictates peaceful submission to duly constituted law enforcement in the first instance; and . . . if it develops that the officer

> was mistaken and the arrest unauthorized, ample means and opportunity for remedial action in the courts are available to the person arrested."
>
> . . . .
>
> Under prior law it was clear that under no circumstances might one employ physical force to resist a lawful arrest. Whether one could justifiably utilize physical force to resist an unlawful arrest or execution of process was, however, unclear. Of course, if the 'unlawfulness' of the arrest lay in the use of excessive physical force upon the person to be arrested, the principles set out by the cases in the Commentary to §§ 41-506, 507 permitted self-defense.

The commentary to Oregon's proposed "no sock" statute referred to above was quoted in a concurring opinion in *State* v. *Laurel,* 476 P. 2d 817 (Or. Ct. App. 1970). It says that an unlawful arrest could be resisted at common law but says the modern trend is in the direction of a provision that one may not resist arrest by a law enforcement officer whether the arrest is lawful or unlawful. And it also says, "if the unlawful manner of the arrest reasonably leads the arrestee to believe he is the victim of a murderous assault, or of kidnappers, homicide committed by him will not be criminal if he uses no more force than reasonably appears to be necessary under the circumstances."

After the statute was adopted in Oregon it was found constitutionally sound and the court held that it did not deny the right to resist an arrest made with excessive force. *State* v. *Crane,* 612 P. 2d 735 (Or. Ct. App. 1980).

In *State* v. *Ramsdell,* 285 A. 2d 399 (R.I. 1971) the Supreme Court of Rhode Island, where the common law right to resist unlawful arrest has been abolished by statute, explained the reason for the difference in submitting to arrest — whether lawful or unlawful — and a reasonable defense against excessive force in making an arrest.

> There is a reasonable rationale for one rule which

> requires a citizen to quietly yield to an unlawful arrest and another rule permitting a citizen to use reasonable force to counter the excessive force of an arresting officer. Implicit in the adoption of these two principles is a recognition that liberty can be quickly restored by resort to the legal profession and an acknowledgment that, unless a citizen is afforded the opportunity to protect himself, the restoration of a fractured limb falls within the exclusive province of the medical profession. The abolition of the common-law right to resist an unlawful arrest, therefore, is in no way related to the citizen's right to protect himself from the excessive force of what might be described as an overzealous police officer.

And in *State* v. *Mulvihill,* 57 N.J. 151, 270 A. 2d 277 (1970) the New Jersey Supreme Court stated two qualifications to this right of defense:

> Two qualifications on the citizen's right to defend against and to repel an officer's excessive force must be noticed. He cannot use greater force in protecting himself against the officer's unlawful force than reasonably appears to be necessary. If he employs such greater force, then he becomes the aggressor and forfeits the right to claim self-defense to a charge of assault and battery on the officer. See Restatement, Torts 2d, § 70, p. 118 (1965). Furthermore, if he knows that if he desists from his physically defensive measure and submits to arrest the officer's unlawfully excessive force would cease, the arrestee must desist or lose his privilege of self-defense.

Other cases on this point are the subject of the Annotation in 44 A.L.R. 3d 1078. There is no question, however, that the weight of authority would agree with the appellant's contention that Ark. Stat. Ann. § 41-512, supra, does not deprive one of the defense of justification if the law enforcement officer uses excessive force in making an arrest. But that does not mean that the trial court was in error with regard to the instructions given in this case.

In the first place, the jury certainly could have found that the appellant knew, or reasonably should have known, that the man in a uniform, with a badge, wearing a gun, and who told Foster to get in the police car, was a law enforcement officer. It was therefore clearly proper to instruct the jury that appellant did not have the right to use force to resist arrest by a person who was known, or reasonably appeared, to be a law enforcement officer.

And in the second place, assuming that the evidence would warrant an instruction with regard to the right of appellant to defend himself and Foster against the officer's use of excessive force, no specific instruction to that effect was requested by him. The court is not required to give a specific instruction when none is requested. *Schwindling* v. *State,* 269 Ark. 388, 602 S.W. 2d 639 (1980); *Tyler* v. *State,* 265 Ark. 822, 831, 581 S.W. 2d 328 (1979). If appellant wanted the jury instructed on any point not covered it was his duty to request an instruction correctly declaring the law on that subject. *Griffin* v. *State,* 248 Ark. 1223, 455 S.W. 2d 882 (1970).

So in the absence of a specific instruction on the point, we find no error in adding the language of the statute to the AMCI instruction. Without this modification the effect of the instruction would be that Barnes and Foster could use such force as they reasonably believed necessary to defend against any unlawful *force* they reasonably believed the deputy sheriff was about to inflict upon them. It was proper to add that they could not use force to resist *arrest* by the deputy sheriff — whether that arrest was lawful or unlawful.

*Imposition of Sentence*

Appellant's final point is that the court should have postponed the imposition of sentence until after a hearing to determine if the appellant should be handled under the provisions of the Youthful Offender Alternative Service Act of 1975, Ark. Stat. Ann. §§ 43-2339, et seq. (Repl. 1977). A motion to this effect made after the verdict of the jury was returned was immediately denied by the court without comment.

In *Turner* v. *State,* 270 Ark. 969, 606 S.W. 2d 762 (1980) the court said the trial judge has discretionary authority under the act in two pertinent respects:

> One, the offender is eligible for sentencing under the act if "in the opinion of the sentencing trial court" his interests and those of the State would best be served by resort to the act. Two, if it appears to the trial court that the defendant "may be an eligible offender," the court shall postpone the imposition of sentence for not more than 30 days to allow the submission of written reports with regard to the eligibility of the offender for sentencing under the act.

In *Turner* when defense counsel asked that the imposition of sentence be passed for 30 days for a presentence report the judge said: "I am not interested in his record one way or another, I have heard all I need to hear." The Supreme Court said: "It is evident the court reached an arbitrary conclusion . . . . We do not, of course, disturb the trial court's exercise of discretion unless it is abused, but the statute does contemplate that discretion will actually be exercised."

We do not think the record here shows that the trial judge reached an arbitrary conclusion. He heard the appellant's testimony that he was twenty-four years of age (within a year of the maximum age of an eligible offender under the act) and that he had previous misdemeanor convictions for assault and battery as a result of fights. And while appellant said these occurred when he was between sixteen and nineteen years old, he was not sure that one incident did not occur on January 3, 1977 (about three years before the incident here involved), and when asked if an incident occurred on March 3, 1980, said "I don't know that I remember."

Under the record here we cannot say that the court abused its discretion with regard to the imposition of sentence.

Affirmed.

James VANDERPOOL *v.* STATE of Arkansas

CA CR 81-14 628 S.W. 2d 576

Court of Appeals of Arkansas
Opinion delivered February 17, 1982
[Rehearing denied March 24, 1982.]

*Thomas A. Martin, Jr.,* for appellant.

*Steve Clark,* Atty. Gen., for appellee.

JAMES R. COOPER, Judge. The appellant, James Vanderpool, was charged in the Circuit Court of Newton County with the crime of manufacturing a controlled substance, marijuana, in violation of Ark. Stat. Ann. § 82-2617 (Supp. 1981). After a jury trial, he was found guilty and sentenced to ten years in the Arkansas Department of Corrections plus a fine of $10,000.00. From that conviction comes this appeal.

## THE FACTS

The record reflects that the sheriff of Newton County, Ray Watkins, and one of his deputies discovered a field of marijuana and placed it under surveillance. The surveillance began in the early morning hours of August 8, 1979. Around dawn on August 9, 1979, the record reflects that the sheriff and his deputy observed Mr. Vanderpool coming down a path toward the marijuana with a shotgun and a grocery sack. They observed him harvesting marijuana leaves for approximately twenty minutes. The sheriff and his deputy then returned to Jasper and obtained a search warrant from the municipal judge. Appellant challenges the validity of the affidavit executed for the purpose of obtaining a search warrant. In the course of the trial, the officers testified that they executed the search warrant by returning to a cabin, located on the same property as was the field of marijuana and serving the warrant on Mr. Vanderpool. During the course of their search of the cabin for the grocery sack, there was testimony elicited that Mr. Vanderpool reached up on a refrigerator and got a pan down and then made a statement. The statement was not quoted by the sheriff. Defense counsel moved for a mistrial, and that motion was denied. (We note that the drug analyst testified there were samples tested from the pan and those samples did contain marijuana.)

During the course of the trial the appellant attempted to introduce evidence related to photographic experiments concerning the visibility of the fields from the place where the officers were allegedly concealed.

Also during the course of the trial the appellant

attempted to elicit testimony concerning a later case of tampering with evidence by the sheriff of Newton County. This offer of evidence was deemed inadmissible by the court.

## THE SUFFICIENCY OF THE AFFIDAVIT

In this case the appellant made a motion to suppress the fruits of the search as to both the marijuana seized within the cabin and the marijuana seized in the adjoining fields.

When we review a trial court's ruling on a motion to suppress evidence, we must make an independent determination based upon the totality of the circumstances, with all doubts resolved in favor of individual rights and safeguards, but we will not reverse the trial court's finding unless it is clearly erroneous. *State* v. *Tucker,* 268 Ark. 427, 597 S.W. 2d 584 (1980): *Grant* v. *State,* 267 Ark. 50, 589 S.W. 2d 11 (1979).

The State bears the burden of establishing that a search warrant was issued in compliance with the law by producing the required written evidence that was relied upon by the issuing judicial officer to establish probable cause. *Beed* v. *State,* 271 Ark. 526, 609 S.W. 2d 898 (1980); *Lunsford* v. *State,* 262 Ark. 1, 552 S.W. 2d 646 (1977). If the warrant and affidavit appear on their face to be valid, then it is presumed that everything essential to the issuance of the warrant has been done. It then becomes the defendant's burden to show that the warrant and its supporting documentation is invalid. Thus, any statement of fact, made as such, in the affidavit must be taken to be within the personal knowledge of the affiant, unless the defendant proves otherwise. *Schneider* v. *State,* 269 Ark. 245, 599 S.W. 2d 730 (1980).

A search warrant will not be issued unless it is supported by an affidavit containing facts or circumstances, not mere conclusions. It is the function of the judicial officer, before whom the proceedings are held, to make an independent and neutral determination based on the facts as to the existence of probable cause for the search. *Aguilar* v. *Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Miller* v. *State,* 269 Ark. 341, 605 S.W. 2d 430 (1980).

In *United States* v. *Ventresca,* 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965), the United States Supreme Court considered the standards by which an appellate court should approach the interpretation of affidavits supporting search warrants which have been duly issued by a judicial officer. The Court said:

> [Our] decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.
>
> Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. *Jones* v. *United States,* supra, 362 U.S., at 270, 80 S. Ct., at 735. [380 U.S. at 108, 109; 85 S. Ct. at 746; 13 L. Ed. 2d at 689].

The United States Supreme Court reaffirmed the above interpretation of affidavits in *Spinelli* v. *United States,* 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

The affidavit for search warrant involved in this case states as follows:

AFFIDAVIT

STATE OF ARKANSAS,
County of Newton
City of Jasper

Ray Watkins being duly sworn says on his oath that one Jimmy Vanderpool did, on or about the 9th day of Aug. A.D. 1979, in Newton County, Arkansas, Unlawfully manufactured a controlled substance by going to a field of green vegetables substance located on shop creek near Rex Vanderpools cabin and picked a large brown bag of green vegetables leaves then returned to the cabin with the bag of leaves contrary to the Ordinances and Statutes in such cases made and provided, and against the peace and dignity of the State.

/s/ Ray Watkins

Subscribed and sworn to before me this 9 day of Aug. A.D., 1979.

/s/ Fred Fennell
Municipal Court Judge

Appellant argues that there is nothing on the face of the affidavit to indicate whether the observations were those of Sheriff Watkins or of a third person. The affidavit does contain statements of fact and ought to be taken as within the personal knowledge of Sheriff Watkins absent proof to the contrary by the defendant. *Schneider, supra.*

Appellant also argues that the face of the affidavit does not specify which controlled substance was allegedly being harvested, and that the allegations contained in the affidavit could just as easily apply to turnip greens as to marijuana.

Counsel has cited us to no case which has dealt directly with this question and we have only found one case close on its facts. In *State* v. *Kaercher,* 362 So. 2d 754 (La. 1978), cert. den., 440 U.S. 936, 99 S. Ct. 1280, 59 L. Ed. 2d 494 (1979), the Louisiana Supreme Court dealt with a situation where a police officer had observed green vegetable material on the tailgate of a pickup truck and sought a warrant for the interior of the truck. The affidavit referred to the officer's observation of "green vegetable matter" and "green matter" but did not use the word marijuana in connection with the green material.

In that case, the Court stated:

> It is well established in the jurisprudence that affidavits for search warrants are tested and interpreted in a commonsense and realistic fashion. *United States* v. *Ventresca,* 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965); *State* v. *Boyd,* 359 So. 2d 931 (La. 1978); *State* v. *Segers,* 355 So. 2d 238 (La. 1978); *on rehearing,* 357 So. 2d 1 (La. 1978). Construing the instant affidavit in a realistic manner, we conclude that it did set forth probable cause to search. We agree with the State that the term, "green vegetable matter," is synonymous with the word "marijuana," when it is used in law enforcement and judicial proceedings.... The fact that the search warrant issued authorized exploration for one item only, marijuana, bolsters our conclusion that when sighting a green vegetable matter is reported by a law enforcement official, the "green vegetable matter" is understood to be suspected marijuana.

In the case at bar, the sheriff of Newton County, in the affidavit executed before Judge Fennell, alleged that Mr. Vanderpool had violated the Arkansas Criminal Code by manufacturing a controlled substance by harvesting a green vegetable matter. A commonsense view of the affidavit certainly does not support a conclusion that the sheriff was alleging that Mr. Vanderpool was harvesting turnip greens or lettuce, since those substances obviously are not illegal. We hold that, on these facts, the affidavit stated sufficient probable cause for the issuing magistrate to believe that a criminal offense had occurred, that is, the manufacture of a controlled substance, to wit, marijuana.

## THE GRANTING OF A MISTRIAL

The record reflects that Deputy Bushnell indicated that while the officers were inside the cabin Mr. Vanderpool reached up on the refrigerator and handed them a pan. The deputy indicated Mr. Vanderpool made a statement, but the statement was never related to the jury. The prosecutor indicated that he did not intend to pursue the line of questioning regarding a statement any further. It is from

this pan that two of the samples were obtained which were later tested by the crime lab and found to be marijuana. (We note that something over a hundred and fifty plants were found in the field that was in question and apparently there was less than two ounces of marijuana found in the pan. The grocery sack of marijuana leaves was not located so far as we are able to tell from this record.)

The appellant moved for a mistrial on the basis of the testimony related above. We note that a mistrial is an extreme remedy, and we will not reverse the decision of the trial court unless his ruling constitutes an abuse of discretion. *Meyers* v. *State,* 271 Ark. 886, 611 S.W. 2d 514 (1981). On these facts we cannot say that the trial court abused his discretion. No statement was introduced, nor did the deputy testify as to any statement made to him. He simply testified as to the fact that he observed the defendant remove a pan from the top of the refrigerator and hand it to him. We find no merit to this allegation of error.

## THE EXPERIMENTS AND PHOTOGRAPHS

The appellant attempted to introduce evidence of an experiment which he had conducted. The experiment involved putting a person at the location where the sheriff claimed he was when he saw Mr. Vanderpool and the fields in question. The prosecuting attorney objected and the court held that the evidence was inadmissible because of remoteness of time, inability to duplicate the experience of the officer and the lack of trustworthiness of the witness. We will reverse the trial court's decision only if we find that it is an abuse of his discretion. The factors that the trial court pointed out in his decision are factors which bear on whether the experiment was relevant. See, McCormick, The Law of Evidence, § 202, pp. 485, 486 (2d ed. 1972). We find no abuse of discretion here.

## THE EVIDENCE OF TAMPERING WITH EVIDENCE BY THE SHERIFF

Apparently, the appellant attempted to show a systematic course of conduct by the sheriff of Newton County

which involved tampering with evidence in drug cases. Appellant planned on calling a witness who had previously been a deputy sheriff. The witness supposedly would have testified that in a later case Sheriff Watkins had lost some plants and had replaced them with plants from his evidence locker. The prosecutor responded and pointed out that if the incident happened at all it had occurred a year after the Vanderpool arrest and that such evidence was too remote. Further, the prosecutor indicated that such evidence should be barred under Rule 608 (b) of the Uniform Rules of Evidence as being a "specific incident of conduct." The court ruled the evidence inadmissible because it involved a collateral issue.

On cross-examination of Sheriff Watkins, appellant's counsel inquired of the sheriff as to whether he had substituted marijuana in this case, resulting in the fact that the marijuana tested by the crime lab was not the marijuana seized in the field. The sheriff responded that he had never substituted evidence in a case, including this case. If the issue of substitution of marijuana was a primary issue rather than a collateral one, counsel would be correct in asserting the right to introduce evidence to impeach Sheriff Watkins, but it was never asserted that the marijuana in this case had been tampered with. Therefore, the issue involved here was a collateral one.

In *Mathis* v. *State,* 267 Ark. 904, 591 S.W. 2d 679 (Ark. App. 1980), the Arkansas Court of Appeals stated:

> On cross-examination on collateral issues a cross-examiner is bound by the answers he receives from the witness and may not impeach his testimony by the introduction of contradictory evidence. *Powell* v. *State,* 260 Ark. 381, 540 S.W. 2d 1 (1976); *Odom* v. *State,* 259 Ark. 429, 533 S.W. 2d 514 (1976).
>
> The questions asked of Ms. Dennis were collateral to the issue of the trial. The Arkansas Supreme Court set out the test for determining collateral issues in *McAlister* v. *State,* 99 Ark. 604, 139 S.W. 684 (1911). This was relied upon in *Randall* v. *State,* 239 Ark. 312, 389 S.W. 2d 229 (1965). This determination to be made

> is whether the cross-examining party would be entitled to prove the issue as part of his case. The determination of whether Ms. Dennis was a drug addict was not an issue would would have been an integral part of the appellant's case. See also, *Brown* v. *State,* 259 Ark. 464, 534 S.W. 2d 207 (1976). . . .

In *Goodwin* v. *State,* 263 Ark. 856, 568 S.W. 2d 3 (1978), the Arkansas Supreme Court dealt with a situation where appellant sought to introduce testimony about alleged misconduct of a narcotics agent. In that case the Court stated:

> Appellant also sought to contradict the testimony of Roberts on collateral matters pertaining to conduct of Roberts on wholly unrelated occasions such as an alleged criminal act of Roberts in 1969, his alleged smoking of marijuana in the past, his alleged removal from a college for possession of alcohol, and alleged threats by him to other persons. This testimony was not admissible, although cross-examination on those subjects was proper.

In this case, we hold that the appellant was bound by the answers received from Sheriff Watkins on cross-examination and that he could not impeach his testimony by the introduction of contradictory evidence since the questioning concerned collateral matters. The appellant was not entitled to prove tampering with evidence in other cases as a part of his case in chief and there was no evidence sought to be elicited related to substitution of evidence in the case at bar.

We find no merit to any of the contentions raised by appellant and therefore we affirm.

Affirmed.

# ARKANSAS STATE HIGHWAY COMMISSION *v.* LONE STAR COMPANY, INC. and CARR UNIVERSITY GROCERY

CA 81-197 628 S.W. 2d 23

Court of Appeals of Arkansas
Opinion delivered February 17, 1982

*Thomas B. Keys* and *Philip N. Gowen,* for appellant.

*Frierson, Walker, Snellgrove & Laser,* by: *G. D. Walker,* for appellee Lone Star Company.

*Bill D. Etter,* for appellee Carr University Grocery.

DONALD L. CORBIN, Judge. This is an appeal from an eminent domain proceeding. Lone Star, Inc. and Carr University Grocery were lessees in property from which appellant acquired a highway right-of-way. Carr University Grocery leased the property from the fee holder on which was located a grocery store and gas pumps. Mr. Carr operated the grocery store and sublet the gas pumps to Lone Star, Inc. Appellant settled with the owner of the fee, but trial was held as to the leaseholders. The jury awarded $8,000.00 in damages to Lone Star, Inc. and $6,000.00 in damages to Carr University Grocery. We affirm the judgment as to Carr University Grocery and reverse and remand for a new trial as to Lone Star, Inc.

Appellant's point for reversal is that the trial court erred in permitting testimony regarding profits from the leasehold interest for the jury to consider in awarding just compensation for the taking of a leasehold.

We affirm the judgment as to Carr University Grocery because appellant did not object to Mr. Carr's testimony regarding his damages. It is well settled in this state that objections to testimony may not be raised for the first time on appeal. *Blount* v. *McCurdy,* 267 Ark. 989, 593 S.W .2d 468 (1980).

However, we agree with the appellant that the judgment as to Lone Star, Inc., must be reversed. Chris Houston, Manager of Lone Star, Inc., was testifying when the appellant objected as follows:

Q. How were the sales reported out there?

A. The pump meters were read once a week. The pump meters also computed the dollars and cents of sales. They were read weekly.

Q. And did you receive written reports of that?

A. Yes. I have the records on that.

Q. Do you have those with you?

A. Yes, I do.

Q. Have you made a summary of those written reports?

A. I sure have.

Q. Do you have that summary?

A. Yes, sir.

Mr. Gowen:

I object to the proposed testimony of this witness concerning the profits per month of the gallons sold and the profits per gallon of the gallons sold.

Mr. Walker

To clarify that, you are not objecting to my failure to offer the certificates which I have here?

Mr. Gowen:

No. I am objecting to his testimony.

The Court:

Let the record show that objections such as this are raised in pre-trial conferences in my court, and this

> comes too late, and I am going to allow the parties to proceed.

Appellant also objected to a summary of transactions prepared by Mr. Houston for the period covering June 1, 1979, through May 1, 1980, which the court admitted.

Appellee, Lone Star, Inc., argues that the appellant's point is moot since the trial court overruled the objection because it was not raised in pre-trial conference. We disagree. Appellant made a timely and specific objection to the profit testimony as required by Rule 103 of the Arkansas Uniform Rules of Evidence, Ark. Stat. Ann. § 28-1001 (Repl. 1979). We have no indication from the record that appellant should have anticipated the testimony to which he objected. We express no opinion as to whether, under certain circumstances, we might uphold the court's ruling as to timeliness; but under the particular facts of this case, we believe the appellant made a timely objection. Additionally, we believe appellant sufficiently abstracted the portions of the record which are pertinent to this appeal as required by the rules of this Court.

Appellee, Lone Star, Inc., presents the argument that profit testimony is admissible when determining the value of a leasehold which is condemned. It is asserted by appellee that "capitalization of income" is a recognized method of arriving at the fair market value of real estate used to produce rental income. The appellee relies on the cases of *Housing Authority of Little Rock* v. *Rochelle,* 249 Ark. 524, 459 S.W. 2d 794 (1970); *North Little Rock Urban Renewal* v. *Van Bibber,* 252 Ark. 1248, 483 S.W. 2d 223 (1972) and *Arkansas State Highway Comm.* v. *Barnes,* 263 Ark. 567, 566 S.W. 2d 148 (1978) in support of this method. However, in *North Little Rock Urban Renewal* v. *Van Bibber, supra,* the Supreme Court stated the following:

> In *Rochelle, supra,* . . . we strongly implied that this method (capitalization of income) is acceptable when the income of the property consisted *only of rent.* (Emphasis ours.)

The testimony presented in the present case related to profits and loss of profits from a business conducted on the property, not testimony about rental income from the property. This distinction was also noted in an Arkansas Law Review article.

> [T]he rule seems to be well established that rentals, as such, may be capitalized to determine value, while profits, as such, may not. If the income in question is clearly rent, it may be used, and there is no problem; if the income in question is clearly business profit, it may not be used, and there is no problem. Winner, *Rules of Evidence in Eminent Domain Cases,* 13 Ark. L. Rev. 10, 18-19 (1959).

In *Arkansas State Highway Comm.* v. *McHaney,* 234 Ark. 817, 354 S.W. 2d 738 (1962), the Supreme Court held that when a lessee is dispossessed because the property has been taken in condemnation proceedings, the measure of his damages ordinarily is the difference between the amount of rent reserved in the lease and the fair rental value of the property at the time of the taking. Further, the Supreme Court in *McHaney, supra,* quoting from *Reeves* v. *Romine,* 132 Ark. 599, 201 S.W. 822, defined rental value:

> By rental value is meant not the probable profits that might accrue to the tenant, but the value, as ascertained by proof of what the premises would rent for or by evidence of other facts from which the fair rental value may be determined.

In another case, *Arkansas State Highway Comm.* v. *Addy,* 229 Ark. 768, 318 S.W. 2d 595, the Supreme Court followed its holding in *Hot Spring County, Arkansas* v. *Crawford,* 229 Ark. 518, 316 S.W. 2d 834 where "it was held that net profits from a business operated on the land cannot be considered as a factor in assessing damages for the taking or damaging of land." See also *Arkansas State Highway Comm.* v. *Wilmans,* 236 Ark. 945, 370 S.W. 2d 802 (1963).

Affirmed in part, reversed in part.

CHAPPELL CHEVROLET, INC. *v.*
Steve S. STRICKLAND

CA 81-264 628 S.W. 2d 25

Court of Appeals of Arkansas
Opinion delivered February 17, 1982

*Steven E. Vowell,* for appellant.

*Van T. Younes,* for appellee.

TOM GLAZE, Judge. This appeal arises from a jury award to appellee who filed a breach of contract action against appellant for its failure to deliver a 1978 Pace Car Corvette. Appellant argues that the trial judge admitted inadmissible hearsay evidence which erroneously formed the basis for the $8,590 damages awarded appellee.

The facts are undisputed. Appellee is a Chevrolet dealer in Alabama, and in 1978, he spent a great deal of his time calling Chevrolet dealers in other states in an effort to purchase 1978 Pace Car Corvettes. This model Corvette was a special limited edition and each Chevrolet dealer in the country received at least one such model.

In this connection, appellee called appellant, which agreed to sell its Pace Car Corvette to appellee for the "sticker price" of $14,410.21. This same day, appellee mailed appellant an agreed $500 deposit check to bind the agreement. The balance of the sale price was to be paid appellant when he received delivery of his Corvette from the manufacturer.

Two months later, appellant decided not to sell the car to appellee, and appellant attempted to refund the $500 deposit. Appellee declined the refund and chose to enforce the agreement. Ultimately, appellee filed this action requesting damages for breach of the parties' agreement.

At trial, appellee presented testimony on the damages he incurred due to appellant's failure to deliver the Corvette. To establish the market price of the Corvette at the time of appellant's breach, appellee testified the car's value was $22,500. Although appellant objected that this price was not based on its value at the place of tender, *i.e.,* Berryville, Arkansas, appellee stated the $22,500 was a national price for

the Corvette and was indeed the market price at Berryville as well as in other cities and towns throughout the United States. Appellee and his father, who was in business with appellee, testified that they had contracted for over sixty 1978 Pace Car Corvettes in at least nine states and had sold each one for $22,500.

Additionally, appellee, in his testimony, alluded to a 1978 Wall Street Journal ad section which contained twelve advertisements reflecting this same model Corvette for sale in different states with prices ranging from $21,500 to $50,000. Appellant objected to the admission of these ads and related testimony on hearsay grounds and again, on the basis that they had no relevance to establishing a value of a 1978 Pace Car Corvette in Berryville, Arkansas. The court admitted the ads into evidence for the limited purpose of establishing how appellee arrived at the fair market value or national price of $22,500 for which he sold Corvettes in other states. We believe the trial court ruled correctly.

Concerning the market price, our Uniform Commercial Code requires the market price to be determined as of the place of tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival. Ark. Stat. Ann. § 85-2-713 (2) (1961 Add.). However, when the current market price under § 85-2-713 is difficult to prove or is not readily available, the court is granted reasonable leeway in receiving evidence of current prices in other comparable markets or at other times comparable to the one in question. See Ark. Stat. Ann. § 85-2-723 (1961 Add.) and its Comment. The record clearly reflects that there were relatively few of these model Corvettes in each state which, in turn, made it difficult to prove a market price in a given geographic location. Appellant never offered to show there was a ready market price in the Berryville, Arkansas, area, and we are unable to say the trial court abused its discretion in permitting appellee to testify to a national price of $22,500, which was based on over sixty firsthand sales he had made of similar Corvettes in at least a nine-state area.

Although we find appellee properly established the market price of the Corvette in question, appellant still

contends the damages awarded were affected by the Wall Street Journal ads admitted into evidence. The ads are unquestionably hearsay, but we fail to see any harm suffered by appellant because of their introduction. Appellant cites the well-known rule that any error by a lower court is presumed to be prejudicial unless we can say with assurance that it was not prejudicial to the rights of the appellant. *Arkansas Public Service Commission* v. *Yelcot Telephone Company,* 266 Ark. 365, 585 S.W. 2d 362 (1979).

As was true with the court in *Yelcot,* we have no trouble in stating with complete assurance that the assigned error did not prejudice the appellant. With the exception of one ad which reflected a 1978 Pace Car Corvette for sale at $21,500, all other ads introduced varied in asking prices of at least $25,000 to $50,000. The court clearly instructed the jury that the ads were allowed into evidence for the sole purpose of showing the basis for the price of $22,500, which was the price appellee sold over sixty other comparable vehicles in approximately nine states. Since the damages awarded were exactly $8,590, the $22,500 figure obviously was accepted by the jury as opposed to any figures appearing in the ads. To illustrate this point, if you take $22,500 (market price) minus $14,410 (list price appellee was to pay appellant) plus $500 (amount appellee deposited with appellant), the net amount of damages equals $8,590. In view of the amount determined by the jury as damages, we have no doubt that it relied on the national price established by appellee rather than the substantially higher prices contained in the ads.

Appellant argues one last point for reversal, contending that appellee was barred from bringing this action for breach of contract, because he had previously filed, but dismissed without prejudice, an earlier suit against appellant, seeking to specifically perform the parties' agreement. Although appellant raised this election of remedy issue as an affirmative defense in its answer, the issue was not contained in the trial court's pre-trial order. Under Rule 16 of the Arkansas Rules of Civil Procedure, the pre-trial order, when entered, controls the subsequent course of the action. Therefore, it was appellee's contention, and the trial court

agreed, that appellant could not raise the election of remedy issue at trial time since it was not a part of the pre-trial order.

Rule 16 does permit the trial court to modify its pre-trial order at the trial to prevent manifest injustice. While this may be true, the record in this cause does not reflect that the appellant requested the pre-trial order to be amended to include the election of remedy defense nor does it show that appellant offered any evidence to prove such a defense. We have ruled many times that there must be a proffer of the evidence that is improperly excluded for us to find error. *Parker* v. *State,* 268 Ark. 441, 597 S.W. 2d 586 (1980); *Boykin* v. *State,* 270 Ark. 284, 603 S.W. 2d 911 (Ark. App. 1980); *Goodin* v. *Farmers Tractor & Equipment Company,* 249 Ark. 30, 458 S.W. 2d 419 (1970). See also Rule 103 (a) (2), Uniform Rules of Evidence. The appellant started to offer testimony on this issue, appellee objected, and appellant failed to pursue the matter any further after the trial court held the election of remedy defense was not made a part of the pre-trial order.

Even if appellant had moved for the order to be appropriately modified and had proffered evidence in support of his election of remedy defense, we are still of the opinion the trial court's decision to exclude evidence on the issue should be affirmed. As previously noted, the trial court under Rule 16 may permit its pre-trial order to be modified at trial to prevent manifest injustice. The trial court ruled it would not amend its order and we believe the record supports the court's decision. In doing so, we adopt the reasoning and rule in *Sherman* v. *United States,* 462 F. 2d 577 (5th Cir. 1972), wherein the court stated:

> The trial judge is vested with broad discretion to preserve the integrity and purpose of a pretrial order. Basically, these orders and stipulations, freely and fairly entered into, are not to be set aside except to avoid manifest injustice. Fed. R. Civ. P. 16. However, in the interest of justice and sound judicial administration, an amendment of a pre-trial order should be permitted where no substantial injury will be occasioned to the opposing party, the refusal to allow the amendment

> might result in injustice to the movant, and the inconvenience to the court is slight. [Citations omitted.]

Applying the rule in *Sherman* to the facts at bar, we believe the inconvenience to the court was substantial rather than slight. Moreover, we also believe that appellee would have been greatly injured by the court's permitting a belated amendment to the pre-trial order which would have allowed appellant to urge a defense to which appellee was not prepared to respond. The election of remedy issue could have been raised and decided before any trial. If appellant had done so and prevailed, no trial on the merits of appellee's case would have been necessary. Instead, appellant failed to raise the issue at pre-trial and waited to present it after the jury was impaneled and testimony was elicited on the issue. We are of the opinion that appellant's delay in raising the election of remedy issue at trial placed the appellee in a position where it would have been difficult for him to respond to evidence on the issue without an opportunity and time to prepare and present rebuttal evidence. Under the facts presented, we do not believe the trial court's ruling to exclude testimony on the election of remedy issue was an abuse of discretion.

Affirmed.

MAYFIELD, C.J., dissents.

MELVIN MAYFIELD, Chief Judge, dissenting. In this suit against a Chevrolet car dealer in Berryville, Arkansas, the appellee, a Chevrolet dealer in Uniontown, Alabama, testified that the market value of the 1978 Pace Car Corvette involved here was $22,500.

He then offered in evidence a copy of the classified ad section of the Wall Street Journal dated May 5, 1978, in which there were seven separate advertisements offering to sell 1978 Corvette Pace cars or "Indy" Pace Cars for prices ranging from a low of $21,500 to a high of $50,000.

The appellant objected to the introduction of this page of the newspaper on grounds that it was hearsay and not

admissible to prove market value under either the Uniform Rules of Evidence or the Commercial Code. The court overruled the objection saying, "I am going to admit it for the limited purpose of going to the question of how he arrived at the fair market value that he's stated on these cars."

I think the court was clearly in error. In *Golenternek* v. *Kurth,* 213 Ark. 643, 212 S.W. 2d 14 (1948), the court quoted with approval from American Jurisprudence to the effect that proof of mere offers to buy or sell is not competent to show the value of property. *Golenternek* involved an automobile and the case was cited in *Hinton* v. *Bryant,* 232 Ark. 688, 339 S.W. 2d 621 (1960), a case involving a set of platform scales, where the court said "isolated offers for the purchase of property are not ordinarily competent evidence of its value." And in *Arkansas Hwy. Comm.* v. *Hambuchen,* 243 Ark. 832, 422 S.W. 2d 688 (1968) the court said: "As we pointed out in *Hinton* v. *Bryant* . . . isolated offers to purchase are mere hearsay declarations of third persons, not made under oath and not subject to cross-examination."

This rule is not peculiar to Arkansas. See *Peterson* v. *Valley National Bank of Phoenix,* 102 Ariz. 434, 432 P. 2d 446 (1967); *State* v. *Morehouse Holding Co.,* 357 P. 2d 266 (Or. 1960); *United States* v. *Smith,* 355 F. 2d 807 (5th Cir. 1966); and see generally III Wigmore, *Evidence* § 719 (Chadbourn rev. 1970).

Now it should be noted that the page of the newspaper introduced into evidence did not contain market reports or quotations which would be admissible under Rule 803 (17) of the Uniform Rules of Evidence, but mere offers to sell —hearsay and inadmissible. The majority admits the ads were hearsay but says "we fail to see any harm suffered by appellant because of their introduction."

In *Hanna Lumber Co.* v. *Neff Design Builder,* 265 Ark. 462, 579 S.W. 2d 95 (1979) where hearsay had been improperly introduced, the Supreme Court of Arkansas reversed saying: "Error is presumed to be prejudicial unless it is demonstrated to be otherwise or is manifestly not prejudicial."

And in *Wallin* v. *Ins. Co. of North America,* 268 Ark. 847, 596 S.W. 2d 716 (Ark. App. 1980) the Arkansas Court of Appeals in reversing because hearsay evidence had been admitted said:

> While unquestionably there was ample competent evidence in the record to sustain the verdict of the jury, we could only speculate or surmise as to whether the incompetent evidence influenced the jury in finding for the appellees. Under such circumstances we cannot say the ultimate result was not affected and that there was no prejudice to the appellants. The rule is that error in the trial is presumed to be prejudicial unless the court on appeal can say with assurance the error is harmless. (Citations omitted.)

I am unable to share the majority's assurance that the admission of the ads in the Wall Street Journal offering to sell a 1978 Corvette Pace Car for as much as $50,000 failed to cause the appellant any harm. I cannot escape the feeling that this Arkansas jury paid about as much attention to what the Wall Street Journal said as they did to what the Alabama car dealer said. I am sure the appellee and his attorney hoped it would. I know the trial judge said he was admitting the evidence so the jury could see how the appellee "arrived at the fair market value that he's stated on these cars." And I understand that the appellant thinks that this evidence had something to do with the finding of the jury that a car in Berryville, Arkansas, with a *list* price of $14,410 was actually worth $22,500.

I would reverse.

# NATIONAL INVESTORS FIRE & CASUALTY INSURANCE COMPANY *v.* Paul David CHANDLER, COLUMBIA COUNTY CHAPTER OF THE AMERICAN ASSOCIATION OF RETIRED PEOPLE and Willie McLAUGHLIN

CA 81-223 628 S.W. 2d 593

Court of Appeals of Arkansas
Opinion delivered February 24, 1982
[Rehearing denied March 24, 1982.]

*Tom Forest Lovett, P.A.,* by: *Tom F. Lovett,* for appellant.

*Matthews & Sanders,* by: *Roy Gene Sanders,* for appellees.

*Anderson, Crumpler & Bell, P.A.,* for appellees Columbia Chapter of the Association of Retired People and Willie McLaughlin.

GEORGE K. CRACRAFT, Judge. The appellant, National

Investors Fire & Casualty Insurance Company, appeals from a judgment of the trial court holding it liable to the appellees, Paul David Chandler and Columbia County Chapter of the American Association of Retired People, under a temporary binder of liability insurance issued in favor of the appellee association. The appellant maintains that the trial court's finding that the binder was in full force and effect at the time the loss occurred is clearly against a preponderance of the evidence and that the court further erred in finding that the local agent procuring the binder was not a dual agent capable of receiving notice of cancellation of that binder on behalf of the insureds.

Findings of fact of a trial 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. Rule 52 (a), Arkansas Rules of Civil Procedure; *Sharp County* v. *Northeast Arkansas Planning & Consulting Company,* 269 Ark. 336, 602 S.W. 2d 627 (1980); *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W. 2d 409 (1981).

After hearing evidence the trial court, sitting as a jury, made the following findings of fact:

> In April, 1978 Mr. A. T. Van Pelt acting as an agent of A.A.R.P. contacted Mac Childs of the Southern State Insurance Agency for the purpose of securing automobile insurance on A.A.R.P. vehicles. On April 18, 1978, Childs contacted National Investors by phone and it orally agreed to bind coverage on the automobile. The binder issued by National Investors contained the following provision:
>
> > Coverage has been bound for thirty (30) days from the effective date shown in item 6 above unless previously cancelled by notice to the applicant.
>
> The date of the binder as shown in item 6 was April 18, 1978 and the applicant was identified as A.A.R.P., Columbia County Chapter.

During meetings between Mac Childs and Van Pelt, Van Pelt told Childs he would be leaving town on a vacation and that he would be back in touch with Childs upon his return to Magnolia so that they could attempt to secure excess coverage with another company. Van Pelt left Magnolia on April 26, 1978 and was out of town throughout the time period relevant to this case.

National Investors after issuance of the binder decided to reject the insurance application of A.A.R.P. and gave notice of their intent to cancel by letter dated April 26, 1978 directed to Mac Childs. This letter was received by Childs on April 28, 1978. The letter contained the following statement:

> We will consider coverage bound for an additional five (5) days from the date of this letter in order to give you time to replace.

On April 28, 1978, Childs directed a letter to Van Pelt advising him of the cancellation. The envelope contained a letter with a postmark of April 29, 1978. Based upon the testimony of the Postmaster, the Court finds that the letter was delivered to the indicated address on May 1, 1978. The address on the letter was of the Presbyterian Church as A.A.R.P. had an office located in the church for its use. A.A.R.P. had an employee at the church but since the letter was directed to Van Pelt it was not opened and was placed on Mr. Van Pelt's desk where it remained unopened until after the automobile accident. The Court finds as a matter of fact that had the letter been addressed solely to A.A.R.P., Columbia County Chapter then the letter would have been opened by the employee and transmitted to an executive official of the association. (T. 39-40)

On May 5, 1978 Chandler was involved in a motor vehicle accident with a vehicle owned by A.A.R.P. and driven by its employee. The automobile was identified under the binder as being insured by National Investors and as a consequence Chandler filed a lawsuit against

A.A.R.P. and recovered a judgment in the amount of $2,851.75 with interest and costs. Plaintiff filed a direct action against National Investors for recovery of the judgment, twelve percent (12%) penalty and attorney's fees.

National Investors refused to defend A.A.R.P., who employed its own defense counsel at the cost of $654.82. By intervention A.A.R.P. sought to recover its defense costs and the damages to its automobile in the amount of $1,226.01 plus twelve percent (12%) penalty and reasonable attorney's fee.

On these findings the court concluded that the binder was not cancelled effectively and was in full force and effect on the date the accident occurred. We cannot find from a review of the record that these findings are clearly erroneous or that the conclusions based on them were not warranted.

Relying upon *Home Ins. Company of New York* v. *Jones,* 192 Ark. 916, 95 S.W. 2d 894 (1936), the appellant then argues that the trial court erred in not holding that the mailing of the notice by Childs to Van Pelt was sufficient even though it was not actually received by Van Pelt. In *Home* the policy contained an express provision that "notice of cancellation *mailed* to the insured at the address of the insured stated in the policy *shall be sufficient notice.*" The court there held that under the express wording of the policy the mailing of the cancellation notice was sufficient compliance and actual receipt by the insured was not required as non-receipt of the notice was a risk he assumed under the clear wording of the policy. The binder in question here contained no provision declaring posting of notice to be sufficient. It required that the insured be given notice. Notice of cancellation of coverage is not effective unless actually communicated to the insured unless the policy by its terms provides for constructive notice. *Commercial Union Fire Ins. Co.* v. *King,* 108 Ark. 130, 156 S.W. 445 (1913).

In *Merrimack Mutual Fire Ins. Co.* v. *Scott,* 219 Ark. 159, 240 S.W. 2d 666 (1951), it was stated:

The purpose of provisions for notice to the insured,

> such as the one here involved, is to enable the insured to obtain insurance elsewhere before he is subjected to risk without protection. 29 Am. Jur. 7, § 282; 35 A.L.R. 900. It is well settled by the decisions of this court and the authorities generally that a strict compliance with the conditions of such a provision is a prerequisite to assertion of a right of cancellation thereunder. 45 C.J.S. 7, § 450 (b) (1); 29 Am. Jur. 7, § 275; *Commercial Union Fire Ins. Co.* v. *King,* 108 Ark. 130, 156 S.W. 445; *Home Ins. Co. of New York* v. *Jones,* 192 Ark. 916, 95 S.W. 2d 894.

Here the appellant did not give notice to the appellee as provided in the binder. It communicated its intention to cancel to its local agent and relied entirely upon that agent to give notice to the applicant. It "had no knowledge or preference as to what method Mr. Childs used, except to give notice." The defect in appellant's argument was most succinctly pointed out in *Rommel* v. *New Brunswick Fire Ins. Co.,* 214 Minn. 251, 8 N.W. 2d 28 (1943) where the court stated:

> But the fatal defect with this contention is this information was never communicated to plaintiff. Since defendant necessarily could deal only with the public and this plaintiff through its agents and representatives, it follows that any letter or other communication between its own agents, without notice to the one entitled to receive it, was but a futile gesture, a thing of no more force or value, as notice to plaintiff, than if Neely had talked to himself about it.

The appellant next argues that the posting of the letter by Childs to Van Pelt was sufficient notice to A.A.R.P. and failure of Van Pelt to receive the letter prior to the loss was not the fault of the appellant. Assuming that Childs was the proper person to give the notice and Van Pelt to receive it, this argument overlooks the testimony of Van Pelt that at the time he left for Chicago the binder was in full force and effect and that he had fully informed Childs of his intended absence from the city. The trial court expressly found that Childs was so informed and that "Van Pelt would contact Mac Childs upon his return so they could place excess

coverage with another company." That knowledge on the part of the agent would be imputed to his principal, National Investors.

In *Merrimack* it was held that an attempt to give notice of cancellation is ineffective where the insurer or its agents have knowledge of facts that make it known that the notice will not be received prior to the cancellation date. We find no error in the trial court's findings or conclusion in this regard. As Childs was made aware that Van Pelt would be out of the city and would contact him on his return, any notice of cancellation addressed to Van Pelt would be ineffective and should have been directed to the non-profit organization or one of its available officers or authorized agents.

The appellant finally contends that as Van Pelt left it entirely up to Childs to place the coverage and did not specify any particular insurer, Childs became a dual agent and was agent for A.A.R.P. for the purpose of both securing coverage and receiving notice of cancellation. In support of this argument it relies upon *U.S. Fire Ins. Co.* v. *Montgomery,* 256 Ark. 1047, 511 S.W. 2d 659 (1974). We do not construe *Montgomery* as so holding. It limited that rule to those cases where there has been an agreement that the agent will insure and keep the subject property insured in the future, and declares that such an agreement may be implied where the agent accepts notice of cancellation and renews the policy on expiration without notifying the insured. Here there was no evidence of such agreement or course of prior conduct of the parties from which such an agreement might be implied. The trial court made the following finding:

> Mr. Childs himself testified that he was the agent of National Investors and not A.A.R.P. and the court finds no evidence that Mac Childs had any authority to receive cancellation notices for A.A.R.P. An agency between Mac Childs and A.A.R.P. was solely for the purpose of procuring insurance and was terminated at the time the binder became effective.

From our review of the record we cannot say that this finding

was clearly against a preponderance of the evidence.

We affirm.

MAYFIELD, C.J., not participating.

Thelma CLAY *v.* William F. EVERETT, Director of Labor, and BASLER ELECTRIC

E 81-280 628 S.W. 2d 339

Court of Appeals of Arkansas
Opinion delivered February 24, 1982

Appellant, *pro se.*

*Thelma Lorenzo* and *Michael R. Foreman,* for appellees.

GEORGE K. CRACRAFT, Judge. On May 21, 1981, the appellant applied for benefits under the Arkansas Employment Security Act stating that she quit her job at Basler Electric because her throat become so sore due to fumes that she could not work. The employer replied that after being absent for two consecutive days she voluntarily quit. The agency denied her claim on finding that she voluntarily left her last employment without good cause connected with the work.

She appealed from that determination and appeared at a hearing before the referee. The employer was not represented at that hearing. Though she had not previously made any claim of harassment, appellant testified before the referee that the real reasons for terminating her employment were the improper advances and sexual harassment of a supervisor. The Appeal Tribunal reversed the agency on

finding that she voluntarily left her work but for good cause in connection with her work due to sexual harassment.

The employer filed its petition for appeal to the Board of Review in which it pointed out that because there had been no notice of a claim of sexual harassment before the hearing no one had appeared before the referee in its behalf. It prayed for a rehearing on appeal in order to present evidence in defense of that accusation. Attached to that petition were copies of appellant's written resignation and documentary evidence of her absenteeism. The record reflects that a copy of that petition and the documents attached to it were forwarded to the appellant on July 15, 1981.

Thereafter the employer addressed a letter to the "Chairmen and Members of the Board of Review" in which it set out those matters contained in its original petition and further submitted in support of its defense against the claim of sexual harassment the affidavits of its plant manager, company supervisor, secretary to the plant manager, and assistant group leader of the night shift, all tending to establish that there had been no sexual harassment of the appellant. The record does not disclose that a copy of that letter or of the attached affidavits was furnished to the claimant prior to the decision of the Board of Review.

The Board of Review reversed the determination of the Appeal Tribunal upon finding that she voluntarily tendered her resignation after failing to report to work for two consecutive days and not because of harassment. It is apparent that the Board of Review did consider the affidavits furnished by the employer, which material had not been furnished to the appellant. The Board of Review's opinion makes specific reference to that letter and the affidavits. With regard to her accusations against one of her employers, the Board noted that claimant "had not mentioned this particular problem to her supervisor as is stated in his affidavit."

In *Brown Jordan* v. *Dukes,* 269 Ark. 581, 600 S.W. 2d 21 (1980) and a series of subsequent unpublished opinions we have declared that it is prejudicial error for the Board of Review to consider matters submitted to it by one party

which were not in evidence before the referee and of which the other party is afforded no notice or opportunity of rebuttal. We adhere to this rule.

The decision of the Board of Review is remanded for the taking of further evidence, including the four affidavits referred to, which either party may wish to submit, assuring that notice of any further evidence to be considered is given to each party.

Remanded.

MAD BUTCHER, INC. & CONTINENTAL INSURANCE COMPANY *v.* Carl PARKER

CA 81-133 628 S.W. 2d 582

Court of Appeals of Arkansas
Opinion delivered February 24, 1982
[Rehearing denied March 24, 1982.]

*Chester C. Lowe, Jr.,* for appellants.

*Donald Frazier,* for appellee.

JAMES R. COOPER, Judge. The appellee in this case suffered a broken foot on January 23, 1979, in the course of subduing a shoplifter while working for the appellant Mad Butcher. Appellee was paid temporary total disability benefits from January 24, 1979, to May 5, 1979, and from August 20, 1979, through January 18, 1980. The administrative law judge found that appellee again became temporarily totally disabled as of July 2, 1980, and that disability still existed and would continue to exist until an undetermined date. The administrative law judge also found that appellee had incurred reasonable and necessary additional medical expenses which were controverted by appellants, that the appellants controverted additional temporary total disability benefits, and that the question of evaluation for vocational rehabilitation should be reserved until a date in the future.

The Workers' Compensation Commission affirmed the decision of the administrative law judge with slight modification. The Commission found appellee to be temporarily totally disabled for an indefinite period; that he had incurred reasonable medical expenses for which appellants were liable; that his orthopedic shoes should be paid for by appellants as well as his travel expenses; that it was necessary

for appellee to be treated in a pain clinic by Dr. Boop and that those expenses should be borne by appellants; and that the appellants must pay for a vocational rehabilitation evaluation. The Commission further awarded attorney's fees based on the entire award plus a fee for having prevailed on appeal before the full Commission. Apparently Commissioner Tatum participated to some extent in the hearing before the full Commission but, prior to the issuance of the opinion, he disqualified himself. The remaining two Commissioners signed the opinion. Appellants petitioned the Commission for a rehearing based on several grounds. The Commission denied the petition for rehearing. Several grounds are urged for reversal.

I.

THE OPINION AND AWARD FILED MARCH 13, 1981, AND THE ORDER FILED APRIL 7, 1981, BOTH WERE DECIDED BY ONLY TWO COMMISSIONERS AND ARE THEREFORE UNLAWFUL AND INVALID BY VIRTUE OF ARK. STAT. ANN. § 81-1342.1 (SUPP. 1979), WHICH REQUIRES THE APPOINTMENT BY THE GOVERNOR OF A SPECIAL COMMISSIONER IN THOSE CASES, AS HERE, IN WHICH A MEMBER OF THE COMMISSION BECOMES DISQUALIFIED FOR ANY REASON TO HEAR AND PARTICIPATE IN THE DETERMINATION OF ANY MATTER PENDING BEFORE THE COMMISSION.

Arkansas Statutes Annotated § 81-1342.1 (Supp. 1981) provides as follows:

> Appointment of Special Member. — Hereafter, when any member of the Arkansas Workmen's Compensation Commission is disqualified for any reason to hear and participate in the determination of any matter pending before the Commission, the Governor shall appoint a qualified person to hear and participate in the decision on the particular matter. The special member so appointed shall have all authority and responsibility with respect to the particular matter

> before the Commission as if such person were a regular member of the Commission, but shall have no authority or responsibility with respect to any other matter before the Commission.

Appellants argue that this statute is mandatory by virtue of its use of the word "shall". Appellee argues that the use of the word "shall" is merely directory rather than mandatory. The question of whether a statute is mandatory or directory has been raised in several cases in this State.

In *State* v. *Grace*, 98 Ark. 505, 136 S.W. 670 (1911), the Arkansas Supreme Court dealt with a provision in Kirby's Dig. § 2256, which provided as follows:

> Upon an indictment being found, if the defendant is not in custody or on bail, the court shall forthwith make an order for process to be issued thereon, designating whether it shall be for arresting or summoning the defendant; and if for arresting the defendant, and the offense charged is bailable, the sum in which he may be admitted to bail shall be fixed.

In construing that section, the Supreme Court said:

> In determining whether the words shall have a mandatory or directory effect ascribed to them, the purposes of the act, the ends to be accomplished, the consequences that may result from one meaning or the other, and the context are to be considered. In the application of these rules to the statute under consideration, we have reached the conclusion that the language, 'the court shall forthwith make an order for process to be issued thereon,' is not mandatory upon the circuit court but is directory merely.

In *Arkansas State Highway Commission* v. *Mabry*, 229 Ark. 261, 315 S.W. 2d 900 (1958), the petitioner sought a writ of mandamus to force the Highway Commission to purchase the Toad Suck Ferry based on the provisions of Act No. 3 of 1957 (extended session). This act appropriated, payable out of the State Highway Department fund, for ferries in the State highway system, "$25,000.00 which shall be paid for

the purchase of the ferry on the Arkansas River which connects Highway 60 between Faulkner and Perry Counties". In construing that act, the Supreme Court stated:

> To carry out the legislative intent the word 'shall' may in certain circumstances, we think, as here presented, be construed as the equivalent of 'may'. 'Ordinarily the words "shall" and "must" are mandatory, and the word "may" is directory, although they are often used interchangeably in legislation. This use without regard to their literal meaning generally makes it necessary for the courts to resort to construction in order to discover the real intention of the legislature. Nevertheless, it will always be presumed by the court that the legislature intended to use the words in their usual and natural meaning. If such a meaning, however, leads to absurdity, or great inconvenience, or for some other reason is clearly contrary to the obvious intention of the legislature, then words which ordinarily are mandatory in their nature will be construed as directory, or vice versa. In other words, if the language of the statute, considered as a whole and with due regard to its nature and object, reveals that the legislature intended the word "shall" and "may" to be directory, they should be given that meaning'. Crawford — Statutory Construction, Sec. 262 p. 519.

There was a strong dissent in that case which pointed out that in order for the rules of construction to be applied, the language to be interpreted must in some way be ambiguous. Since the dissenting justices saw no ambiguity, they felt the intent of the legislature was clear.

The appellants correctly point out that the language of the statute in the case at bar is not particularly ambiguous, but in determining whether the legislature intended for the words used to be mandatory rather than directory, we must look at the entire act. Arkansas Statutes Annotated § 81-1342 (e) (Repl. 1976) provides as follows:

> Quorum. A majority of the Commission shall constitute a quorum for the transaction of business, and

> vacancies shall not impair the right of the remaining members to exercise all the powers of the full Commission, so long as a majority remains. Any investigation, inquiry or hearing which the Commission is authorized to hold or underake may be held or undertaken by or before any one [1] member of the Commission, or referee acting for him, under authorization of the Commission.

The common law rule is that action may be taken by a majority of the members present, so long as that number is sufficient to constitute a quorum of the body. *Benton County Taxpayers Ass'n, Inc.* v. *Bolain,* 252 Ark. 472, 479 S.W. 2d 566 (1972). In *Federal Trade Commission* v. *Flotill Products, Inc.,* 389 U.S. 179, 88 S. Ct. 401, 19 L. Ed. 2d 398 (1967), the United States Supreme Court dealt with the question of whether an enforceable cease-and-desist order of the Federal Trade Commission required the concurrence of a majority of the full Commission, or only of a majority of the quorum that participated in the decision to issue the order. The Federal Trade Commission has five members and the United States Supreme Court pointed out that the Federal Trade Commission Act did not specify the number of Commissioners which constituted a quorum. In that opinion, the Court said:

> The almost universally accepted common-law rule is the precise converse — that is, in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body. Where the enabling statute is silent on the question, the body is justified in adhering to that common-law rule.

When Ark. Stat. Ann. § 81-1342 (e) is considered along with Ark. Stat. Ann. § 81-1342.1, it appears that the legislature was merely creating the mechanics for filling vacancies caused by disqualification. The emergency clause in Ark. Stat. Ann. § 81-1342.1 pointed out that there was no authority for the appointment of special members to the Commission when a regular member was disqualified and, therefore, it was in the public's best interest that authority be

provided for the appointment of special members. We hold that the legislature intended to create the mechanics for appointment of members to fill vacancies caused by disqualification but that in doing so the legislature did not intend to modify, repeal, or alter the earlier statute which determined what constituted a quorum for the purpose of exercising "all the powers of the full Commission". Such a result is consistent with the entire act and with the common-law rule.

II.

THERE IS NOT SUFFICIENT COMPETENT EVIDENCE IN THE RECORD IN ANY EVENT TO SUPPORT THE COMMISSION'S FINDINGS THAT APPELLEE CARL PARKER IS ENTITLED TO ADDITIONAL TEMPORARY TOTAL DISABILITY BENEFITS.

On January 18, 1980, Dr. William L. Steele released appellee from observation and treatment with a permanent impairment rating of 25 per cent of the amputation value to the lower extremity below the knee. Thus, the injury was a scheduled one. Ark. Stat. Ann. § 81-1313 (c) (Repl. 1976). The issue of whether appellee is entitled to temporary total or temporary partial disability benefits must be determined based on whether the appellee's healing period was still continuing or whether it had ended in January, 1980, when he was rated by Dr. Steele.

In *International Paper Co.* v. *McGoogan,* 255 Ark. 1025, 504 S.W. 2d 739 (1974), the Arkansas Supreme Court held that temporary total disability benefits were payable from the date of the injury through the end of the healing period. The *International Paper* case was a scheduled injury case.

Arkansas Statutes Annotated § 81-1302 (f) (Repl. 1976) defines the healing period as being "that period for healing of the injury resulting from the accident". The healing period continues until the employee is as far restored as the permanent character of his injury will permit. If the underlying condition causing the disability has become

stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. The persistence of pain may not of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. 2 Larson, The Law of Workmen's Compensation, § 57.12, pp. 10-8 — 10-16 (1981).

The determination of when the healing period has ended is a factual determination that is to be made by the Commission. If that determination is supported by substantial evidence, it must be affirmed on appeal. *Porter Seed Cleaning, Inc.* v. *Skinner,* 1 Ark. App. 235, 615 S.W. 2d 380 (1981). The evidence in the record shows that Drs. Steele, Thompson, and Galbraith agreed that the appellee had reached his maximum degree of physical recovery. The evidence shows that the healing period ended when Dr. Steele released the appellee from treatment and rated him as to the degree of permanent injury. There is no evidence to support a finding that the appellee's healing period had not ended. Since his healing period had ended, appellee could not be entitled to additional temporary total disability benefits. Therefore, the decision of the Commission on this point is reversed.

Even though the appellee is not entitled to temporary total, he may very well be entitled to "current" total disability benefits. Therefore, this case is remanded to the Commission for it to consider the appellee's disability in light of *City of Humphrey* v. *Woodward,* 4 Ark. App. 64, 628 S.W. 2d 281 (1982), and *Sunbeam Corp.* v. *Bates,* 271 Ark. 385, 609 S.W. 2d 102 (Ark. App. 1980).

III.

THERE IS NOT SUFFICIENT COMPETENT EVIDENCE IN THE RECORD IN ANY EVENT TO SUPPORT THE COMMISSION'S FINDING THAT APPELLANTS SHOULD PAY APPELLEE CARL PARKER'S ADDITIONAL MEDICAL EXPENSES.

Arkansas Statutes Annotated § 81-1311 (Supp. 1979) states that the employer shall provide to the injured em-

ployee all medical services which "may be reasonably necessary for the treatment of the injury received by the employee".[1] The right to medical benefits is separate and distinct from the right to income benefits. 2 Larson, The Law of Workmen's Compensation § 61.11 (b), p. 10-671 (1981). Medical benefits can continue even after the income benefits cease. See, *Brooks* v. *Arkansas-Best Freight System, Inc.*, 247 Ark. 61, 444 S.W. 2d 246 (1969).

On January 18, 1980, the appellee was released from observation and treatment and was rated as to his permanent impairment by Dr. Steele. After his release, the appellee was examined twice by Dr. Steele. During these examinations, the appellee complained of pain, stiffness, and swelling relating to his original injury. In June, 1980, the appellee moved to Flippin from Little Rock. On July 2, 1980, he contacted Dr. Carson regarding pain and other problems that he was having with his injured foot. Dr. Carson examined the appellee, gave him some medication and referred him to Dr. Sward, an orthopedic surgeon. Dr. Sward examined the appellee and later referred him to Dr. Galbraith. Dr. Galbraith hospitalized the appellee for certain tests. During the time the appellee was hospitalized, he was also examined by Dr. Thompson.[2] Dr. Galbraith and Dr. Thompson stated that the appellee had reached his maximum degree of physical recovery. They did refer the appellee to Dr. Boop for evaluation and possible treatment in a pain clinic program.

The Workers' Compensation Commission Rule 21, regarding change of physicians, does not apply so as to preclude payment for services as to Dr. Thompson and Dr. Boop. Dr. Steele, appellee's original physician, instructed Dr. Thompson to examine the appellee. Dr. Thompson concurred in Dr. Galbraith's referral of the appellee to Dr. Boop. Therefore, these changes of physicians occurred as a result of Dr. Steele's referral and are not precluded by Rule 21.

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[1]The case at bar was decided under Ark. Stat. Ann. § 81-1311 as it existed in 1980. This statute has been amended by Act No. 290 of 1981.

[2]Dr. Thompson is a partner of Dr. Steele and was examining the appellee pursuant to Dr. Steele's instructions.

With regard to Drs. Carson, Sward, and Galbraith, Rule 21 would preclude payment for their services by the appellants, if applied literally. However, the Commission has discretion to allow deviation from its rules where it finds compliance with the rules is impossible or impracticable. Workers' Compensation Commission, Rule 23. Our review of this question is limited to a finding of whether the Commission abused its discretion in holding the appellants liable for these services. *Rogers* v. *International Paper Co.*, 1 Ark. App. 164, 613 S.W. 2d 844 (1981). The administrative law judge found that the appellee's location in Flippin and its geographical distance from Little Rock was a good reason to seek care nearer his residence. This finding was affirmed by the full Commission. We cannot say that this finding constitutes an abuse of discretion. Therefore, we hold that the appellants are liable for all medical expenses incurred by appellee. Further, the Commission's finding that the appellants have controverted these payments is affirmed.

IV.

THERE IS NOT SUFFICIENT COMPETENT EVIDENCE IN THE RECORD IN ANY EVENT TO SUPPORT THE COMMISSION'S FINDING THAT APPELLEE CARL PARKER IS ENTITLED TO BENEFITS FOR VOCATIONAL REHABILITATION, WHICH WAS DECIDED PREMATURELY.

Arkansas Statutes Annotated § 81-1310 (f) (Supp. 1979) provides that an employee who is entitled to receive compensation benefits for a permanent disability can receive rehabilitation benefits if the Commission finds that the rehabilitation program is reasonable. The request for such a program must be filed with the Commission prior to a determination of the amount of permanent disability benefits.

The appellee's permanent disability has never been determined by the Commission. The appellee's request for vocational rehabilitation was made before the Commission determined his permanent disability and before the statute

of limitations governing workers' compensation cases had run. The Commission's decision requires the appellants to pay for a rehabilitation evaluation. We affirm the decision of the Commission on this point.

This case is affirmed in part and reversed and remanded in part to the Commission to make a determination regarding disability benefits consistent with this opinion.

Affirmed in part, reversed and remanded in part.

MAYFIELD, C.J., concurring.

Leo David FORD *v.* STATE of Arkansas

CA CR 81-121 628 S.W. 2d 340

Court of Appeals of Arkansas
Opinion delivered February 24, 1982
[Rehearing denied March 17, 1982.*]

*John W. Settle,* for appellant.

*CORBIN and GLAZE, JJ., would grant the petition.

*Steve Clark,* Atty. Gen., by: *Alice Ann Burns,* Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. The appellant was charged with aggravated robbery and being an habitual criminal. He was convicted and sentenced to thirty years in the Arkansas Department of Corrections. The sole issue raised on appeal is that the trial court erred in refusing to require the appointment of a special prosecutor because of the involvement of the prosecuting attorney in the apprehension of the appellant.

On February 28, 1981, the prosecuting attorney for the Twelfth Judicial District, the Honorable Ron Fields, was riding with Officer Garrett on his regular patrol duty in the late hours of February 27, and the early morning hours of February 28, 1981. They received a call concerning a fight at the Regal Eight Motel and proceeded to that location. The prosecutor and the officer observed what appeared to be a fight and the prosecutor observed a knife in the appellant's hand. The appellant was arrested and charged with aggravated robbery and being an habitual criminal. Counsel for the appellant filed a motion to appoint a special prosecutor because of the involvement of the prosecuting attorney. The prosecuting attorney participated in appellant's trial as a witness. The trial and, as it appears from the record, all pre-trial matters were handled by a deputy prosecuting attorney, who was acting under the authority of the prosecuting attorney.

Essentially, the appellant argues that the prosecuting attorney in this case was unable to act in a proper capacity regarding possible negotiations and other matters in the handling of this particular case.

A special prosecutor may be appointed where the elected prosecutor is indicted for a criminal offense (Ark. Stat. Ann. § 24-108 [Repl. 1962]), and where the prosecuting attorney is implicated in the investigation of a criminal offense (*Weems* v. *Anderson,* 257 Ark. 376, 516 S.W. 2d 895 [1974]). In the event the prosecutor is unable to perform his duties because of illness or disability, Ark. Stat. Ann. §

24-117 (Repl. 1962) provides the authority for appointment of a prosecutor in that situation. In *Weems, supra,* the Arkansas Supreme Court stated:

> The absence of specific statutory authority for the appointment of a special prosecuting attorney under the circumstances of this case does not mean that the court is without authority to do what justice, reason and common sense dictate must be done. In other jurisdictions where there was the same lack of statutory authority for the appointment of a special prosecuting attorney under circumstances such as those here presented, the courts have held that there is an inherent power in the courts to make such an appointment. We hold that the Arkansas Circuit Courts also have such an inherent power.

The *Weems* case dealt with the investigation of the prosecuting attorney rather than his prosecution after indictment. We believe that the logic of that case compels us to conclude that the circuit court did have the authority to appoint a special prosecuting attorney in the case at bar. However, the court did not choose to do so, and the issue before us is whether the trial court abused its discretion in failing to appoint a special prosecuting attorney. The exercise of the inherent authority to appoint a special prosecutor must of necessity be discretionary.

The *Arkansas Code of Professional Responsibility,*[1] 33 Ark. L. Rev. 605 (1980) provides as follows:

> DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.
>
> ***
>
> (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is

[1]Adopted by the Arkansas Supreme Court. *Per Curiam,* 260 Ark. 910 (June 21, 1976).

obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101 (B) (1) through (4).

The general rule is that an attorney should not act as both trial counsel and a material witness for his client. *Boling* v. *Gibson,* 266 Ark. 310, 584 S.W. 2d 14 (1979); *Enzor* v. *State,* 262 Ark. 545, 559 S.W. 2d 148 (1977); *Jones* v. *Hardesty,* 261 Ark. 716, 551 S.W. 2d 543 (1977); *Dingledine* v. *Dingledine,* 258 Ark. 204, 523 S.W. 2d 189 (1975); *Watson* v. *Alford,* 255 Ark. 911, 503 S.W. 2d 897 (1974).

There are several reasons for the general rule. First, because of interest or the appearance of interest in the outcome of the trial, the advocate who testifies at trial may be subject to impeachment and the evidentiary effect of his testimony will be weakened, thus harming his client. Second, opposing counsel may be handicapped in cross-examining and arguing the credibility of trial counsel who also acts as a witness. Third, an advocate who becomes a witness may be in the unseemly position of arguing his own credibility. Fourth, the roles of advocate and witness are inconsistent and should not be assumed by one individual.[2] Last, the attorney should not act as both trial counsel and a material witness because of the appearance of impropriety.[3]

Although the prosecuting attorney in this case did not participate in the prosecution of the appellant, the information was filed under his name and authority by a deputy prosecuting attorney and the case was tried by another deputy. The issue in this case narrows to a question of whether, on the facts, the trial court abused its discretion in failing to disqualify the entire staff of a prosecuting attorney who was to appear as a witness in a criminal trial.

The authority of a deputy prosecuting attorney is derived from the prosecutor, and it is clear that the deputy prosecuting attorney has no authority independent of that possessed by the prosecutor. Ark. Stat. Ann. § 24-119 (Repl. 1962); *Sheffield* v. *Heslep,* 206 Ark. 605, 177 S.W. 2d 412 (1944).

From the adoption of the American Bar Association's Canons of Professional Ethics in 1908 until their replacement in 1970 by the Code of Professional Responsibility, no provision existed which required the withdrawal of an entire firm from representation of a client because one attorney in the firm was to be a material witness at trial. Recusal of the entire law firm is required by Disciplinary Rule 5-102 (A). *Boling* v. *Gibson, supra.* The obvious reason

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[2]See, Arkansas Code of Professional Responsibility, Ethical Consideration 5-9.

[3]6 Wigmore, Evidence § 1911, pp. 775-776 (Chadbourn rev. 1976).

for the rule is the common interest of the attorney/witness with his law firm in the outcome of the litigation and the appearance of impropriety. These reasons have validity where the attorney/witness has a financial interest in the outcome of the litigation, although the soundness of the rule has been questioned by some legal commentaries. See 6 Wigmore, Evidence, § 911, pp. 775-780 (Chadbourne rev. 1976).

However valid the reasons underlying the disciplinary rules may be, as applied to attorneys or firms engaged in practice for remuneration, they do not appear to have any validity in the case of a prosecuting attorney's office which consists of the prosecutor and several deputies. The relationship between the prosecutor, his deputies, and the State, their sole client, is fundamentally different from that which exists between law firms and the ordinary attorney-client relationship. The prosecuting attorney and his deputies have no financial interest in the outcome of criminal prosecutions conducted by themselves, unlike private law firms engaged in practice for remuneration. Public prosecutors have the duty to seek justice, not merely to convict.[4] They must also disclose to the defense counsel any evidence that tends to negate the guilt of the defendant, mitigate the degree of the offense, or reduce the punishment.[5]

A prosecuting attorney has discretion in performing the functions of his office, and although counsel appears to argue that the prosecuting attorney exercised no discretion in this case, the record is devoid of any evidence which supports such an argument. Counsel also alleges that appellant's case did not receive the objective review which is common for other cases, and again the record is devoid of any evidence to support such a conclusion.

With regard to the reasons underlying the basic rule concerning an attorney acting as trial counsel and material witness, we observe that none of the fundamental reasons

[4]Arkansas Code of Professional Responsibility, Ethical Consideration 7-13.

[5]Arkansas Code of Professional Responsibility, Disciplinary Rule 7-103 (B).

have validity in this case. In this case, Mr. Fields did not act as an advocate on behalf of the State and there is no evidence in the record to indicate that he participated either in the decision to charge, preparation of the case, pretrial matters, or the actual trial.

Second, we can see no way in which appellant's counsel could be handicapped by cross-examining and arguing the credibility of Mr. Fields since that situation would not be altered one bit by the appointment of a special prosecutor. Mr. Fields would still be a competent witness for the State, and we hardly see how the effect on the jury would have been any less once he had been identified on the witness stand as the prosecuting attorney for the judicial district. Any extra credibility which he possessed by virtue of his office, and its effect on the appellant, would not have been lessened by the appointment of a special prosecutor.

Third, as noted earlier, the issue of actual or apparent financial interest in the outcome of the case has no application in a situation where the prosecutor is representing the people and prosecuting an alleged criminal. Next, we find no validity in the argument that there is an appearance of impropriety. The question of impropriety should be addressed to the perception of the jury as to impropriety. Since Mr. Fields was not acting as an advocate in this case, but only as a witness, we find it difficult to believe that the jury could ascribe any impropriety to such action that would be any different than any impropriety the jury might find in Mr. Fields' testifying while a special prosecutor handled the trial.

We also see no conflict of interest or the appearance of a conflict of interest, which would indicate that the prosecuting attorney would be less than impartial in performing his discretionary functions. Had the prosecuting attorney been the victim of the aggravated robbery, such a conclusion might be reached; however, that is not the situation here.

We conclude that, on these facts, the trial court did not abuse its discretion in failing to grant appellant's motion to disqualify the prosecuting attorney and his entire staff and appoint a special prosecutor to handle this case.

Affirmed.

CORBIN and GLAZE, JJ., dissent.

DONALD L. CORBIN, Judge, dissenting. Court proceedings must not only be fair and impartial, they must also appear to be fair and impartial, not only for the benefit of the litigants directly involved, but this is necessary in order to maintain the public's confidence in the judicial system. *Oliver* v. *State,* 268 Ark. 579, 594 S.W. 2d 261 (1980).

We do not, in any sense, attach any improper motives to the actions of the prosecutor or his staff for what occurred in this case. However, we are convinced that this trial lacked the appearance of fairness and impartiality which has been the bedrock of our judicial system.

The Arkansas Supreme Court has repeatedly criticized the practice of the lawyer acting as both witness and advocate in civil cases. See *Bowling* v. *Gibson,* 266 Ark. 310, 584 S.W. 2d 14 (1979), and cases cited therein. The majority argues that a lack of a financial interest in the outcome of a criminal prosecution sets the prosecutor and his office apart from other lawyers. However, experience and common sense tell us that the prosecutor is, of course, vitally interested in the outcome of criminal prosecutions. To say that the lack of a financial interest exempts him from the standards applicable to the practicing bar is to take an unrealistic view of the criminal justice system.

The majority notes that the prosecutor was not acting as an advocate, but as a witness. However, it was clearly the staff which he hires and supervises which carried out the prosecution in this case. Again, although we reiterate that we attach no improper motives to the prosecutor or his staff in this case, we believe the interests of fairness and justice would have been better served through the appointment of a special prosecutor. I therefore respectfully dissent.

I am authorized to say that Judge GLAZE joins me in this dissent.

# Gregory D. COPELAND *v.* ALCOHOLIC BEVERAGE CONTROL BOARD, State of Arkansas

CA 81-215 628 S.W. 2d 588

Court of Appeals of Arkansas
Opinion delivered February 24, 1982
[Rehearing denied March 24, 1982.*]

*Morgan E. Welch* and *Ralph M. Patterson, Jr.,* for appellant.

*Donald R. Bennett,* for appellee.

LAWSON CLONINGER, Judge. The trial court upheld a decision of the Alcoholic Beverage Control Board denying appellant's application for an off-premises beer permit. For reversal, appellant contends that there is no substantial evidence to support the decision of the Board.

Ark. Stat. Ann. § 5-713 (Supp. 1979), provides that the courts may reverse or modify a decision of an administrative board if the decision is not supported by substantial evidence. We find there is substantial evidence to support the decision of the Board in this case, and we affirm.

*COOPER and CORBIN, JJ., would grant the petition.

By Act 7, Acts of the Legislature for 1933, compiled as Ark. Stat. Ann. § 48-501 to 527 (Repl. 1977), the Alcoholic Beverage Control Board is charged with the responsibility of issuing permits for the sale of beer within the state. Ark. Stat. Ann. § 48-1311 (Repl. 1977) authorizes the Board to promulgate regulations to enforce the provisions of the Alcohol Control Law, and specifically clothes the Director of the Board with broad discretionary power to enforce all the provisions of the alcohol control laws.

The regulation adopted by the Board provide in relevant parts:

> Section 1.32. No permit shall be issued pursuant to an alcoholic beverage control law of the state of Arkansas for the following premises:
>
> . . . .
>
> (3) Premise for which adequate police protection is not available. Any premise for which, in the judgment of the Director, adequate police protection is not available due to the remoteness of the location of the premises.
>
> (4) Premise which will not promote public convenience and advantage. Any premise for which the issuance of a permit would not, in the judgment of the Director, promote the public convenience and advantage. In determining whether the issuance of a permit would promote the public convenience and advantage, the Director may consider, in addition to all other relevant factors, the number of permits issued in the general vicinity of the premises for which application has been made.

Appellant argues that the Board was in error in basing its conclusions upon the following findings:

. . . .

> 2. That there is a great deal of testimony within the record which tends to indicate that school buses are in the area of the store on a regular basis during both the morning and afternoon hours and that numerous school children are in the immediate and adjacent area of the store. It is further found that a great deal of testimony was offered during the hearing that the presence of a controlled beverage at the grocery store would tend to be a source of danger to the school children who frequent the area.
>
> . . . .
>
> 4. That testimony was offered by a local law enforcement official which would tend to indicate that the proposed location is a poor site for a controlled beverage outlet. The testimony would tend to show that the placement of controlled beverages at that store would greatly enhance the law enforcement problems in the area. The testimony further showed that due to the number of roads in the area and their junctions in proximity to the proposed site that it would be impossible to effectively roadblock the area should a robbery or other criminal problem occur at the store.

It is well settled that administrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures to determine and analyze underlying legal issues. *Gordon* v. *Cummings,* 262 Ark. 737, 561 S.W. 2d 285 (1978). That principle is particularly applicable in this case, because the legislature has expressly clothed the Director with broad discretionary authority to enforce all the provisions of the Alcohol Control Laws.

The Board finding number 2 is not alone sufficient to support the decision of the Board. Appellant presently operates a convenience store on the premises in which he proposed to exercise the beer permit applied for. Evidence indicates that two children board the school bus at the intersection where appellant's store is located, and that two or three times a week a school bus stops and children are

permitted to get a cold drink in appellant's store. Witnesses expressed a belief that the addition of beer to appellant's other sales would be a source of increasing danger to the children frequenting the area. The Board was entitled to consider the possibility of increased danger, but the evidence, standing alone, is too speculative to support the Board's finding.

There is substantial evidence in the record to support the Board's finding number 4. Appellant's store is located in a sparsely populated area, embracing a total populaton of 130 to 160 within a two-mile radius. It is six miles from the nearest towns, Prairie Grove to the north and West Fork to the south, and it is twelve miles from the county sheriff's office. A deputy sheriff is seen in the area two or three times a week. In the judgment of a representative of the sheriff's office, which judgment has been confirmed by the Board, adequate police protection is not available due to the remoteness of the location of the premises. The remoteness issue was not a factor in our recent decision in *Snyder* v. *Alcoholic Beverage Control Board,* 1 Ark. App. 92, 613 S.W. 2d 123 (1981).

This court will not substitute its judgment for that of an administrative agency, in the absence of an abuse of discretion by the agency. *Gordon* v. *Cummings, supra.* We find there is substantial evidence to support the finding of the Board and that there was no showing of an abuse of discretion.

Affirmed.

COOPER and CORBIN, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. The majority opinion accurately outlines the authority of the Alcoholic Beverage Control Board with regard to the issuance of beer permits.

On judicial review of administrative decisions, we are charged with the responsibility of reviewing the entire record and determining whether there is substantial evi-

dence to support the administrative findings. *Citizens Bank v. Arkansas State Banking Board,* 271 Ark. 703, 610 S.W. 2d 257 (1981).

I disagree with the majority that substantial evidence exists in this case. The majority points out that none of the Board's findings except finding four are sufficient to support the decision of the Board. I agree with the majority that point four is the only possible finding which could support the action taken by the Board. However, I disagree with the majority in its determination that the Board was justified in refusing the permit on that basis. In this case, the appellant's proposed location was six miles from two other liquor stores. There is absolutely no showing as to why that additional six miles would cause any great inconvenience or disadvantage to the public nor is it shown by any evidence in the record that adequate police protection (or at least as adequate police protection as was available for the liquor stores in Prairie Grove and West Fork) would not be available in the event this permit was issued. On this basis alone, I would reverse and direct the Board to grant the permit.

Also, the majority has ignored one other extremely important factor. The full Board denied issuance of the permit on six findings of fact, rather than two. Those findings are as follows:

> 1. That there is no finding by the Board that the applicant is not qualified legally and morally to hold the applied for permit.
>
> 2. That there is a great deal of testimony within the record which tends to indicate that school buses are in the area of the store on a regular basis during both the morning and afternoon hours and that numerous school children are in the immediate and adjacent area of the store. It is further found that a great deal of testimony was offererd during the hearing that the presence of a controlled beverage at the grocery store would tend to be a source of danger to the school children who frequent the area.

3. That there are petitions both for and against the application contained within the file.

4. That testimony was offered by a local law enforcement official which would tend to indicate that the proposed location is in a poor site for a controlled beverage outlet. The testimony would tend to show that the placement of controlled beverages at that store would greatly enhance the law enforcement problems in the area. The testimony further showed that due to the number of roads in the area and their junctions in proximity to the proposed site that it would be impossible to effectively roadblock the area should a robbery or other criminal problem occur at the store.

5. Testimony was also presented to the Board that would show that the majority of the residents in the immediate area of the store are against the application.

6. It is further found that an additional letter of objection to the application was received from another area public official.

The decision by the Pulaski Circuit Court was handed down March 3, 1981. On March 25, 1981, this Court handed down the decision in *Snyder* v. *Alcoholic Beverage Control Board,* 1 Ark. App. 92, 613 S.W. 2d 126 (1981). This Court pointed out that the number of persons who favor or oppose the issuance of permits is irrelevant in determining whether the public advantage will be served by the issuance of a permit. We also pointed out that opposition by public officials may be of some significance, but only because of their reasons for opposition, not just the fact of opposition.

Therefore, at the very least, this case should be remanded to the circuit court, with instructions to remand to the Board. At least three of the findings on which the Board based its decision may not be considered under our holding in *Snyder, supra.* It is not possible to determine what weight the Board placed on the various findings and I therefore believe that the case should be remanded for consideration of only those factors which may be considered under *Snyder.*

The majority appears to have reviewed the record *de novo,* and then determined on its own that one of the findings is supported by substantial evidence. I believe that such an approach is wrong.

The Board has the responsibility to follow the statute and to determine whether the public convenience and advantage would be served or harmed by the issuance of this permit. They have not done so in this case. See, *Stringfellow* v. *Alcoholic Beverage Control Board,* 3 Ark. App. 124, 623 S.W. 2d 213 (1981) (Dissenting Opinion).

I respectfully dissent.

I am authorized to state that Judge CORBIN joins in this dissent.

CONWAY PRINTING COMPANY *v.* Don L. COLLINS, d/b/a CAMBIATA PRESS

CA 81-224 628 S.W. 2d 591

Court of Appeals of Arkansas
Opinion delivered February 24, 1982
[Rehearing denied March 24, 1981.]

*Wright, Lindsey & Jennings,* for appellant.

*Henry & Graddy,* by: *Larry E. Graddy,* for appellee.

LAWSON CLONINGER, Judge. Appellant, Conway Printing Company, filed an action to recover $3,057.14 for the cost of photographic negatives sold to appellee, Don L. Collins, d/b/a Cambiata Press. The jury returned a verdict for appellee.

The only issue on this appeal is whether the trial court was in error in denying appellant's motion for a directed verdict at the conclusion of all the evidence. We hold that appellant's motion for a directed verdict should have been granted.

From 1972 to 1978 appellant performed printing services for appellee's sheet music publishing company. In 1978 appellee made other arrangements for his printing work, and at that time it was agreed that appellee would purchase from appellant the negatives of music printed earlier by appellant. The negatives were delivered to appellee over an eleven-month period as they were needed, and appellee was billed for them.

In December of 1979 appellee became aware of the practice of a number of printers to surrender the negatives to the customer at no charge above the printing cost. Appellee then informed appellant that the negatives had already been paid for and that appellee had no legal obligation to pay the account. Evidence was presented to both support and refute appellee's contention that there is a usage or custom in the printing trade that the negatives belong to the customer and not the printer.

At trial, it was not seriously controverted that there was a contract entered into for the sale and purchase of the negatives, or that all the negatives had been delivered to appellee. Appellee does not contest the amount of appel-

lant's claim. The essence of appellee's argument in the trial court and on this appeal is that his agreement to purchase the negatives was void for lack of consideration.

A directed verdict would be proper in this case only if there is no substantial evidence from which reasonable minds could find for the defendant after all the inferences are drawn and all evidence is considered in the light most favorable to the defendant. *Ralls* v. *Mittlesteadt,* 268 Ark. 741, 596 S.W. 2d 349 (Ark. App. 1980).

There were no controverted issues to be presented to the jury relating to appellee's agreement to pay for the negatives, performance by the appellant, or the amount of the claim. The only way for appellee to avoid his agreement to purchase the negatives was to prove the contract void for lack of consideration. He sought to do this by showing that there is a usage or custom in the printing trade that the negatives belong to the customer, but even if we assume that he successfully established that point, he is required to go farther; he must present evidence which would tend to establish that the parties were aware of and relied upon that usage or custom at the time they entered into the contract.

In *Glidewell* v. *Arkhola Sand and Gravel Company,* 212 Ark. 838, 208 S.W. 2d 4 (1948), the Arkansas Supreme Court stated with approval:

> In the chapter on 'Customs and Usages,' 25 C.J.S., § 9, pp. 84 and 85, the text writer says: 'A party relying on a usage must himself have had knowledge of it at the time the transaction was entered into; . . . A party to a transaction cannot set up a usage of the other party, of which the party setting it up was ignorant at the time of the transaction, . . . ,' and in *Wall* v. *Mutual Life Insurance Company of New York,* 217 Ia. 1106, 253 N.W. 46, the Supreme Court of Iowa stated the rule: 'It is another well-settled principle that where a claim is made of particular custom and usage the same must be known by the parties affected by it or it will not be binding. Or, to say it another way, where one seeks to advantage himself of a particular custom or usage, the

same must have been known to him at the time he acted and he must have acted and relied thereon.'

In *Ben F. Levi, Inc.* v. *Collins,* 215 Ark. 172, 219 S.W. 2d 762 (1949), the issue was whether the appellant was required by his contract to puchase merchandise for appellees on its own initiative or was to await orders from its principals. The court ruled that a custom may be shown as an aid to interpretation if it is known to both parties, but that appellant's evidence was inadmissible because it failed to establish appellee's knowledge or notice of the custom.

The evidence in this case reflects that appellee was unaware of the purported custom he now urges until after the contract was made and after appellant had completed delivery. The evidence indicates that neither of the parties entered into the contract in reliance upon a custom that the negatives belonged to the customer; in fact, appellant continues to maintain that according to usage and custom in the printing business, the negatives belong to the printer.

There was no substantial evidence from which reasonable minds could find for the defendant, therefore the trial court should have granted appellant's motion for a directed verdict.

Reversed and remanded to the trial court with directions to grant appellant's motion.

Homer D. CLARK and Ruby CLARK, Husband and Wife *v.* James E. CLARK and Anna Mae CLARK, Husband and Wife

CA 81-236 631 S.W. 2d ___

Court of Appeals of Arkansas
Opinion delivered March 3, 1982

*Elrod & Lee,* by: *John R. Elrod,* for appellants.

*Thomas J. Tucker,* for appellees.

GEORGE K. CRACRAFT, Judge. Appellants, the Homer Clarks, appeal from a chancery court decree quieting title to a parcel of real estate in appellees, the James Clarks, asserting that the chancellor's finding that the appellees had acquired title to the disputed parcel by adverse possession

was clearly against the preponderance of the evidence. We must agree.

The issues in this case are extremely difficult to follow without the aid of the following reproduction of "Petitioners' Exhibit D," a plat of a portion of Block 4 in E. N. Coons Revised Subdivision to the City of Siloam Springs, Benton County, Arkansas.

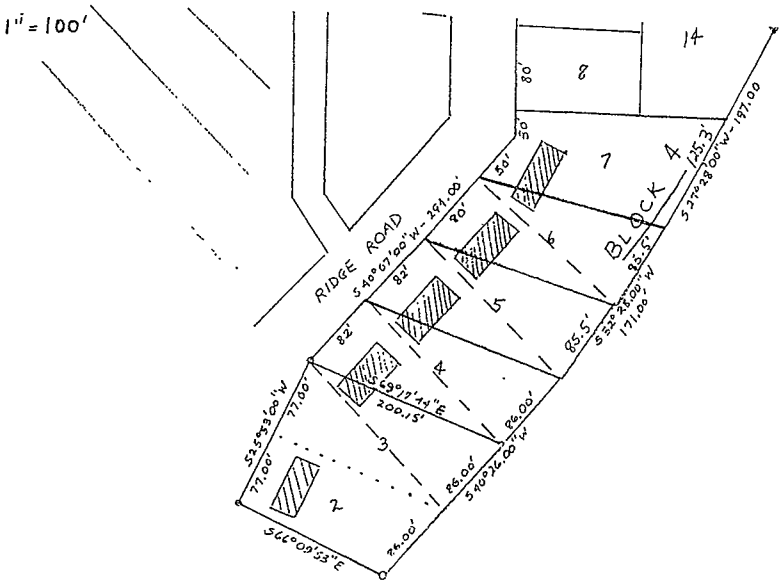


EXHIBIT "D"

The surveyed lot lines in that block are shown in solid unbroken lines. It was not disputed that between 1966 and 1968 E. N. Coons, then the owner of Lots 2, 3, 4, 5, 6 and 7 of Block 4, constructed four houses purportedly located on Lots 4, 5, 6 and 7, but all of which lay astraddle of the lot lines as shown on Exhibit D. Coons also constructed a house on Lot 2 which occupies the position shown on the exhibit. All of these houses were conveyed by Coons in deeds describing them by lot numbers with reference to the original plat as surveyed. All the parties agreed that their houses were located on the lots substantially as shown on Exhibit D.

Appellees, the James Clarks, the fourth owners in the chain of title from Coons, purchased record title to Lot 4 on November 3, 1977. Appellants, the Homer D. Clarks, the sixth owners in the chain of title from Coons, purchased record title to Lots 2 and 3 on December 6, 1978. After purchasing the property the appellant Homer Clark caused a survey to be made which disclosed the error affecting all of Block 4. After that survey Homer Clark made demand upon James Clark, which was refused. Thereafter the owners of Lots 6 and 7 joined with appellee James Clark in a petition to quiet their titles and reform the various mortgages securing lands on the respective properties. Each asserted that he had always claimed that the boundaries to his property were along the lines roughly equi-distant between and parallel to the houses, and that each had acquired title by adverse possession for a period of more than seven years. The lot lines contended for are shown on the attached plat by the broken or hatched lines.

The owner of Lot 5 was made defendant along with appellants. The appellants, the Homer Clarks, agreed that the appellees, the James Clarks, should be decreed to be the owners of that portion of Lot 3 on which their residence and rear concrete patio were physically located but counter-claimed to evict the appellees from any other portion of Lot 3.

During the course of the trial the owners of Lots 5, 6 and 7 consented to the entry of a decree realigning their boundary lines as prayed in the petition and the case was tried solely on the issue of the boundary line between appellants' Lot 3 and appellees' Lot 4.

After hearing evidence the chancellor, with the consent of the parties, made a personal inspection of the property. He thereafter filed written findings of fact and conclusions of law in which he found that there were no monuments, markings or physical evidence of any kind showing boundaries along the lines of adverse possession claimed by the appellees and that the backyard areas of both residences merged into one another without any physical indications of either the platted boundary line or the purported bound-

ary line. He did find, however, that the value of the appellees' property would be substantially diminished if the property line in question remained as platted, and that it would be grossly inequitable to substantially destroy the value of the property by resolving the issue in the manner requested by the appellants. He specifically found that when the appellant, Homer Clark, had purchased his property the north line was shown to him to be generally in accord with the line contended for by the appellee, James Clark, and "thus decides for James Clark on equity."

The chancellor further found that as Homer Clark had agreed that the portion of Lot 3 actually occupied by appellees' residence should be vested in appellees by adverse possession, the only issue to be determined was what additional portions of Lot 3 the James Clarks and their predecessors had acquired by actual adverse possession. The chancellor found that the use and dominion over the balance of Lot 3 used for backyard area exercised by the James Clarks and their predecessors in title for more than seven years was such as to vest title in them by adverse possession to all of Lot 3 lying north of the hatched line on Exhibit D and entered a decree accordingly.

While this court reviews proceedings in chancery cases *de novo* we do not reverse the decision of a chancellor unless findings are clearly erroneous and clearly against the preponderance of the evidence. Rule 52, Arkansas Rules of Civil Procedure; *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W. 2d 409 (1981).

Applying this standard of review we first address the chancellor's finding that the value of the James Clark property would be substantially diminished if the property lines in question remained as platted and that it would be grossly inequitable to substantially destroy the value of that property by resolving the issues in the manner requested by appellant. We determine these findings and conclusions to be erroneous for at least two reasons: First, there was not a scintilla of evidence from any witness as to the effect an adverse decision would have on the value of either property. While personal inspections of the property are permissible

and proper as an aid to better understanding by the chancellor of what the witnesses had testified to, such views are limited to that purpose and a judge's personal observations on the site are not themselves evidence of facts. *Mitcham* v. *Temple,* 215 Ark. 850, 223 S.W. 2d 817 (1949). Second, the chancellor does not state what rule of equity he relied upon in determining that a record title may be divested because it is more financially advantageous to one party or to the other that this be done. No such rule has been cited to us and we find none applicable to the circumstances presented by this record.

There is authority from sister states that in a proper case a court may balance hardship and equities and grant appropriate relief in cases involving the erection of costly structures which in part encroach on a neighbor's land. The rule is not applied merely because it would be inconvenient or expensive to remove the structure but only where the hardship of removal is grossly disproportionate to the hardship to the plaintiff if the structure is permitted to remain. That rule, however, is limited to encroaching structures. It does not, and cannot, provide a means for eminent domain for private purposes to alleviate other inconveniences or hardship. *Tauscher* v. *Andruss,* 240 Or. 304, 401 P. 2d 40 (1965). Appellants made no claim that the structure should be removed. To the contrary, they consented that title to the area occupied by their dwelling be quieted in appellees.

It is obvious to us from his findings and conclusions that the chancellor sought to reach what he considered to be an equitable result. While this is, and should be, the goal in all equitable proceedings, it can only be reached within the limits of equitable jurisprudence. While there must be a remedy for every wrong, the wrongdoers causing or contributing to the dilemma of these parties are not before the court. The appellants are wholly innocent as to any acts bringing about this situation or which would raise equitable defenses of laches or estoppel. On the other hand the appellees might have avoided the dilemma in which they find themselves by simply having caused a survey to be made prior to the time of their purchase. Upon the evidence

presented by this record both parties stand at least equally innocent of blame or guilty knowledge. Consequently the maxim that when the equities of the parties are equal, the legal title must prevail applies with all its force.

Our cases have been uniform in setting out six distinct and necessary elements which an adverse claimant must show before his possession will ripen into ownership. They are that the possession be 1) actual, 2) visible and notorious, 3) distinct and exclusive, 4) of a hostile character, 5) accompanied by an intent to hold adversely against the true owner, and 6) for a period of seven years' continuous duration. *Potlatch Corp.* v. *Hannegan,* 266 Ark. App. 847, 586 S.W. 2d 256 (1979).

The first five elements deal with the required nature and extent of the possession. Proof as to those factors may vary and must be measured by a reasonable view as to the location and character of the land itself. It is ordinarily sufficient if the acts of ownership are of such a nature as one would exercise over his own property and would not exercise over that of another. The acts must amount to such dominion over the land as it is reasonably adapted to and under circumstances as would put the true owner on actual or constructive notice of an adverse claim. Those acts of control which might constitute sufficient dominion and notice as to one tract might not be held sufficient in another case. *Cooper* v. *Cook,* 220 Ark. 344, 247 S.W. 2d 957 (1952).

The extent of required possession also may vary in accordance with the circumstances. One who enters adversely under color of title and actually possesses any part of the tract is deemed to have constructive possession of the entire area described in the document constituting color of title. *St. Louis Union Trust Co.* v. *Hillis,* 207 Ark. 811, 182 S.W. 2d 882 (1944). Where one enters adversely upon an enclosed tract his possession of any part thereof is constructive possession of the entire enclosure. *Kieffer* v. *Williams,* 240 Ark. 514, 400 S.W. 2d 485 (1966). Where, as here, one enters with neither color of title nor enclosure he is unaided by constructive possession and his claim is limited to that area over which he maintains actual pedal posses-

sion. *DeClerk* v. *Johnson,* 268 Ark. 868, 596 S.W. 2d 359 (1980).

However, the sixth element permits no variation. The adverse possession must be maintained for a period of seven full, consecutive years. To constitute effective adverse possession the possession must be continuous for the full period. If there is a break in the continuity of the adverse holding the period of limitations begins anew. *Utley* v. *Ruff,* 255 Ark. 824, 502 S.W. 2d 629 (1973); *Brown* v. *Hanauer,* 48 Ark. 277, 3 S.W. 27 (1886).

The burden was upon appellees to prove by a preponderance of the evidence that they actually possessed and occupied the disputed area for seven consecutive years under the prescribed circumstances. The finding of the chancellor that he had sustained that burden was clearly erroneous.

The appellees introduced evidence by the first occupant of the dwelling located partially on Lot 4 as to certain isolated acts of dominion alleged to have been exercised by him over the disputed area during the one year period that he resided there in 1967-68. The appellant testified to certain acts of dominion exercised by him over the disputed area subsequent to his acquisition of the property on November 3, 1977, and prior to the commencement of this action in 1980. The record is totally silent as to what dominion was exercised by whom over the disputed area for the intervening period between 1968 and 1977. In this time period appellees' Lot 4 changed hands three times while appellants' Lots 2 and 3 changed ownership 5 times.

While we are not convinced that the acts testified to by the appellees during that two year period were actual, open, notorious, exclusive, or hostile, it is certain from the record that there was no proof whatever that such acts were continuous for a period of seven years. The proof was limited to the two year period of occupancy maintained by the appellees immediately preceding commencement of the action. As far as this record discloses the dwelling houses, as well as the disputed area, might have been unoccupied

during the entire period between 1968 and 1977. There is no proof to the contrary.

However, as appellants have consented to the entry of a decree vesting title in appellees to that part of Lot 3 on which their dwelling and patio is located, so much of the decree appealed from as vests title to that area in appellees is affirmed. The cause is reversed and remanded for such proceedings as may be necessary or required for entry of a decree consistent with this opinion.

Affirmed in part and reversed and remanded in part.

Supplemental Opinion on Petition for Rehearing
delivered April 7, 1982

GEORGE K. CRACRAFT, Judge. In our opinion in this case delivered on March 3, 1982, we found from a review of the record that the evidence did not support a finding that the appellees had acquired the entire area in dispute by maintenance of hostile dominion over it for the required period of time. We reversed the chancellor's finding in that regard. However, the chancellor in his findings stated that the appellants "agreed that the James Clarks should be decreed to be the owners of that portion of Lot 3 on which their residence and rear concrete patio are located." We affirmed that part of the decree which vested the "residence and rear patio" in appellees and remanded the cause for further action by the chancellor as the record was not

sufficiently developed for us, on trial *de novo,* to determine on what part of Lot 3 these two items were actually located.

On petition for rehearing the appellees point out to us that the stipulation of disclaimer by the appellants was broader than that recited by the chancellor in his finding and referred us to the transcript where that stipulation appears. We determine that it was broader. The appellants disclaimed any ownership interest in the James Clarks' actual house or any part of the patio *"or extensions of his house* that might come over on to Lot 3." In their petition for rehearing the appellees contend that the stipulation also covered an attached garage, access to a septic tank system, a driveway and overhanging eaves. As it appears from the record that the appellants have expressly disclaimed any interest in, and consented to the entry of a decree vesting title in appellees to, that part of Lot 3 on which the house, patio and *extensions of the house* are located, we modify our opinion to affirm so much of the decree as would vest those interests in the appellees. The cause is reversed and remanded for such further proceedings as may be necessary or required to determine what extensions of the house are to be included in the stipulation of disclaimer and entry of a decree consistent with this opinion as so modified.

Olan Victor HAYSE *v.* Rita Kaye HAYSE

CA 81-243 630 S.W. 2d 48

Court of Appeals of Arkansas
Opinion delivered March 3, 1982

*Zolper & Everett,* by: *Michael Everett,* for appellant.

*Burton Dabney,* for appellee.

GEORGE K. CRACRAFT, Judge. The appellant, Olan Victor Hayse, appeals from that part of a divorce decree which denies him any interest in the proceeds of a $20,000 money market certificate. During the marriage the appellee, Rita Kaye Hayse, inherited $23,000 from her father who died intestate. From the proceeds of that inheritance she purchased a $20,000 money market certificate in the name of appellee or appellant. When the certificate matured the appellee did not renew it but transferred the proceeds to a bank account in her own name and that of her daughter. Thereafter marital difficulties arose and an action for divorce was filed. The appellant asserted an interest in the proceeds of the money market certificate claiming that he had acquired an interest therein by way of gift from the appellee.

The chancellor after hearing evidence found that the funds were not marital property, that there was no delivery to the appellant, that the inclusion of his name on the certificate did not constitute a gift to him, and denied him any interest in the proceeds of that certificate.

The findings of a chancellor will not be reversed unless clearly against a preponderance of the evidence. Since the question of preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the superior position of the chancellor. Rule 52 (a), Arkansas Rules of Civil Procedure; *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W. 2d 409 (1981).

Appellee testified that she inherited a sum of money from her father's estate from which she purchased a $20,000 certificate of deposit and caused it to be issued in their joint names. Prior to the purchase she had discussed it with her husband and at his suggestion placed it jointly "so if he ever needed to borrow money he would have collateral." He contributed nothing to the purchase money and never made any claim to it. He never had possession of the certificate which was kept in her own deposit box to which he had no key or access. When the certificate matured she did not renew

it but took and deposited the proceeds in another account held in her name and that of her daughter. After the marital difficulties arose she used a portion of that sum to purchase a mobile home in which she resided at the time of the divorce.

The appellant testified that he was aware that his wife inherited the money and that he had talked to her about purchasing the money market certificate. He testified that they expected to build a house with that money but "she went ahead and bought the certificate." He testified that he never saw the certificate, never had it in his hand and never claimed any ownership in it.

Property received by bequest, devise or descent is not "marital property" subject to equal division upon divorce under Ark. Stat. Ann. § 34-1214 (Supp. 1981). The wife's inheritance would not be subject to equal division in the divorce unless by some action she had destroyed its status as non-marital property by creating an interest therein in her husband. The chancellor correctly found that she had not done so.

In order to establish a completed inter vivos gift there must be clear and convincing evidence that there was an actual delivery of the subject matter of the gift with a clear intent to make an immediate present and final gift beyond recall accompanied with an unconditional release of future dominion and control by the donor over the property delivered. *Porterfield* v. *Porterfield,* 253 Ark. 1073, 491 S.W. 2d 48 (1973); *McEntire* v. *Estate of McEntire,* 267 Ark. 169, 590 S.W. 2d 241 (1979).

It is clear from the testimony of the parties that neither contemplated that the purchase of the certificate constituted a gift to the husband of an interest in it. We cannot say that the finding of the chancellor was clearly against a preponderance of the evidence.

Appellant contends, however, that the purchase of the certificate in both names conclusively established her intention to vest an interest in the certificate of deposit in him. He relies upon that language in Ark. Stat. Ann. § 67-552 (a) and

(b) (Supp. 1981) which provides that when a person purchasing a certificate of deposit designates it as being held in joint tenancy with right of survivorship with others or when the designated parties are husband and wife it shall be "conclusive evidence" in any subsequent action of the intention of the parties to vest title in the survivor or survivors. In *Black* v. *Black,* 199 Ark. 609, 135 S.W. 2d 837 (1940) our court held that this provision was passed for the protection of the bank in which the deposit was made. There the court stated:

> The statute effects no investiture of title as between the depositors themselves, but only relieves the bank of the responsibility and duty of making inquiry as to the respective interests of the depositors in the deposit until one of the joint tenants shall give notice in writing that the joint ownership has been dissolved.

We agree with the chancellor that the mere issuance of the certificate of deposit in the names of both parties without other manifestations of intent did not create any interest herein in appellant.

An estate by the entireties in bank deposits differs from such an estate in real property in that the estate exists in the accounts only until one of the tenants withdraws such funds or dies leaving a balance in the account. Funds withdrawn or otherwise diverted from the account by one of the tenants and reduced to that tenant's separate possession ceases to be a part of the estate by the entireties. *Black* v. *Black,* supra; *McEntire* v. *Estate of McEntire,* supra.

The appellant finally contends that the chancellor erred in failing to impose a constructive trust on the mobile home purchase by the appellee with part of the proceeds from this certificate. In view of our disposition of the other points we find no merit in this contention.

We affirm.

CITY OF SHERWOOD et al *v.* Patricia LOWE et al

CA 81-300 628 S.W. 2d 610

Court of Appeals of Arkansas
Opinion delivered March 3, 1982

*Jerry G. James,* Public Employees Claims Div., Ark. Insurance Dept., for appellants.

*Gary Eubanks & Associates,* by: *Gary L. Eubanks* and *Hugh F. Spinks,* for appellees.

JAMES R. COOPER, Judge. This is a workers' compensation case. Officer Walter D. Lowe, Sr., who was employed by the Sherwood, Arkansas Police Department, was killed in an automobile accident on Wednesday, November 13, 1979. At the time of his death, Officer Lowe was in uniform and riding his personal motorcycle which was equipped with police blue lights. The accident occurred within the Sherwood city limits, in front of Couch's Exxon Station. Officer Lowe was employed at the station during his off-duty hours.

The street on which the accident occurred was on a direct route from Officer Lowe's home to the Sherwood police station. The accident occurred at 9:50 P.M., and on that night, Officer Lowe was to have begun his shift at 11:00 P.M. On the previous Monday night, he had clocked in at the station at approximately 10:00 P.M.

The parties stipulated as to the relationship of employer/employee and the rate of compensation. It was further stipulated that Officer Lowe left surviving him a widow and four minor children who were actually and wholly dependent upon him.

At the hearing before the administrative law judge, it was alleged that Officer Lowe was on a special mission and that therefore he was on duty, thus entitling his dependents to benefits under the Act. The administrative law judge specifically found that Officer Lowe was not on duty at the time of his death, and that he was en route from his home to work, but that the claim for benefits was not barred by the

"going and coming" rule. The full Commission adopted the opinion of the administrative law judge and awarded benefits. We affirm.

It was the duty of the Commission to follow a liberal approach and to draw all reasonable inferences favorable to the claimant. *Williams* v. *National Youth Corps,* 269 Ark. 649, 600 S.W. 2d 27 (Ark. App. 1980). 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. Before we may 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 conclusion arrived at by the Commission. *Office of Emergency Services* v. *Home Ins. Co.,* 2 Ark. App. 185, 618 S.W. 2d 573 (1981); *Bunny Bread* v. *Shipman,* 267 Ark. 926, 591 S.W. 2d 692 (Ark. App. 1980).

The sole issue in this case is whether the injury which caused the employee's death arose out of and in the course of his employment. Ark. Stat. Ann. § 81-1302 (d) (Repl. 1976).

Arkansas recognizes the general rule that injuries which occur while an employee is going to or from work are not compensable. The reason for the general rule is that all persons, including employees, are subject to the recognized hazards of travel to and from work in a vehicle. *Williams, supra; Brooks* v. *Wage,* 242 Ark. 486, 414 S.W. 2d 100 (1967).

In order for the injury to be compensable, the employee must fall within one of the exceptions to the "going and coming" rule. *Williams, supra; Brooks, supra.* There are numerous exceptions to the "going and coming" rule: (1) where an employee is injured while in close proximity to the employer's premises; (2) where the employer furnishes the transportation to or from work; (3) where the employee is a traveling salesman; (4) where the employee is injured on a special mission or errand; and (5) when the employer compensates the employee for his time from the moment he

leaves home until he returns home.[1]

The issue of the application of the "going and coming" rule to police officers, while raised for the first time in this state, has been decided in other states. The opinions from the various courts are not in agreement.

Florida, New Jersey, Tennessee, and California recognize an exception to the general "going and coming" rule for police officers. Florida[2] allows compensation to a police officer who is injured while going to or coming from work. The police officer need not be in uniform. The only limitation is that the officer must be injured within his jurisdiction. New Jersey[3] and Tennessee[4] allow compensation if the police officer is in uniform while going to or coming from work. California[5] allows compensation if the police officer is wearing his uniform as a matter of necessity and not simply as a matter of choice. Thus, the officer is covered by workers' compensation if the employer has requested or required the officer to wear his uniform on the way to or from work. The officer is also covered if the employer does not provide the officer a place to change from street clothes into his uniform at the police station.

The reason for the above exception is that the police officer is on duty twenty-four hours a day and may at any moment be called into service, either by his superiors or by what he observes. The reason is strengthened when the police officer is in uniform. Regardless of whether he is

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[1]*See* Ross, *Workmen's Compensation: The "Going and Coming Rule" and Its Exceptions in Arkansas,* 21 Ark. L. Rev. 414 (1967).

[2]*Warg* v. *City of Miami Springs,* 249 So. 2d 3 (Fla. 1971); *Sweat* v. *Allen,* 145 Fla. 733, 200 So. 348 (1941); *City of Coral Gables* v. *Williams,* 389 So. 2d 1212 (Fla. App. 1980); *City of Miami Beach* v. *Valeriani,* 137 So. 2d 226 (Fla. 1962).

[3]*Jasaitis* v. *City of Paterson,* 31 N.J. 81, 155 A. 2d 260 (1959).

[4]*Mayor & Aldermen* v. *Ward,* 173 Tenn. 91, 114 S.W. 2d 804 (1938).

[5]*State Compensation Ins. Fund* v. *Workmen's Compensation App. Bd.,* 29 Cal. App. 3d 902, 106 Cal. Rptr. 39 (1973); *Guest* v. *Workmen's Compensation App. Bd.,* 2 Cal. 2d 670, 470 P. 2d 1, 87 Cal. Rptr. 193 (1970); *Garzoli* v. *Workmen's Compensation App. Bd.,* 2 Cal. 3d 502, 467 P. 2d 833, 86 Cal. Rptr. 1 (1970).

required to wear his uniform or permitted to do so, the employer derives a benefit. A police officer in uniform has the same significance to the public whether the officer is technically on or off duty. The benefit derived by the employer is that the officer deters crime by his uniformed presence, he acts as a haven for those in need of protection, and he symbolizes a safe community. The benefit the employer receives is distinguishable only in degree from the service received when the officer is on duty.

Colorado[6], Connecticut[7], Maryland[8], Nebraska[9], New York[10], Ohio[11], and Oregon[12], do not recognize an exception to the general "going and coming" rule for police officers. These states require that the police officer actually be engaged in the performance of law enforcement activities when he is injured. The officer must be performing a police duty, *i.e.,* responding to a direct order from his superiors, responding to a call from a private person, or handling an emergency.

The reason for this rule is that the police officer who is going to or coming from work, and who has not been called into active service, encounters the same hazards and risks of the streets as are encountered by the public in general. Thus, his risk is not employment-related.

Even though New York does not recognize an exception to the general "going and coming" rule for police officers, under certain circumstances the officer will be covered by

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[6]*Rogers* v. *Industrial Commission,* 574 P. 2d 116 (Colo. App. 1978).

[7]*McKiernan* v. *City of New Haven,* 151 Conn. 496, 199 A. 2d 695 (1964).

[8]*Mayor & City Council of Baltimore* v. *Jakelski,* 45 Md. App. 7, 410 A. 2d 1116 (1980); *Police Commissioner of Baltimore City* v. *King,* 219 Md. 127, 148 A. 2d 562 (1959).

[9]*Baughman* v. *City of Omaha,* 142 Neb. 663, 7 N.W. 2d 365 (1943).

[10]*Blackley* v. *City of Niagara Falls,* 284 A. D. 51, 130 N.Y.S. 2d 77 (1954).

[11]*Simerlink* v. *Young,* 172 Ohio St. 427, 178 N.E. 2d 168 (1961).

[12]*Walker* v. *State Accident Ins. Fund,* 28 Or. App. 127, 558 P. 2d 1270 (1977).

workers' compensation. In *Juna* v. *New York State Police,* 40 A.D. 2d 742, 336 N.Y.S. 2d 738 (1972), a state trooper, who was killed in an automobile accident as he was returning to the barracks from his home, was held to be covered by workers' compensation. The accident occurred within the geographic area of his troop and approximately one and one-half hours before he was to start duty. The officer was subject to call twenty-four hours a day, was prohibited from any kind of outside employment or activity for two hours preceding his assigned tour of duty, and was required to assure his availability at his assigned station with a minimum of delay consistent with safety. The court said that:

> At the time of the accident he was performing his duty, in the sense that he was in the process of placing himself in the position of being available at his assigned station with minimum delay in the event of need, as required by the regulations. (336 N.Y.S. 2d at p. 739).

In *Collier* v. *County of Nassau,* 46 A.D. 2d 970, 362 N.Y.S. 2d 52 (1974), the police officer was covered by workers' compensation when he had an automobile accident on his way home from work. The distinguishing factor in this case was that the officer was driving a police department car to and from work.

Other states have considered the same issue, but they fall somewhere between the above two positions. Georgia[13] held that a police officer was covered by workers' compenstion in the following factual circumstances. The police officer was in uniform, had his service revolver, and was en route from his home driving his private automobile to his place of employment. The officer was killed outside the city limits. The officer was shot twice with a shotgun and four times with a pistol in a planned ambush-type murder. The officer had been participating in the prosecution of a criminal case and had appeared before a Grand Jury. The officer was the

[13]*Barge* v. *City of College Park,* 148 Ga. App. 480, 251 S.E. 2d 580 (1978).

sole witness upon whose testimony a conviction of the defendant could be sustained. On two occasions, bribe attempts had been made which he reported to his superiors. Trial was to have been approximately November 27, and he was killed November 7. The court held that under the circumstances of his death, being on call twenty-four hours a day, in uniform, armed, and on his way to work the officer was killed in the line of duty. The decision was a five to four decision.

Louisiana[14] has held that an off-duty police officer is covered by workers' compensation when the officer is on his way home from work and is injured when he stops to render assistance at the scene of an automobile accident.

Maine[15] allowed death benefits to the widow of a Portland police officer. The officer was killed in an automobile accident just outside the city limits of Portland, while driving his private automobile. The officer was in uniform and was on a route that he usually took when going to or coming from work. The court held that a rebuttable presumption that the employee received an injury that arose out of and in the course of his employment was applicable under these circumstances.[16] The court decided that the evidence presented by the city to rebut the presumption, created a question of fact for the Industrial Accident Commission and that the Commission's finding of fact would not be disturbed on appeal.

Michigan's[17] law is unclear on the issue. In the only case

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[14]*Krasnoff* v. *New Orleans Police Dept.*, 241 So. 2d 11 (La. App. 1970).

[15]*Toomey* v. *City of Portland,* 391 A. 2d 325 (Me. 1978).

[16]39 M.R.S.A. § 64-A provides:

> In any claim for compensation, where the employee has been killed, or is physically or mentally unable to testify, there shall be a rebuttable presumption that the employee received a personal injury by accident arising out of and in the course of his employment, that sufficient notice of the injury has been given, and that the injury or death was not occasioned by the willful intention of the employee to injure or kill himself or another.

[17]*Chambo* v. *City of Detroit, Police Dept.*, 83 Mich. App. 623, 269 N.W. 2d 243 (1978).

that has been decided in Michigan, the police officer was injured in an automobile accident outside the city limits. The court noted that even under the rule followed by Florida, the officer could not recover since his accident occurred outside the city limits. The court, in *dicta,* indicated that it will probably follow the states that do not recognize an exception to the general "going and coming" rule for police officers.

On the facts of this case, we believe that the Commission correctly found that Officer Lowe's death was compensable under the Act and that the claim was not barred by the "going and coming" rule. A decision in any case of this type must depend upon the particular state of the facts proved. *Hunter* v. *Summerville,* 205 Ark. 463, 169 S.W. 2d 579 (1943). To all outward appearances, Officer Lowe was on duty. He was armed, in uniform, and was operating a vehicle equipped with police blue lights within his jurisdiction. The City of Sherwood derived a benefit from his presence on the city streets in uniform and operating the police equipped vehicle. This benefit was not so tenuous as to require denial of coverage by workers' compensation. Therefore, we affirm the decision of the Workers' Compensation Commission.

Affirmed.

CRACRAFT, J., concurs.

# Judy JONES *v.* William F. EVERETT, Director of Labor and NEKOOSA PAPER, INC.

E 81-294 629 S.W. 2d 305

Court of Appeals of Arkansas
Opinion delivered March 3, 1982
[Rehearing denied April 7, 1982.*]

Appellant, *pro se.*

*Gary Williams,* for appellee.

JAMES R. COOPER, Judge. Appellant voluntarily quit her last work as a secretary with Nekoosa Paper, Inc., on May 29, 1981, to move with her husband to El Dorado, Arkansas. After her arrival in El Dorado on June 7, 1981, she filed a claim for unemployment insurance benefits on June 8, 1981. On June 23, 1981, the appellant filled out additional forms and indicated that she had not contacted any person seeking work, but that she had checked with friends concerning job openings. She was denied benefits by the Agency, and filed a notice of appeal to the Appeal Tribunal. At a hearing held before the appeals referee on July 20, 1981, she testified that she had contacted four potential employers during the period of time in question, that is between June 7, 1981, and June 23, 1981. The appellant further testified that the reason for the discrepancy between her earlier statement to the Agency concerning her failure to contact any employers in person was that she understood the Agency representative to indicate that those persons should be listed to whom she had actually made application. She testified that several of the

*MAYFIELD, C.J., would grant the petition.

employers she contacted were not accepting applications at that time.

The appellant's letter notifying the Agency that she wished to appeal offers a great deal of insight into the problems claimants encounter when applying for employment benefits under our system in Arkansas. She stated:

> In my opinion, I have followed every procedure you have set forth. Upon arriving in El Dorado, I immediately went to the Employment Security Division and signed up for employment. At that time I was not informed of any particular procedure I was to follow in seeking employment. The only information I was given was to fill out the paper I was given and return on 6-23-81 to see a film that would give me complete details regarding my responsibilities and unemployment insurance. . . .

Under Ark. Stat. Ann. § 81-1106 (a) (Supp. 1981), an individual who quits employment for the purpose of accompanying his spouse to a new place of residence is disqualified from benefits if, upon arrival at the new place of residence, that person does not make an immediate entry into the labor market. The reason for this rule is obvious: unemployment benefits are designed to protect workers who, through no fault of their own, become unemployed and who, through their efforts, are obviously seeking work. Unemployment compensation is not designed to protect those persons who are not seeking work, who quit without cause, or who are discharged for misconduct.

The function of the Employment Security Division is to administer the Act and to make sure that only those persons who are entitled to benefits receive them. The law imposes various requirements on claimants, such as the requirement of registration and weekly reporting and that the claimant do those things which a reasonable person would do to seek work. Ark. Stat. Ann. § 81-1105 (Repl. 1976). All these requirements are for the benefit of the public in general and to prevent the payment of benefits to persons who are not entitled to them.

However, in this case and in many others which this

Court has seen, the Board of Review has referred to a requirement that the persons immediately enter the labor market. That statutory requirement has no definition, and the Board has not adopted a regulation which gives any guidance as to what constitutes an immediate entry into the labor market. If this Court does not know what the Employment Security Division considers an *immediate* entry into the labor market (except by reference to isolated cases and unique fact situations), then how can a claimant possibly know. This appellant, as is the case with many other claimants, was told when she initially filed for unemployment benefits that she should return two weeks later to see a film and to receive a booklet outlining her rights and responsibilities under the Act. There is no question that she followed proper procedures after June 23, 1981, and we presume that her ability to do so was based, at least in part, on the information she received from the film and her second appearance at the ESD office. During the two-week interval from her first visit until her second she had absolutely no guidance whatsoever and was never advised as to what was required of her in order that she might draw benefits during her period of unemployment.

The law does not specify how many job contacts are necessary during any given week; we have found no cases which outline specific requirements as to job contact numbers; and there are no regulations in existence which indicate how many job contacts are necessary. So far as this Court knows, there is not even a consistent internal policy within the Employment Security Division which indicates how many contacts will be accepted in a given case.

This Court has indicated in several recent opinions that claimants are entitled to a higher degree of specific guidance in knowing what is expected of them in the way of efforts to secure employment, especially since they risk the loss of eligibility. See, *Eubanks* v. *Daniels,* 267 Ark. 888, 591 S.W. 2d 673 (Ark. App. 1979).

In *Rainbolt* v. *Everett,* 3 Ark. App. 48, 621 S.W. 2d 877 (1981), we held that the Employment Security Division could be estopped to deny certain things based on the representation of its agents. Here, there was no direct

representation by the agent that appellant need do nothing during the two weeks after her first encounter with the Employment Security Division, but that was certainly not an unreasonable belief on her part.

In *Foote's Dixie Dandy, Inc.* v. *McHenry,* 270 Ark. 816, 607 S.W. 2d 323 (1980), the Arkansas Supreme Court held that although estoppel is not a defense that should be readily available against the State, it is not a defense which should never be available. The Supreme Court held that the State was estopped from collecting additional assessments in unemployment insurance contributions by a corporation's reliance upon statements of a field auditor of the Employment Security Division. In *Rainbolt, supra,* we pointed out that the Arkansas Supreme Court relied on *Gestuvo* v. *District Director of the United States Immigration and Naturalization Service,* 337 F. Supp. 1093 (C.D. Cal. 1971), in deciding *Foote's Dixie Dandy, supra.* The Supreme Court quoted from *Gestuvo* as follows regarding estoppel:

> Four elements are necessary : (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel had a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Applying the rationale of *Rainbolt* and *Foote's Dixie Dandy* to the case at bar, it appears that the State should be estopped to deny benefits from the period June 7, 1981, to June 23, 1981, based on its own conduct. Obviously the Employment Security Division is aware that it plans to apply some unknown standard in determining whether workers have immediately entered the labor market upon arrival at a new place of residence. The Agency, by advising appellant that she was to return in two weeks to see a film and receive a booklet concerning her rights and obligations under the Act, has created a situation where the claimant may reasonably believe that nothing more is necessary other than to return on the assigned date. The claimant, as are most claimants in these type cases, was obviously ignorant

of the fact that the Employment Security Division had any requirement regarding job contacts, at least prior to her viewing of the film, and last, the claimant has obviously relied on the Employment Security Division's conduct to her detriment in that she has been denied benefits.

Therefore, on these facts, and based on prior holdings of this Court and the Arkansas Supreme Court, we hold that the Employment Security Division is estopped to deny benefits to the appellant. Where the claimant has relied on the failure of Employment Security Division to advise of any additional requirements, that Agency should not be allowed to turn around and impose additional requirements, which were unknown to the claimant, in order to deny her benefits. Obviously, a claimant must make an attempt to find a job in order to be qualified under the Act, but if the Agency wishes to impose specific requirements such as two job contacts a week, four contacts a week, or any other such number, claimants should be advised of what those requirements are at the time they make initial contact with the Agency.

We reverse the decision of the Board of Review and remand the case with directions to award benefits under the Act.

Reversed and remanded.

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

MELVIN MAYFIELD, Chief Judge, dissenting. I would affirm the Board of Review because its decision is supported by substantial evidence and under those circumstances it is our duty to affirm. *Harris* v. *Daniels,* 263 Ark. 897, 567 S.W. 2d 954 (1978); *Hodnett* v. *Daniels,* 271 Ark. 479, 609 S.W. 2d 172 (Ark. App. 1980).

Also, I do not agree with some of the language in the majority opinion or with the implications of that language.

Certainly the Employment Security Division should administer the law fairly and reasonably and this includes providing necessary and proper information about their

rights and duties to those who apply for unemployment benefits.

But I think the meaning of terms which have not been defined in an act passed by the General Assembly should be established on a case by case basis through the administrative and adjudication process of the agency and the courts.

For example, I do not subscribe to the notion that the Employment Security Division should establish by regulation what "immediate entry into the labor market" means. Nor do I agree that it can, or should, be defined as two, four, or any other definite number of job contacts a week.

When applicable, I think a claimant for unemployment benefits should be told about the duty to immediately re-enter the labor market but whether an immediate re-entry has been accomplished or not should be decided on a case by case basis in light of the attendant circumstances. It is most difficult for anyone, even courts, to make definite, mechanical — and perhaps arbitrary — rules which will do justice in all future situations.

CRACRAFT, J., joins in this opinion.

Supplemental Opinion on Denial of Rehearing
delivered April 7, 1982

JAMES R. COOPER, Judge. Appellee, Director of Labor, has filed a petition for rehearing in this case, which raises several points on which appellee urges reconsideration of our original opinion in *Jones* v. *Everett,* 4 Ark. App. 169, 629 S.W. 2d 305 (1982). The petition for rehearing is denied, but we are issuing this supplemental opinion to clarify our original opinion.

The scope of review by this Court in unemployment cases is governed by the substantial evidence rule. Ark. Stat. Ann. § 81-1107 (d) (7) (Supp. 1981). This rule requires that this Court review the evidence in the light most favorable to the appellee, and if there is substantial evidence to support the decision by the Board of Review, its decision must be affirmed. *Harris* v. *Daniels,* 263 Ark. 897, 567 S.W. 2d 954 (1978).

In the case at bar, the Board of Review made a factual determination that the appellant did not "immediately upon arrival at the new place of residence, enter the labor market". The Board found that the appellant had not made sufficient job contacts. The only evidence in the record, when reviewed in the light most favorable to the Board of Review, shows that the appellant made some contacts with potential employers. Our opinion, as originally issued, holds that appellee is estopped to deny that the appellant made sufficient job contacts. The estoppel was based on the actions of the agency at its initial contact with appellant.

Appellee argues that our original opinion was in error, in that no one testified that the appellant had not received a booklet outlining her rights and responsibilities at the time of her original contact. Although the appellee is correct that direct testimony was never given on that point, such a conclusion is inescapable when the record is considered in its entirety. Appellant testified that, "The *only* information I was given was to fill out the paper I was given and return on 6-23-81 to see a film that would give me complete details regarding my responsibilities and unemployment insur-

ance." (T. 10) [Emphasis added]. Nothing appears in the record to contradict that testimony.

The application of the doctrine of estoppel has no effect whatsoever on a claimant's burden of proof in unemployment cases. That burden still rests, as it should, on the claimant. *See, Tate* v. *Director, Arkansas Employment Security Division,* 267 Ark. 1081, 593 S.W. 2d 501 (Ark. App. 1980).

We note that two exhibits are attached to the petition for rehearing, and we are urged to consider them as support for appellee's position. We are unable to consider these documents. This Court cannot take additional evidence, nor may we consider matters which are outside the record. Ark. Stat. Ann. § 81-1107 (d) (7) (Supp. 1981). Neither document appears in the record of this case, and therefore they must be disregarded.

The petition for rehearing is denied.

MAYFIELD, C.J., would grant the petition for rehearing.

W. T. VOWELL *v.* STATE of Arkansas

CA CR 81-87 628 S.W. 2d 599

Court of Appeals of Arkansas
Opinion delivered March 3, 1982

*Robert E. Young,* of *Rhine, Rhine & Young,* for appellant.

*Steve Clark,* Atty. Gen., by: *William C. Mann, III,* Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. Appellant was charged in the Greene County Circuit Court with violating Ark. Stat. Ann. § 41-1601 (Repl. 1977), first degree battery. It was alleged that he had caused serious physical injury to another person by means of a deadly weapon under circumstances manifesting extreme indifference to the value of human life. Following a jury trial, appellant was found guilty of first degree battery and sentenced to nine years in the Arkansas Department of Corrections. Appellant urges eight grounds for reversal.

I.

THE TRIAL COURT ERRED IN REFUSING TO CONDUCT *VOIR DIRE* IN ACCORDANCE WITH ARKANSAS STATUTE § 43-1903.

Appellant's attorney requested that *voir dire* be conducted in accordance with Ark. Stat. Ann. § 43-1903 (Repl. 1977), and his request was stated as follows:

> MR. YOUNG: Your Honor, I would ask that the State of Arkansas interview each juror one juror at a time, then I voir dire the juror, then the State exercise its challenge and then I exercise my challenge.
>
> THE COURT: Well, I am going to overrule that to one slight extent, I am going to let the State examine the jurors, if they want to examine all twelve or one at a time. Whatever they want to do they can do. Now, as far as you are concerned, when it comes your time to

> examine, you will be allowed to examine the jurors one at a time and then you can submit that person and the State must exercise their option at that time before you go to the next one, but I'm not going to tell the State that they've got to examine each juror one at a time. Now, if you wish to, you certainly may. (T. 34, 35)

The State elected to question the jurors three at a time.

Arkansas Statutes Annotated § 43-1903 states:

> Felonies, selection in. — In a prosecution for felony, the clerk, under the direction of the court, shall draw from the jury box the names of twelve [12] petit jurors, who shall be sworn to make true and perfect answers to such questions as may be asked them touching their qualifications as jurors in the case on trial, and each juror may be examined by the State and cross-examined by the defendant, touching his qualifications. If the court decide he is competent, the State may challenge him peremptorily or accept him, then the defendant may peremptorily challenge or accept him. If not so challenged by either party, he shall stand as a juror in the case, and each of the twelve [12] jurors shall be examined and disposed of in like manner. If any of said jurors are disqualified or challenged, the clerk shall draw from the box as many more as may be required, and as often as may be required, until the jury shall be obtained, or the whole panel exhausted.

Both the appellant and appellee cite two recent Arkansas cases on this point, the appellant claiming those decisions require reversal, and the appellee seeking to distinguish them. In *Clark* v. *State*, 258 Ark. 490, 527 S.W. 2d 619 (1975), the trial court requested examination of all twelve jurors by both parties before any peremptory challenges were permitted. After all twelve jurors were examined, the State was required to exercise its peremptory challenges, and then the appellant was required to make his challenges. The Arkansas Supreme Court quoted Ark. Stat. Ann. § 43-1903 (Repl. 1964), and then stated:

> It can be seen from this statutory scheme that the State is first required to accept or reject an individual juror before the defendant is required to accept or reject an individual juror. A number of cases beginning with *Lackey* v. *State,* 67 Ark. 416, 55 S.W. 213 (1900), have consistently given this construction to the statute, *supra.* The State to sustain this conviction does not contend that the procedure used is authorized by statute but argues that appellant has not demonstrated any prejudice. Of course, the rule is that prejudice is presumed from an error unless the contrary affirmatively appears, *Crosby* v. *State,* 154 Ark. 20, 241 S.W. 380 (1922). Furthermore, since the State here exercised 4 of its 6 and the appellant 5 of his 8 peremptory challenges on the first 12 jurors drawn from the panel, it at once becomes obvious that it was an advantage to the State to be able to examine all of the next 9 jurors before exercising its last 2 challenges — *i.e.,* it could peremptorily challenge the least desirable of the nine jurors instead of rejecting them one at a time. Consequently, we must hold that the trial court erred in requiring the appellant to examine all of the jurors drawn from the panel each time before the State was required to either accept or reject a juror.

In *Roleson* v. *State,* 272 Ark. 346, 614 S.W. 2d 656 (1981), the Arkansas Supreme Court dealt with a situation where "*only* the State was permitted to *voir dire* all of the remaining jurors before either party was allowed to exercise peremptory challenges". In *Roleson,* the Court held that the trial court erred in allowing such a jury selection process because it did not follow Ark. Stat. Ann. § 43-1903 (Repl. 1977), nor did it conform to the Court's holding in *Clark, supra.* The Court pointed out that "[i]n *Clark* we held a jury selection procedure to be unfair where the State and the defendant were allowed to *voir dire* all jurors before allowing either party to exercise its peremptory challenges . . . . "

Neither *Clark* nor *Roleson* involved exactly the same type *voir dire* as was done in the case at bar. *Clark* holds that a defendant may not be *required* to examine all the jurors

drawn from the panel before the State must exercise its peremptory challenges. *Roleson* holds that where *only* the State is permitted to *voir dire* the entire panel, prejudice occurs.

In the case at bar, both the appellant and the State were permitted to *voir dire* as they chose, but peremptory challenges were to be exercised one at a time with the State going first. Thus, it appears that neither *Clark* nor *Roleson* are exactly in point. This case presents for the first time the precise question of whether, following a timely objection, *voir dire* of more than one juror at a time by the State is to be permitted. It is clear that the trial court in this case set out the correct procedure for the exercise of peremptory challenges, *i.e.,* following *voir dire,* the State is required to exercise its peremptory challenge as to a juror and then, if the juror is accepted by the State, the defense must exercise its peremptory challenge.

Although the statute in question is capable of being interpreted in more than one way regarding *voir dire,* we believe that the Arkansas Supreme Court has, through *Clark* and *Roleson,* effectively disposed of this issue, even though this precise issue was not decided. If, as in *Clark,* it is unfair to require *voir dire* of all jurors by both sides prior to the exercise of peremptory challenges and if, as in *Roleson,* the State has an unfair advantage by being the only party allowed to *voir dire* all the jurors, then it certainly can be no less of an advantage for the State where the State is allowed the choice as to the number of jurors it wishes to *voir dire* at a time. Both *Clark* and *Roleson* indicate that the advantage to the State is bottomed on the idea that it is able to look ahead at the next group of jurors and select the least desirable in exercising its peremptory challenges. That advantage exists whether the State *voir dires* three, six, nine, or twelve at a time, since the State would have the information regarding the least desirable juror in that group at the time it began to exercise its peremptory challenges. The advantage to the State and disadvantage to the appellant cannot, under the holdings in *Clark* and *Roleson,* be alleviated by allowing the State to choose the number of jurors it wishes to *voir dire* and allowing the same choice to the appellant. This allows the

State to place itself in an advantageous position, *i.e.*, it could peremptorily challenge the least desirable of the group of jurors instead of rejecting them one at a time. Therefore, we hold that, upon a timely request, *voir dire* of jurors in felony cases must be conducted one at a time, followed by a peremptory challenge as to that juror by the State, and then if that juror is accepted by the State, a peremptory challenge by the defendant. This case must be reversed and remanded for a new trial.

II.

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE SEVERAL PRIOR D.W.I. CONVICTIONS OF DEFENDANT [APPELLANT].

In this case, the first degree battery charge was based on an automobile accident between appellant's vehicle and a van. The evidence indicated that appellant was intoxicated at the time of the accident, that he had crossed the center line, and that he collided with the van on the shoulder of the road adjacent to the lane in which the van had been traveling, seriously injuring one of the occupants of the van. During cross-examination by the State, appellant admitted that he had been convicted of three prior D.W.I.'s. The trial court allowed this line of questioning under the Uniform Rules of Evidence, Rule 404 (b), Ark. Stat. Ann. § 28-1001 (Repl. 1979), which provides:

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

This rule permits evidence of other criminal activity if it has relevance independent of a mere showing that the appellant is a bad person. *Price* v. *State,* 268 Ark. 535, 597 S.W. 2d 598 (1980); *Alford* v. *State,* 223 Ark. 330, 266 S.W. 2d 804 (1954). Even where the evidence has independent rele-

vance, it must be scrutinized under the substantial prejudice rule of Rule 403 of the Uniform Rules of Evidence. *Price, supra.* In this case the trial court did not make a determination as to whether the independent relevance of the prior D.W.I. convictions was substantially outweighed by the danger of undue prejudice, and on that basis alone the decision of the trial court would have to be reversed.

In *Blackwell* v. *State,* 34 Md. App. 547, 369 A. 2d 153 (1977), the Court of Special Appeals of Maryland dealt with a similar situation. In that case, an intoxicated defendant was operating his automobile and struck and killed a teenage girl who was riding her bicycle. Several witnesses testified as to prior bad acts of the defendant. One witness testified that appellant had pled guilty to driving while impaired sometime prior to the fatal accident. Another witness testified that the proprietor of a local tavern had refused to serve the defendant hard liquor and had restricted him to the purchase of beer because of his tendency to over indulge. A third witness testified that in 1973 the defendant had been involved in an accident while he was intoxicated. The court ruled that since one of the essential ingredients of murder was malice, then implied malice would have to be shown and that part of the proof of implied malice would be the defendant's knowledge regarding the risk to human life that he was taking in his actions. The court stated:

> It seems to me his previous experience with accidents while driving drunk as well as his previous experience with excessive drinking is some evidence for the Jury to consider in deciding what his state of mind was or the condition of his heart. . . .

In *Blackwell, supra,* the appellate court stated:

> Although we have found the evidence sufficient for the jury to have convicted appellant of driving while intoxicated and manslaughter by automobile, it is evident that the extensive testimony of prior drinking-habits and related misconduct (including a conviction for driving while impaired) was both improper and prejudicial.

In *Ross* v. *State,* 276 Md. 664, 669-670, 350 A. 2d 680, 684, the Court of Appeals clearly and concisely set forth the general rule of exclusion, its exceptions and the exceptions to the exceptions:

> 'The frequently enunciated general rule in this state, followed uniformly elsewhere, is that in a prosecution for a particular crime, evidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same type, is irrelevant and inadmissible. [citing cases] This principle is merely an application of the policy rule prohibiting the initial introduction by the prosecution of evidence of bad character. Thus, the state may not present evidence of other criminal acts of the accused unless the evidence is "substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character." C. McCormick, Evidence § 190 (2d ed. 1972).'
>
> * * *
>
> There are exceptions to this general exclusionary rule which, perhaps, are equally well-recognized. Thus, evidence of other crimes may be admitted when it tends to establish (1) motive, (2) intent, (3) absence of mistake, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other and (5) the identity of the person charged with the commission of a crime on trial. [citing cases]

In *Blackwell, supra,* the court pointed out that it could imagine nothing more prejudicial in a case involving murder and manslaughter by vehicle while intoxicated than prior acts of intoxication. The court further pointed out that such evidence "has no purpose to serve in this case that could outweigh its inherent prejudicial effect."

We believe that the trial court was in error in determining that the prior D.W.I. convictions had independent relevance. The threshold question here is whether the evidence of three prior D.W.I. convictions was admissible in order to show appellant's intent, knowledge, or absence of accident. We believe that it was not. Battery in the first degree requires proof that a person caused serious physical injury to another peson under circumstances manifesting extreme indifference to the value of human life. Ark. Stat. Ann. § 41-1601 (1) (c) (Repl. 1977). The evidence supports a conclusion that the appellant did cause serious physical injury to another person. The evidence reflects that the circumstances surrounding the collision included a state of intoxication on the part of appellant. It was his intoxication and the manner of operating his vehicle at the time of the collision that were relevant for the jury in determining whether the "circumstances manifested extreme indifference to the value of human life".

We are unable to see how convictions for driving while intoxicated in the past had any independent relevance in proving the circumstances of this accident. Therefore we hold that, on these facts, evidence of the prior D.W.I. convictions had no independent relevance and therefore was improperly admitted. Further, even if such evidence was determined to have independent relevance, its prejudicial effect would be such as to require its exclusion from consideration by the jury.

III.

THE TRIAL COURT ERRED IN ALLOWING MENTION OF DEFENDANT'S [APPELLANT'S] REVOKED DRIVER'S LICENSE.

On direct examination, a state trooper testified that the appellant did not have a valid driver's license. Appellant's counsel objected, and his objection was sustained on the grounds of hearsay. The State then asked the officer to read the expiration date on the driver's license. Appellant's counsel objected again and his objection was sustained. When the appellant took the stand, the State was allowed, on

cross-examination, to elicit testimony from him that his license had in fact been revoked and that he did not have a valid driver's license at the time of the collision. The court ruled that this evidence was admissible as touching on the appellant's credibility.

Before acts of misconduct for impeachment purposes may be inquired into on cross examination, three conditions must be met: (1) the questions must be asked in good faith, (2) the probative value of the conduct must outweigh any prejudicial effect, and (3) the misconduct must relate to truthfulness or untruthfulness. *Harper* v. *State,* 1 Ark. App. 190, 614 S.W. 2d 237 (1981); *Divanovich* v. *State,* 271 Ark. 104, 607 S.W. 2d 383 (1980); *Gustafson* v. *State,* 267 Ark. 278, 590 S.W. 2d 853 (1979). We are unable to find any connection between the credibility of the appellant and whether he possessed a valid driver's license at the time of the collision. We hold that this testimony should have been excluded. We further hold that the trial court should not have allowed the State to argue about the revocation of the license during its closing argument.

IV.

THE TRIAL COURT ERRED IN REFUSING TO GIVE A REQUESTED JURY INSTRUCTION DEFINING THE PHRASE "UNDER CIRCUMSTANCES MANIFESTING EXTREME INDIFFERENCE TO THE VALUE OF HUMAN LIFE."

The trial court instructed the jury as follows:

> W. T. Vowell is charged with the offense of Battery in the First Degree. To sustain this charge, the State must prove beyond a reasonable doubt that W. T. Vowell caused serious injury to Gary Camp under circumstances manifesting extreme indifference to the value of human life.
>
> "Serious physical injury" means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of

> health, or loss of — or loss or protracted impairment of the function of any bodily member or organ. (T. 156, 157).

This instruction is contained in Arkansas Model Criminal Instructions § 1601. The trial court is required to give the applicable AMCI unless it does not accurately state the law. Arkansas Supreme Court, *Per Curiam,* 264 Ark. 967 (Jan. 29, 1979).

Appellant's counsel requested an instruction defining the phrase "under circumstances manifesting extreme indifference to the value of human life." The requested instruction reads as follows:

> A person acts under circumstances manifesting extreme indifference to the value of human life if he intended to cause serious physical harm to another person or if he was practically certain that his conduct would cause serious physical harm to another person. (T. 149).

The trial court denied the request. We view the requested instruction as one which would define the culpable mental state which was a necessary element in proving first degree battery.

The culpable mental state necessary to warrant a conviction is not set out in Ark. Stat. Ann. § 41-1601 (1) (c) (Repl. 1977). In *Martin* v. *State,* 261 Ark. 80, 547 S.W. 2d 81 (1977), the Arkansas Supreme Court said that, in a first degree battery case, a culpable mental state must be proved, thus making it a necessary element of the crime. The Supreme Court noted that the commentary to Ark. Stat. Ann. § 41-1603 (Repl. 1977) states:

> For the most part, battery in the first degree comprehends only life-endangering conduct. The severity of punishment authorized is warranted by the conjunction of severe injury and a wanton or purposeful culpable mental state. Each subsection describes con-

> duct that would produce murder liability if death resulted. . . .

The lowest degree of murder is found in Ark. Stat. Ann. § 41-1503 (Repl. 1977), which states:

> Murder in the second degree. — (1) A person commits murder in the second degree if:
>
> (a) with the *purpose* of causing the death of another person, he causes the death of any person; or
>
> (b) he *knowingly* causes the death of another person under circumstances manifesting extreme indifference to the value of human life; or
>
> (c) with the *purpose* of causing serious physical injury to another person, he causes the death of any person. (Emphasis added).

Under this statute, the State must prove that the defendant acted either purposely or knowingly. Therefore, the State must prove as an element of first degree battery, that the appellant acted either purposely or knowingly.

The trial court must instruct the jury as to what the elements of the offense charged are. This does not mean that the trial court must give an instruction defining each element. *Pridgeon* v. *State,* 266 Ark. 651, 587 S.W. 2d 225 (1979).

We hold that the appellant was entitled to an instruction requiring the State to prove that he acted either "purposely or knowingly", and that he was also entitled to have the jury instructed regarding the definition of "purposely and knowingly". However, the court was correct in not giving appellant's requested instruction, since that instruction could have confused the jury. However, we would not reverse on this point alone because it was appellant's duty to propose a correct instruction. See, *Griffin* v. *State,* 248 Ark. 1223, 455 S.W. 2d 882 (1970).

V.

THE COURT ERRED IN REFUSING TO DECLARE

A DIRECTED VERDICT OF ACQUITTAL.

In his argument on this point, appellant argues that the evidence is insufficient to support the conviction and that the trial court should have directed the verdict at the close of the State's case or the appellant's case. This case has been reversed and remanded for a new trial because of improper jury *voir dire* and improper admission of evidence. Improper admission of evidence is a trial error. *Burks* v. *United States,* 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). We will not review the properly admitted evidence to determine whether it is sufficient to prove guilt. The reason for this is because it is impossible to know what additional evidence the State might have produced or what theory it might have pursued had the improper evidence been excluded at trial.

VI.

THE TRIAL COURT ERRED IN LIMITING THE TESTIMONY OF DEFENDANT [APPELLANT] CONCERNING HIS INJURIES.

The appellant testified about the collision and the resulting injuries he suffered. He now complains that the trial court erred in failing to allow him to display his injuries to the jury. Appellant's injuries were not relevant in determining whether appellant was guilty of the crime charged. To allow the appellant to display his injuries to the jury might have prejudiced the minds of the jurors by creating sympathy for the appellant. *Jefferson* v. *State,* 196 Ark. 897, 120 S.W. 2d 327 (1938). It is in the trial court's discretion as to whether a witness will be allowed to display his injuries to the jury. *Vaughn* v. *State,* 252 Ark. 260, 478 S.W. 2d 759 (1972). We cannot say that the trial court abused that discretion.

VII.

THE TRIAL COURT ERRED IN ALLOWING IMPROPER CLOSING ARGUMENT BY THE PROSECUTING ATTORNEY.

Appellant argues that the prosecuting attorney improperly referred to the revoked driver's license in his closing argument. That point has already been dealt with under point III. The State also argued that the jury should not consider appellant's physical injuries in determining a sentence. The appellant put this evidence before the jury and the weight it should be given was clearly a matter which could be argued by the prosecuting attorney. With regard to the other actions alleged to constitute misconduct during closing arguments by the prosecuting attorney, we note that the trial court has broad discretion in controlling, supervising, and determining the propriety of arguments of counsel, and we will not reverse the trial judge on such an issue in the absence of a gross abuse of discretion. *Shaw* v. *State,* 271 Ark. 926, 611 S.W. 2d 522 (1981). We find no abuse of discretion here.

VIII.

THE TRIAL COURT ERRED IN SEVERAL OTHER PARTICULARS.

Since counsel has conceded that none of the errors alleged under this general point constitute reversible error, we do not consider it necessary to rule on them as several are relatively unimportant and several others are unlikely to recur on retrial.

Reversed and remanded.

CLONINGER, J., concurs in part and dissents in part.

MAYFIELD, C.J., dissents.

LAWSON CLONINGER, Judge, concurring in part, dissenting in part. I agree with the majority that this case must be reversed and remanded on the grounds that the *voir dire* was not conducted in accordance with § 43-1903, but I believe the majority is mistaken in holding that it was error to allow evidence of appellant's prior D.W.I. convictions and evidence of appellant's revoked driver's license.

It is not seriously contended that appellant caused serious physical injury to another by means of a deadly weapon; he only contends that his acts were not committed under circumstances manifesting extreme indifference to the value of human life. Uniform Rules of Evidence, Rule 404 (b), permits evidence of other acts to prove intent or absence of mistake or accident. The appellant contends that the collision resulting in injury was an accident, and the purpose of introducing evidence of appellant's prior D.W.I. convictions and revoked driver's license was to rebut that contention.

The question is not whether the appellant, when he drove an automobile while drunk, intended to injure another; the question is whether he manifested extreme indifference to the value of human life *under the circumstances*. Part of the circumstances was the fact that appellant had been convicted of doing exactly the same thing on three previous occasions, which means that he was detected and convicted only three previous times; the further circumstance was the fact that appellant had been declared unfit to operate an automobile and he knew it. He caused serious injury and he did so because, just has he had done at least three times before, he manifested total indifference to the value of human life and had even been told by the State that he was not a fit person to operate a vehicle. The jury found that this was no accident and the jurors were the triers of fact. There is no way we can say that the trial judge did not weigh the danger of undue prejudice simply because he did not say the magic words, and there is no evidence that he abused his discretion in admitting the evidence.

I would reverse and remand on the issue of improper *voir dire* and find no merit to the appellant's other points for reversal.

MELVIN MAYFIELD, Chief Judge, dissenting. About 6:45 p.m. on April 8, 1979, Gary and Carol Camp and their three children left Paragould to return to their home in Blytheville. They had traveled only about two miles when the appellant, coming from the opposite direction, drove his vehicle across the center line of the highway and hit the

Camp vehicle which had been pulled onto the shoulder on its side of the road in an attempt to avoid the appellant's vehicle.

As a result of injuries sustained in the collision, Gary, who was then 35 years old, is now confined to a wheelchair, paralyzed from his armpits down, with no bowel or kidney functions, and in need of constant care.

The appellant was returning to Jonesboro from southeast Missouri where he had spent the day drinking. By 5:00 p.m. he was so drunk that an acquaintance who rode with him from one bar to another would no longer ride with him and the state trooper who got to the scene of the accident about 7:00 p.m. testified the appellant was under the influence of alcohol at that time.

Appellant had been convicted of driving under the influence of intoxicating liquor in February of 1977, in June of 1978, and in August of 1978. At the time of the collision in April of 1979, he did not have a valid driver's license because it had been revoked.

The majority of this court has found that appellant's conviction of battery in the first degree should be reversed. I dissent.

## ADMISSIBILITY OF EVIDENCE

One reason given by the majority for reversal is that the court erred in admitting evidence of appellant's prior D.W.I. convictions and evidence that his driver's license had been revoked.

I think this evidence was admissible under Rule 404 (b) of the Uniform Rules of Evidence. In *Price* v. *State*, 267 Ark. 1172, 599 S.W. 2d 394 (Ark. App. 1980) the court of appeals pointed out that this rule only codified the law in existence before the rule was adopted, and said: "In our view, the rule should be interpreted to exclude evidence of other offenses when its only purpose is to show the accused's character or some general propensity he might have to commit the

particular sort of crime in question." The Arkansas Supreme Court reviewed and affirmed that decision saying "the rule clearly permits such evidence if it has relevancy independent of a mere showing that the defendant is a bad character." *Price* v. *State,* 268 Ark. 535, 597 S.W. 2d 598 (1980). And the court quoted from its prior decision in *Alford* v. *State,* 223 Ark. 330, 266 S.W. 2d 804 (1954) as follows:

> If other conduct on the part of the accused is independently relevant to the main issue — relevant in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal — then evidence of that conduct may be admissible . . . .

Just when evidence of other crimes, wrongs, or acts is independently relevant has been decided on a case-by-case basis. *Price* v. *State,* 267 Ark. 1172, supra; *Conley* v. *State,* 267 Ark. 713, 720, 590 S.W. 2d 66 (Ark. App. 1979). And in *Thomas* v. *State,* 273 Ark. 50, 615 S.W. 2d 361 (1981), the court said "it would be wise not to hold such evidence inadmissible as a matter of law and to leave it instead to the trial court's discretion, subject to a case-by-case consideration." It is clear that rule 404 (b) does not specifically list all the purposes for which such evidence is admissible. In addition to those listed, such evidence has been held admissible to show guilty knowledge and to corroborate the testimony of another witness, *Price* v. *State,* 268 Ark. 535, supra; and to establish the facts and circumstances surrounding the commission of the offense under what was called the "res gestae exception," *Young* v. *State,* 269 Ark. 12, 598 S.W. 2d 74 (1980). A publicized example, from another jurisdiction, of when evidence of another crime has independent relevancy to the offense charged is the case involving Patty Hearst where she said she participated in a bank robbery because of duress and the court allowed evidence that she willingly participated with the same group in later criminal activity. *United States* v. *Hearst,* 563 F. 2d 1331 (9th Cir. 1977).

So, in the instant case, the first question is whether the D.W.I. convictions tended to prove some material issue

involved in the case. That portion of the statute under which the defendant was charged required the state to prove that he caused serious physical injury to another person *under circumstances manifesting extreme indifference to the value of human life.* Without the evidence of the D.W.I. convictions the jury could have found that the defendant spent the day drinking; that he was driving his car while drunk; and that the collision occurred because he was driving while intoxicated. The majority opinion seems to suggest that this evidence would be sufficient to support a finding that the defendant caused the injuries to Gary Camp under circumstances manifesting extreme indifference to the value of human life, but that does not mean that the D.W.I. convictions are not relevant on that issue. It is one thing to have too much to drink and think you can drive home safely; it is quite another to drive for the fourth time in 28 months while intoxicated. I believe the jury was entitled to know about the prior D.W.I. convictions.

Once the independent relevancy of the evidence is established, it must be scrutinized in the light of Uniform Evidence Rule 403 to determine if its probative value outweighs its prejudicial effect. *Price* v. *State,* 268 Ark. 535, supra; *Young* v. *State,* 269 Ark. 12, supra. *Price* says this balancing test is mandatory when there is an objection to the admission of the evidence but neither *Price* nor *Young* makes reference to the necessity of any oral or written finding to be made of record. *Price* cites *United States* v. *Sangrey,* 586 F. 2d 1312 (9th Cir. 1978) as authority for the rule that the determination must be made but *Sangrey* said "we refuse to require a mechanical recitation of rule 403's formula on the record as a prerequisite to admitting evidence under rule 404 (b)." *Price* also cites *United States* v. *Conley,* 523 F. 2d 650 (8th Cir. 1975) where the only reference to how the trial judge is to perform the balancing test is found in the opinion of a judge who dissented from the court's refusal to grant a rehearing and that opinion does not say that the trial court should make any express finding for the record with regard to the determination of the admissibility of the evidence. It does suggest, however, that a judge admitting such evidence should immediately caution the jury about its use *unless the cautionary instruction is*

*waived.* In the instant case no request for such a limiting instruction was made and in *Price* the court stated it could not say the evidence's potential for prejudice outweighed its probative value, especially in light of *petitioner's failure to request a cautionary instruction.*

In *Young* the supreme court affirmed the trial court in admitting evidence of other criminal activity and the opinion, which cites and relies on *Price,* makes no mention of any oral or written finding by the trial court reciting that a determination had been made that the probative value of the evidence outweighed its prejudicial effect. The Arkansas Supreme Court in both cases simply reviewed the record, found that it would support a finding in favor of allowing the evidence, and affirmed the trial court. This is our procedure in similar situations and this is the procedure we should follow here. See *Toney* v. *Miller,* 268 Ark. 795, 597 S.W. 2d 102 (Ark. App. 1980). We should also follow *Price* and *Young* which say that the trial court has wide discretion in determining the admissibility of this kind of evidence and that its determination will not be reversed absent an abuse of that discretion.

With regard to the evidence that appellant's driver's license had been revoked, I think this rides with the D.W.I. evidence. The defendant admitted his license had been revoked at the time of the collision and he admitted he had been convicted of D.W.I. within a year of that time. Under Ark. Stat. Ann. § 75-1029 (Repl. 1979), his license could have been revoked for a year upon his conviction for D.W.I. Without anything else in the record we have to assume that this is why his license was revoked. Thus, the revocation was admissible as a part of his D.W.I. conviction. It is true that the trial court stated this evidence related to appellant's credibility but we do not reverse just because the trial court gave the wrong reason for allowing it to be introduced. *Sanders* v. *Neuman Drilling Co.,* 273 Ark. 416, 619 S.W. 2d 674 (1981).

## REQUESTED INSTRUCTION

Another reason given for reversing this case is that the

trial court refused to give appellant's requested instruction telling the jury that a person acts under circumstances manifesting extreme indifference to the value of human life "if he intended to cause serious physical harm to another person or if he was practically certain that his conduct would cause serious physical harm to another person." The majority opinion says this instruction should have been given because *Martin* v. *State,* 261 Ark. 80, 547 S.W. 2d 81 (1977) holds that a defendant must act with one of the culpable mental states defined in Ark. Stat. Ann. § 41-203 (Repl. 1977). In my opinion, *Martin* holds to the contrary. There the court said of Ark. Stat. Ann. § 41-1601 (1) (c) (Repl. 1977), which is the statute the appellant here is charged with violating:

> In the case at bar the phrase "circumstances manifesting extreme indifference to the value of human life" indicates that the attendant circumstances themselves must be such as to demonstrate the culpable mental state of the accused. The language of the Arkansas statute does not require reasonable men to speculate as to its common understanding or application.

In *Martin* the trial court had given the jury an instruction defining "purposely," one of the culpable mental states defined in Ark. Stat. Ann. § 41-203 (Repl. 1977), and the supreme court said that the appellant could not object because the trial court had imposed the highest burden upon the state, requiring it to prove that the appellant's conduct was done purposely instead of knowingly or recklessly. But *Martin* did not hold that it was necessary for the court to define any of these terms. In my judgment, the case holds that the requisite culpable mental state is sufficiently defined by the language of the statute itself.

## SELECTION OF JURY

One other reason given by the majority for reversal is that the trial court erred in not requiring the voir dire of prospective jurors to be conducted one at a time and each one either challenged or accepted before the next one was

examined. The majority opinion concedes that the statute involved can be interpreted in more than one way and that the exact question presented here has not been decided by the Arkansas Supreme Court. Faced with this situation, I would reach a different result.

In the first place, the statute involved, Ark. Stat. Ann. § 43-1903 (Repl. 1977), certainly does not say that prospective jurors must be examined in such one-at-the-time manner. And in the second place, the *Clark* and *Roleson* cases which the majority opinion relies upon "even though this precise issue was not decided" should not be extended, in my opinion, to apply to the case at bar.

In both *Clark* and *Roleson* the state was allowed to exercise all its peremptory challenges at one time against a group of prospective jurors which the state had examined. This, the court held, gave the state the advantage of being able to exercise its challenges against the group and excuse those considered least desirable instead of having to reject them one at a time and perhaps use all its challenges before discovering those least desirable. Now it is easy to see how this would be beneficial to the state but it is difficult to understand why the defendant could not be given the same opportunity to enjoy an equal benefit. Surely there is no virtue in a rule adopted for the sole purpose of preventing peremptory challenges from being used to excuse undesirable jurors.

But, in any event, whatever vice existed in *Clark* and *Roleson* does not exist in the instant case. Here, the court specifically ruled that before the state could exercise *any* challenge the defendant would have the option to examine prospective jurors as a group or one at a time and to submit them to the state for challenge either as a group or one at a time. Thus, no prejudice could have resulted to the defendant and no reversible error was committed in this regard.

In addition, the process of voir dire already takes a great deal of time. To *require* that each prospective juror drawn be examined one at a time will require even more time. It is

possible that the time spent in the trial of criminal cases could consume an organized society.

I would affirm.

Leardis SMITH *v.* William F. EVERETT, Director of Labor, and ODUS PACK CARPET SALES

E 81-200 629 S.W. 2d 309

Court of Appeals of Arkansas
Opinion delivered March 3, 1982
[Rehearing denied April 7, 1982.*]

*MAYFIELD, C.J., COOPER and GLAZE, JJ., would grant the petition.

*Katherine D. Ehrenberg,* Central Ark. Legal Services, and *James R. Cromwell,* UALR Law School Legal Clinic, for appellant.

*Thelma Lorenzo* and *Bruce H. Bokony,* for appellees.

LAWSON CLONINGER, Judge. This is an appeal from a decision by the Board of Review that the claimant, Leardis Smith, was disqualified for unemployment benefits under the provisions of § 5 (b) (2) of the Arkansas Employment Security Law, Ark. Stat. Ann. § 81-1106 (b) (2) (Repl. 1976), on the finding that he was discharged from his last work for misconduct involving dishonesty.

Claimant contends that the decision of the Board of Review was not based upon evidence taken in such a manner as to ascertain his substantial rights, and that there is no substantial evidence to support the finding.

We affirm the decision of the Board of Review.

Ark. Stat. Ann. § 81-1107 (d) (4) (Repl. 1976) provides that the Board of Review shall not be bound by common law or statutory rules of evidence or by technical rules of procedure, but that the hearing or appeal shall be conducted in such manner as to ascertain the substantial rights of the parties.

In *Bockman* v. *Arkansas State Medical Board,* 229 Ark. 143, 313 S.W. 2d 826 (1958), the Arkansas Supreme Court stated:

> Although the evidence consists of affidavits and certified copies of court decisions, it was nevertheless competent. This is not a criminal prosecution, in which the accused is entitled to be confronted by the witnesses against him. It is an administrative proceeding, civil in nature, as to which the governing statute provides: 'The Board shall not be bound by strict or technical rules of evidence, but shall consider all evidence fully and fairly . . . ' Ark. Stat. § 72-614. . . . Affidavits are frequently used in quasi-judicial proceed-

> ings, as in hearings before the Workmen's Compensation Commission; there is no constitutional objection to this method of proof in a civil proceeding. . . .

Claimant, a carpet salesman for Odus Pack Carpet Sales, was accused by his employer of selling carpet to a customer, Ray Brown, for less than its true value in return for a kickback from Brown. Odus Pack, the employer, stated by sworn affidavit that the company had given Brown money with which to make the purchase from claimant because of a suspected previous act of dishonesty by claimant. Ray Brown stated, also by sworn affidavit, that he had purchased the carpet from claimant for less than its true value and had paid claimant $40.00 as a kickback. A Pack employee appeared at the hearing and testified that she was the one who gave the money to Brown to pay the kickback, and another employee identified the ticket which was written up for the Brown sale. The ticket bears the initials of claimant, but claimant denies that he prepared the ticket or initialed it.

In *Parker* v. *Ramada Inn,* 264 Ark. 472, 572 S.W. 2d 409 (1978), the claimant was discharged for missing one day's work after having worked seven consecutive days. The employer did not respond to inquiries from the Employment Security Division and did not appear at the hearing. The court held that the findings of the Board of Review are conclusive on appeal if supported by substantial evidence, and that the court could not, as a matter of law, say that appellant's conduct was not a violation of a standard of behavior that his employer had a right to expect.

In *Woods* v. *Daniels,* 269 Ark. 613, 599 S.W. 2d 435 (Ark. App. 1980), this court held that although hearsay evidence is admissible in hearings before an administrative tribunal, hearsay alone does not constitute substantial evidence. The court held that the claimant made a prima facie case showing that he had been forced to leave his job to protect his health, and that the only evidence offered by the employer was offered by company employees who had no personal knowledge of the circumstances. This court reaffirmed the position taken in *Woods* in *Deltic Farms and*

*Timber Company* v. *Dunn,* 270 Ark. 421, 605 S.W. 2d 471 (Ark. App. 1980), ruling that "in the face of direct testimony to the contrary, we will not accept as 'substantial evidence' the testimony of a company representative who has no knowledge of relevant facts."

In the case before the court it is not questioned that Ray Brown and Odus Pack had direct knowledge of relevant facts; their affidavits were objected to because the claimant contended that he had a right to confront and cross examine witnesses against him. There is no constitutional objection to this method of proof in administrative hearings, and the Board was not bound by strict rules of evidence. *Bockman* v. *Arkansas State Medical Board, supra.* Claimant's substantial rights were ascertainable by the procedure followed: the affidavits were under oath; claimant was afforded an opportunity to reply to the affidavits, and he responded to both; and the evidence given in the affidavits was corroborated by the testimony of the employees who appeared at the hearing.

We hold that the procedure followed protected the substantial rights of claimant, and that the decision of the Board of Review is supported by substantial evidence.

Affirmed.

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

Delbert ELLIS and Amos GREEN *v.*
STATE of Arkansas

CA CR 81-135 628 S.W. 2d 871

Court of Appeals of Arkansas
Opinion delivered March 3, 1982
[Rehearing denied March 31, 1982.*]

*CORBIN and GLAZE, JJ., would grant the petition.

*McDaniel, Gott & Wells, P.A.,* by: *Phillip Wells,* for appellant Ellis.

*Andrew Fulkerson,* for appellant Green.

*Steve Clark,* Atty. Gen., by: *William C. Mann, III,* Asst. Atty. Gen., for appellee.

LAWSON CLONINGER, Judge. Appellants Delbert Ellis and Amos Green were found guilty by jury verdict of conspiracy to commit arson. Appellant Ellis was assessed punishment of two years in prison, and appellant Green was sentenced to three years as an habitual offender.

Appellant Ellis contends that the trial court committed the following errors:

1. A mistrial should have been granted after Barney Ramer testified that he took a polygraph test.

2. A jury instruction on conspiracy to commit criminal mischief should have been submitted instead of an instruction on conspiracy to commit arson.

3. A motion to suppress evidence was improperly denied.

4. Cross examination of a police officer concerning a series of photographs should have been permitted.

Appellant Green joins appellant Ellis as to point 1, above, and also contends that the court erred in refusing to give an instruction on conspiracy to commit criminal

mischief in addition to the instruction on conspiracy to commit arson.

We find no reversible error and the judgments are affirmed.

The home owned by appellant Ellis was totally destroyed by fire about midnight on Sunday, July 21, 1980. Following an investigation into the cause of the fire, the state charged appellant Ellis with criminal mischief in the first degree and conspiracy to commit arson, alleging that, in a conspiracy with appellant Green, appellant Ellis purposely destroyed his own property for the purpose of collecting insurance. Appellant Green was charged with arson and conspiracy to commit arson.

At one point in the investigation, Barney Ramer was a suspect, but after giving a statement to the police, Ramer was not charged with any crime. He was a key witness in the trial of appellants, and appellant Green filed a motion in limine to exclude any reference to a polygraph test taken by Ramer. During an attempt by counsel for appellant Ellis to impeach Ramer, the following exchange took place:

> Q. And after you gave your statement which is the same as it is here today —
>
> A. That is correct.
>
> Q. Nothing ever happened to you?
>
> A. That is correct. I took a polygraph test.

The trial judge refused to grant appellants' motion for mistrial, but admonished the jury to completely and totally disregard the reference to a polygraph test. Ramer testified that the prosecuting attorney had instructed him not to mention the fact that he had taken a polygraph test, but that he had forgotten. The trial court ruled that the series of questions which preceded reference to the polygraph test were such that the witness's answer was not unresponsive and should have been anticipated by defense counsel, and we

agree. The question on appeal is whether the trial court abused its discretion in failing to grant a mistrial. A mistrial is an extreme remedy and should be utilized only as a last resort. *Bateman* v. *State,* 2 Ark. App. 339, 621 S.W. 2d 232 (1981).

In *Van Cleave* v. *State,* 268 Ark. 514, 598 S.W. 2d 65 (1980), it was held that, ordinarily, neither the defense nor the state may mention a polygraph test. However, considering the fact that the polygraph was mentioned twice by a witness, without objection, reference to the test by the prosecuting attorney in closing argument was not prejudicial error. In *Roleson* v. *State,* 272 Ark. 346, 614 S.W. 2d 656 (1981), the court recognized that any reference to a polygraph test in the absence of agreement or other justifiable circumstances would constitute error. In *Roleson* a witness testified that she had taken a polygraph test. Later, on cross examination, the witness made references to the test such as, "I can't answer the question without doing something the judge asked me not to do," and "I can't explain it because the judge won't let me." The court observed that "this situation is aggravated in that defense counsel tried to approach the bench to prevent any reference to the polygraph examination, but the court refused to hear the objection and the testimony came in immediately afterwards." In the instant case, the reference to the test was wholly spontaneous, not unresponsive to questions by appellant, made after the witness had been cautioned by the prosecuting attorney, and the reference was not repeated. Under the circumstances, the trial court did not abuse its discretion in refusing to grant a mistrial.

Ark. Stat. Ann. § 41-1902 (Repl. 1977), in pertinent part, defines arson as follows:

> Arson. (1) A person commits arson if he starts a fire or causes an explosion with the purpose of destroying or otherwise damaging: (a) an occupiable structure that is the property of another person . . .

Ark. Stat. Ann. § 41-1906 (Repl. 1977) defines criminal mischief as follows:

> Criminal mischief in the first degree. (1) A person commits the offense of criminal mischief in the first degree if he purposely destroys or causes damage to: (a) any property of another; or (b) any property, whether his own or that of another person, for the purpose of collecting any insurance therefore.

Criminal conspiracy is defined in Ark. Stat. Ann. § 41-707 (Repl. 1977), as follows:

> Criminal conspiracy. A person conspires to commit an offense if with the purpose of promoting or facilitating the commission of any criminal offense he: (1) agrees with another person or other persons: (a) that one or more of them will engage in conduct that constitutes that offense; or (b) that he will aid in the planning or commission of that criminal offense; and (2) he or another person with whom he conspires does any overt act in pursuance of that conspiracy.

Appellant Ellis contends that he cannot be convicted of conspiracy to commit an offense which he could not, by definition, commit himself; that since the structure destroyed was his own, he could not be convicted of arson; thus, the court should have instructed the jury on criminal mischief instead of arson. It is sufficient here to point out that § 41-707 (1) (a) provides that a person conspires to commit an offense if he agrees with another person that *one or more* of them will engage in conduct that constitutes that offense.

There is no error in the refusal by the trial court to give an instruction where there is no evidence to support the giving of the instruction. *Frederick* v. *State,* 258 Ark. 553, 528 S.W. 2d 362 (1975). There was no evidence upon which appellant Green might be found guilty of criminal mischief rather than arson. He either damaged an occupiable structure or he damaged no structure. There was no basis for his request for an instruction on criminal mischief in addition to an instruction on arson.

Rules of Criminal Procedure, Rule 16.2, provides in part:

Motions to suppress evidence.

(a) Objection to use in evidence of things seized shall be made by a motion to suppress evidence. The motion shall be made to the court which is to conduct the trial at which things seized may be offered into evidence.

(b) The motion to suppress shall be timely filed but not later than ten (10) days before the date set for the trial of the case, except that the court for good cause shown may entertain a motion to suppress at a later time.

The motion to suppress in the present case was filed four days before trial. The trial court found that the motion was not timely filed.

In *Parham* v. *State,* 262 Ark. 241, 555 S.W. 2d 943 (1977), the Arkansas Supreme Court affirmed the trial court's denial of a motion to suppress, when it was filed only a day or two before trial with no cause for delay, and this court held in *Dodson* v. *State,* 4 Ark. App. 1, 626 S.W. 2d 624 (1982) that a motion to suppress evidence filed six days before trial was not timely when appellant offered no good cause for the delay. The court, in this case, in the absence of good cause shown, properly denied appellant Ellis's motion to suppress.

A police officer called as a witness by the state testified that he observed a vehicle traveling at a high rate of speed near the home of appellant Ellis just before he observed the Ellis house on fire. The officer testified that he had seen appellant Ellis and another man in the same car a short time earlier; that he knew appellant Ellis's car, and recognized the car as belonging to appellant Ellis. On cross examination, counsel for appellant Ellis attempted to display a series of photographs to the officer which contained cars similar to the vehicle owned by appellant Ellis and owned by residents in the nearby radius of the Ellis house.

The trial court allowed appellant Ellis to make a proffer of testimony, but rejected his argument, ruling that the

testimony was not relevant to the issue, was unfair and improper, and would be confusing to the jury. The trial court's ruling was proper. The officer had testified that he had observed appellant in his vehicle at close range only a few minutes before the fire was discovered and he observed the fire approximately two minutes after observing the car the second time. Uniform Rules of Evidence, Rule 403, provides that, although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Appellant cites no Arkansas law as authority for his proposition and his argument is not persuasive.

Affirmed.

COOPER, J., concurs.

CORBIN and GLAZE, JJ., dissent.

DONALD L. CORBIN, Judge, dissenting. I must respectfully dissent from the majority's conclusion that this case should be affirmed. In *Roleson* v. *State,* 272 Ark. 346, 614 S.W. 2d 656 (1981), the Arkansas Supreme Court found error where there was reference to a polygraph test by a key witness for the prosecution. The Court in *Roleson* v. *State, supra,* stated the following:

> Cecellia's counsel properly cites *Gardner* v. *State,* 263 Ark. 739, 569 S.W. 2d 74 (1978) for the rule that the results of polygraph tests are inadmissible in criminal cases. And it is recognized that any reference to a polygraph test in the absence of agreement or other justifiable circumstances would constitute error. *Van Cleave* v. *State,* 268 Ark. 514 (1980).

In *Van Cleave* v. *State,* 268 Ark. 514, 598 S.W. 2d 65 (1980), the Arkansas Supreme Court stated the following on this issue.

> All parties agreed that the settled rule in Arkansas is that the results of polygraph tests are not admissible in criminal cases in the absence of mutual agreement.

> *Gardner* v. *State,* 263 Ark. 739 at 756, 569 S.W. 2d 74 (1978). Although we have not had previous occasion to determine whether a reference to a polygraph test is permissible, we note the case of *Johnson* v. *Florida,* 166 So. 2d 798 (1964), that neither the results of a polygraph examination nor any allusion to such examination are proper subjects of comment. This is understandable because, whether it was the state or the defense that made the reference to the person taking the test, it would be an obvious attempt to put before the jury the fact that he had taken the test and failed or passed.

This decision seems to foreclose the opportunity for impeachment by defense counsel where the prosecution's key witness has taken a polygraph test. I would reverse and remand for a new trial.

GLAZE, J., joins in this dissent.

D. W. CRISP and Jim MOTHERSHED *v.* Ruth BROWN

CA 81-232 628 S.W. 2d 596

Court of Appeals of Arkansas
Opinion delivered March 3, 1982
[Rehearing denied March 24, 1982.]

*Richard L. Peel,* for appellants.

*James K. Young,* of *Young & Finley,* for appellee.

TOM GLAZE, Judge. Appellant seeks to reverse the lower court's judgment for three reasons: (1) the court erroneously admitted into evidence the depositions of appellee and her husband, both of whom appeared and testified at trial; (2) the court should have directed a verdict on behalf of appellants at the close of appellee's proof and at the conclusion of the trial; and (3) the court's decision was clearly against the preponderance of the evidence.

Appellee brought this action against appellants for misrepresentations made in their sale of certain real property to appellee. In sum, appellee claimed she purchased appellants' property to use it as a mobile home park, a purpose for which appellants represented it could be used. After the purchase, appellee claimed it was not possible to place mobile homes on the property. Appellee subsequently sought and was awarded $2,500 damages against appellants for the alleged misrepresentation they made in connection with their sale of the property to appellee.

At trial, apparently to bolster her own testimony, appellee offered into evidence the pre-trial discovery depositions of appellee and her husband. Appellants objected to the introduction of the depositions, stating they contained hearsay testimony which was inadmissible. The trial court overruled appellants' objections and admitted both deposi-

tions. We believe the trial court erred, and in so doing, we must reverse and remand this cause for a new trial.

Rule 32 of the Arkansas Rules of Civil Procedure sets forth when and how depositions can be used in court proceedings. Section (a) (3) of Rule 32 provides the deposition of a witness, whether or not a party, may be used by any party for any purpose if any one of five conditions are found to exist by the court.[1] The record before us does not show, nor is it argued, that any of the five conditions contained in Rule 32 (a) (3) exist here so as to permit the introduction of the depositions of appellee or her husband. In fact, appellee and her husband were present in court when their depositions were introduced and admitted into evidence, and they both testified at the same proceeding. We are unaware of any rule which authorizes the use and introduction of depositions of witnesses under the circumstances existing here. From our own research, we find the procedure in most jurisdictions bars the use of the deposition as evidence in lieu of testimony if the witness is available to give firsthand oral testimony in court. See 3 B. Jones, The Law of Evidence, § 18.26 (Gard ed. 1972).

In the instant case, the depositions introduced were replete with inadmissible hearsay testimony. We also find that without the introduction of these depositions, appellee's attempt to otherwise prove actionable fraud or misrepresentation against appellants must fail. For instance, to support appellee's misrepresentation action, she was required to show appellants made representations that they knew to be false, or else, not knowing, they asserted them to

[1]Rule 32 (a) (3): The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of this state, unless it appears that the absence of a witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

be true. See *Fausett & Company, Inc.* v. *Bullard,* 217 Ark. 176, 229 S.W. 2d 490 (1950), and *Lane* v. *Rachel,* 239 Ark. 400, 389 S.W. 2d 621 (1965).

At trial, the in court testimony given by appellee and her husband established: (1) she purchased appellants' property for the purpose of placing mobile homes on it, (2) appellants represented the property was a great spot for mobile homes, (3) appellee relied on this representation which induced her to purchase the property, and (4) appellee subsequently claimed she could not place a mobile home on the property. No in court testimony or other admissible evidence was presented to show why appellee could not place mobile homes on the property. The appellee not only failed to show the cause which precluded her from placing the mobile homes on the property but, more importantly, failed to show such a cause existed at the time the alleged misrepresentation was made.

Appellee attempted to testify at trial that a man named Howard Porter had a percolation test conducted on the property. She said that the test results were not good, and therefore she could not get permission to put a septic tank on the property. The court ruled appellee's testimony concerning the percolation test was inadmissible. However, the depositions which the trial court admitted into evidence contained this same inadmissible evidence relating to the percolation tests. The primary purpose of appellants' objection to exclude these depositions was to avoid this very problem, *i.e.,* to exclude inadmissible hearsay evidence.

Although appellee argues the court did not rely on this evidence contained in the depositions, we are unable to reach that conclusion. The entire depositions of appellee and her husband were admitted into evidence and their hearsay testimony regarding the percolation tests were made a part of this record. In our review of this cause, the rule is well established that any error by a lower court is presumed to be prejudicial unless we can say with assurance that it was not prejudicial to the rights of the appellant. *Wallin* v. *Insurance Company of North America,* 268 Ark. 847, 596 S.W. 2d 716 (Ark. App. 1980).

Under the circumstances of this case, we are clearly of the view that appellee was not authorized to introduce into evidence her deposition or that of her husband. Since we believe that without these two depositions the remaining admissible evidence presented by appellee failed to show actionable fraud or misrepresentation, we must conclude that appellants were prejudiced by the wrongful introductions of the depositions.

Inasmuch as appellee could possibly supply upon a retrial the deficiency of proof we find in this review, we therefore reverse this cause and remand it for a new trial. See *Follett* v. *Jones,* 252 Ark. 950, 481 S.W. 2d 713 (1972).

Reversed and remanded.

William E. EVERETT and Elva Lee EVERETT, et ux
*v.* PARTS, INC.

CA 81-73 628 S.W. 2d 875

Court of Appeals of Arkansas
Opinion delivered March 10, 1982

*John B. Driver,* for appellants.

*Highsmith, Gregg, Hart & Farris,* by: *John C. Gregg,* for appellee.

MELVIN MAYFIELD, Chief Judge. This is an appeal from a Chancery Court decree awarding Parts, Inc. judgment against appellants and ordering foreclosure of a mortgage on their land. We affirm.

Parts is a Tennessee distributor of automotive parts and to assure outlets it assists suitable prospects in setting up retail stores. As part of this policy, Parts assisted William and Elva Everett in opening an auto parts store in Mountain View, Stone County, Arkansas.

The Everetts executed a promissory note to a Tennessee bank in the amount of $105,441.00, which included pre-computed interest at 13% per annum — a rate permissible under Tennessee law. Payment was to be made in 84 installments of $1,255.25 per month beginning August 13, 1979. The note, guaranteed by Parts, was secured by a first lien on all of the Everetts' inventory, accounts receivable, furniture, fixtures, and equipment. As additional security, the Everetts executed a mortgage on some Stone County land.

Parts then agreed to sell auto parts to the Everetts to stock the new store. The parties agreed to an open account with a stated credit limit. This agreement was secured by a second lien to Parts on the Everetts' inventory, accounts receivable, et cetera, and by a second mortgage on the Stone County land.

The $69,000.00 principal on the note was distributed as follows: $50,000.00 to Parts for the initial inventory, $10,307.09 to the Everetts for operating capital and expenses, and $8,692.91 to the Bank of Mountain View to discharge a prior mortgage on the Stone County real estate collateral.

The Everetts opened their auto parts store in late summer, but by December had made only one payment on the note to the bank and had become indebted to Parts for $21,627.89 for additional merchandise purchased on open account. The bank then called upon Parts as guarantor to pay the note and on December 19, 1979, it paid $72,304.74 principal and accrued interest, and became entitled to the bank's security rights against the Everetts.

Parts, now with a first and a second lien on the inventory, furniture, and equipment, et cetera, of the store and a first and a second mortgage on the Stone County land, filed suit seeking repossession of all the personal property collateral securing the note and open account and for foreclosure of the real estate. Parts made a repossession bond and under an Order of Delivery the sheriff repossessed all the store inventory, furniture and equipment on February 19, 1980.

The Everetts' answer contained a general denial and also alleged the instruments attached to the complaint and the interest sought on the open account were usurious. (The usury defense, however, was withdrawn on the day of trial.) Later they filed a pleading alleging that certain personal items, not covered by the security agreements, were wrongfully repossessed and should be returned. They also admitted the execution of the note and the receipt and distribution of the $69,000.00 principal but alleged the Commercial Code provisions had not been followed in the repossessing of the personal property collateral. And they asserted that the real property mortgage was subject only to that portion of the $69,000.00 which was used to discharge the prior mortgage on the land and they offered to pay that amount.

The trial court found that the Everetts were indebted to Parts for the amount it had paid to discharge the note to the

bank; for the additional merchandise purchased on open account after the store opened; and for certain repossession costs. The court further found that all property repossessed was covered by the security agreements except some shelving worth $2,500.00 for which credit should be given on the amount owed. The court found that the Everetts should also be given credit for the full market value of the property repossessed. After those credits were allowed, there was a deficiency for which judgment was given and the mortgage was ordered foreclosed and the lands therein sold with the proceeds to be applied to the payment of the judgment.

On appeal the Everetts make four general contentions: (1) because the personal property was repossessed by an action of replevin, the entire indebtedness was cancelled; (2) the real estate mortgage only secured the $8,692.91 used to discharge a prior mortgage on the same land; (3) judgment should not have been allowed for the open account; and (4) the judgment granted was too high.

*The Replevin Action*

This first contention appears to be bottomed on the law of a bygone day. Under the conditional sale device, widely used in Arkansas prior to the Uniform Commercial Code, a seller could either sue for the purchase price or repossess the property; but not both. See Mooney, *The Old and the New: Article IX,* 16 Ark. L. Rev. 145, 151 (1961) where, in discussing the effect of the code, it is said:

> The most significant change in the law of conditional sales contracts is the final and conclusive eradication of the doctrine of election of remedies which has dogged conditional sellers and overjoyed conditional buyers almost since the founding of the State of Arkansas.

The repossession of the secured property did not cancel the debt in the instant case. Neither did the fact that the chancellor allowed Parts to keep the property have that effect. While there is a provision in the Code, Ark. Stat. Ann. § 85-9-505 (2) (Supp. 1981), which provides that the parties may assent to the seller's retaining possession of the collateral in satisfaction of the debt, that obviously is not the

situation here. Parts certainly did not propose to keep the repossessed property in satisfaction of the debt.

*The Real Estate Mortgage*

The argument that Parts cannot foreclose the real estate mortgage to obtain payment of the indebtedness from the operation of the store is based upon the statement that "the court, in essence, granted judgment on a promissory note that had inventory, etc., as collateral, but ordered the real estate sold to satisfy a judgment on inventory." We think this contention fails to recognize two things.

In the first place, the Tennessee bank had a lien securing its note on both the inventory, et cetera, and the real estate. Parts guaranteed the bank's note and on the Everetts' default, Parts paid the note. That note was introduced in evidence, is in the record, contains an assignment to Parts, and there was testimony that it was delivered by the bank to Parts. "An assignment of the note carries the mortgage." *Bryan* v. *Easton Tire Co.*, 262 Ark. 731, 561 S.W. 2d 79 (1978). "It has long been the rule that when a party secondarily liable upon a note is required to pay it, he is entitled to enforce the obligation against the maker." *K & S International* v. *Howard,* 249 Ark. 901, 462 S.W. 2d 458 (1971). Without doubt, Parts is entitled to foreclose the mortgage for payment of what it paid on the Everetts' note to the Tennessee bank.

In the second place, there is a failure to recognize that the Everetts also executed, directly to Parts, a second mortgage to secure the open account purchases that were made after the initial inventory. A written agreement was executed by the parties under which Parts agreed to sell merchandise to the Everetts on open account, up to a stated amount, and the Everetts agreed to secure their open account indebtedness by a second mortgage on the described real estate (and also by a second lien on the inventory, et cetera). A mortgage was executed which describes the credit agreement and states it is secured by the mortgage.

> Any obligation capable of being reduced to a money amount may be secured by a mortgage. Thus, unliquidated debts such as open book accounts and

> contingent obligations that are uncertain in amount, such as indemnity bonds, may be secured by a mortgage on real estate. Moreover, promises to build a driveway and a sewer line on mortgagor's land and to build an apartment house have been held to be mortgagable.

Osborne, Nelson & Whitman, *Real Estate Finance Law,* 20 (1979). See also *Hollan* v. *American Bk. of Commerce & T. Co.,* 168 Ark. 939, 272 S.W. 654 (1925); *First Nat'l. Bank* v. *Conway Sheet & Metal,* 244 Ark. 963, 428 S.W. 2d 293 (1968); and *In re Dorsey Electric Supply Co.,* 344 F. Supp. 1171 (1972).

The chancellor found there was a second mortgage on the land to secure the open account. We have no doubt he was right.

*The Open Account*

The Everetts say that Parts did not produce an itemized account as required by *Griffin* v. *Young,* 225 Ark. 813, 286 S.W. 2d 486 (1956). That case explains that an itemized account consists of a detailed list of the various items purchased — not merely a statement of the account showing charges for items described by such generic words as "merchandise" or "groceries." We agree that the statements of account introduced here did not constitute an itemized account. But in *Griffin* the judgment was reversed because the court overruled the defendant's motion to require the plaintiffs to make their complaint more definite and certain by itemizing the account on which the suit was brought. Here, no similar motion was filed.

*Griffin* was cited in *Burns* v. *Hall,* 234 Ark. 943, 356 S.W. 2d 235 (1962) where the court held the failure to attach an itemized account to the complaint did not mean that the complaint did not state a cause of action. We agree that Parts had the burden of proving its account and its credit manager testified that he had charge and custody of the company's business records; that there were invoices in the home office to support the statements of account which were introduced; and that the balance due on the open account was $21,627.89. We cannot say the chancellor was clearly erroneous in finding this amount due. Rule 52 (a), Rules of Civil

Procedure; *Shannon* v. *Anderson,* 269 Ark. 55, 598 S.W. 2d 97 (1980).

*The Amount of Judgment*

The contention about the amount of the judgment is really an objection to the method of disposing of the repossessed inventory. This property was not sold as authorized by Ark. Stat. Ann. § 85-9-504 (Supp. 1981) but at the time of trial, some nine months after repossession, was still in Parts' warehouse in Tennessee. In its brief, Parts says it was awaiting the court's determination of the defense of usury (withdrawn on the day of trial) before making a disposition of the collateral. At the trial Parts proposed to allow eighty percent of the market value of the inventory (at time of repossession) as a credit against the indebtedness. In a letter to the attorneys the court found this was a commercially reasonable method of disposing of the collateral but found the credit allowed should be the full market value of the collateral.

Provisions of the Commercial Code are cited which Parts says expressly or by implication authorize that action by the court. See Ark. Stat. Ann. §§ 85-9-501 (1) (4) (Add. 1961) and 85-9-507 (2) (Supp. 1981). However, if the repossessed security was not disposed of in accordance with the requirements of the code, the Everetts would have a right to recover for any loss caused by the failure to comply. In that event, Parts would have the burden of proving the amount that should reasonably have been obtained through a sale conducted according to law and judgment could be rendered for any deficiency that existed after the debt was credited with that amount. *Universal C.I.T.* v. *Rone,* 248 Ark. 665, 453 S.W. 2d 37 (1970).

The chancellor allowed a credit for the full market value of the repossessed collateral. There was evidence from which he could find that a sale of the property would not have brought that much. We affirm the amount of credit allowed.

COOPER, J., not participating.

HARRELL MOTORS, INC. *v.* Theodore A. SWEETEN

CA 81-256 628 S.W. 2d 878

Court of Appeals of Arkansas
Opinion delivered March 10, 1982

*Laws & Swain, P.A.,* by: *Ike Allen Laws, Jr.* and *William S. Swain,* for appellant.

*William R. Bullock,* of *Bullock, Hardin & McCormick,* for appellee.

LAWSON CLONINGER, Judge. Appellee, Theodore A. Sweeten, filed an action for damages against appellant, Harrell Motors, Inc., alleging that he was entitled to a surplus realized by appellant in the repossession and resale of a truck previously sold to appellant under a security agreement. Following a non-jury trial, appellee was awarded damages of $811.11, and on this appeal, appellant urges that the trial court's finding that a profit resulted from the resale of appellee's vehicle was incorrect.

The findings of the trial court were not clearly erroneous, or clearly against the preponderance of the evidence, and we affirm.

A written contract was in evidence which reflects that the truck, after the repossession by appellant, was sold by appellant to Claude Hixon for the stated price of $5,793. At the time of the repossession, appellee's pay-off balance was $4,727.36. The trial court found that the surplus to be accounted for by appellant was the sale price to Hixon, reduced by appellee's pay-off balance, further reduced by the repossession and resale expenses of $256.53 incurred by appellant.

A representative of appellant testified that the Hixon contract did not reflect the true sale price; that the figure shown was an inflated one employed only as a means to obtain full financing by Chrysler Credit Corporation. The trial court rejected appellant's effort to vary the terms of the written contract by parol testimony, and the court's action is not clearly erroneous. The Uniform Commercial Code, at Ark. Stat. Ann. § 85-9-504 (Supp. 1981), provides that the secured party, after repossession and sale, must account to the debtor for any surplus, and the trial court was justified in finding that there was, in this case, a surplus of $811.11.

Appellant urges that the trial court was in error in finding that appellant failed to give proper notice of the resale, but we hold that such a finding, if made, is not material to the issues of this case. The Code provides that, after repossession, reasonable notification of the time after which a private sale is to be made shall be sent by the secured party to the debtor. In this case, the judgment of the trial court made no reference to the notice requirement. The record reflects that the trial judge did, at one point, comment that appellant failed to give notice, but after counsel for the appellant correctly pointed out that appellant was not seeking a deficiency judgment, the notice requirement was not again mentioned. In any event, the issue of the adequacy of the notice is moot. Appellant was not seeking a deficiency

judgment and there is no indication that the question of notice influenced the judgment rendered.

Affirmed.

Dixie Amis BOWEN *v.* Joe T. DANNA and Sue L. DANNA

CA 81-393 631 S.W. 2d ___

Court of Appeals of Arkansas
Opinion delivered March 10, 1982

*A. Wayne Davis,* for appellant.

*Lewis E. Epley, Jr.,* of *Epley, Epley & Castleberry, Ltd.,* for appellees.

LAWSON CLONINGER, Judge. This is a companion case to *Bowen* v. *Danna,* CA 81-209.[1] These two cases were

[1]This case, subsequent to a petition for rehearing filed by appellee, was certified to the Arkansas Supreme Court. The opinion written by this court was withdrawn.

consolidated for consideration on appeal. On April 4, 1979, appellant, Dixie Bowen, filed her complaint in the Circuit Court of Benton County against appellees, Joe T. Danna and Kathryn S. Danna, for fraud and misrepresentation in the inducement and sale of a particular piece of property in Carroll County. Appellant sought money damages and a jury trial. On December 12, 1979, the Dannas filed their foreclosure action in the Chancery Court of Carroll County against Bowen seeking to foreclose a mortgage on the property. This was the subject of the previous appeal — CA 81-209 [*Bowen* v. *Danna, supra*]. The chancery action was tried first on October 12 and a decree of foreclosure was entered on February 19, 1981. On August 11, 1981, the Circuit Court of Benton County entered an order dismissing Bowen's complaint on the basis of *res judicata.* From this order appellant, Dixie Bowen, now brings this appeal.

Her sole point for reversal is that the trial court erred in dismissing her complaint on the basis of *res judicata* because the issues had not been litigated nor waived. Specifically, appellant alleges that in the chancery suit, appellant, Dixie Bowen, merely tried to show that the filing of the fraud and misrepresentation suit in Benton Circuit Court was the motive for commencing the foreclosure action. There was no evidence going to fraud or misrepresentation on the part of the Dannas prior to the execution of the note and mortgage. According to appellant, these issues were preserved for jury trial in the Benton Circuit Court action. In essence, the trial court found that Bowen's action for fraud and misrepresentation was a compulsory counterclaim under Rule 13 (a) of the Arkansas Rules of Civil Procedure, and should have been alleged in the action in chancery court.

We find that the trial court was in error. Rule 13 (a) provides that any causes of action which a party has against his opponent and which arise out of the same transaction or occurrence as the opponent's claim must be pleaded as counterclaims. Such pleading is compulsory. However, when the cause of action which would otherwise of necessity be pleaded as a compulsory counterclaim is also the subject of pending litigation in another court — litigation which

had been commenced before the instant action — waiver will not result from the failure to counterclaim the cause of action in question and the failing party will not thereafter be barred by *res judicata.* See *Union Paving Company* v. *Downer Corporation,* 276 F. 2d 468 (9th Cir. 1960); *Esquire, Inc.* v. *Varga Enterprises,* 185 F. 2d 14 (7th Cir. 1960).

In *Braswell* v. *Gehl,* 263 Ark. 706, 567 S.W. 2d 113 (1978), appellees brought suit in circuit court to evict appellants for non-payment of rent on premises leased to them. Appellants answered and counterclaimed for damages, alleging that appellees had breached the lease agreement. Appellees moved to dismiss appellants' counterclaim on the basis that the same issues were involved in a pending action in Pulaski Chancery Court. The trial court granted the motion. On appeal the Arkansas Supreme Court reversed, recognizing that the litigation in Pulaski Chancery Court sought injunctive relief. The court also recognized that the counterclaim in that particular case was filed to recoup the appellants' business investment and solely because appellees' present action against them jeopardized that investment. Further, their counterclaim was a substantially different action than the case in Pulaski Chancery Court. The court held that if the objects of two suits are different, they may progress at the same time although they are between the same parties and involve the same subject matter.

In this situation, we have essentially two different cases. This case was a suit for fraud and misrepresentation in the inducement and sale of real property. In this case, Bowen sought money damages and a jury trial. In the suit in chancery court, Danna brought a foreclosure action based upon default. Bowen raised the defense of fraud and misrepresentation, but not in the sale of the property as was the subject of the suit in the circuit court, but only as these terms related to the allegations of default. Fraud and misrepresentation in the sale of the property was neither raised in the pleadings nor was it argued in the proceedings in chancery court. Moreover, this action was filed before the Dannas filed their action in chancery court. This has been

held to be a bar to a claim of *res judicata* in the federal courts. *Union Paving Company, supra; Esquire, Inc., supra.*

Reversed and remanded with instructions to proceed with the action.

Carl Wendell AKINS *v.* STATE of Arkansas

CA CR 81-132 628 S.W. 2d 880

Court of Appeals of Arkansas
Opinion delivered March 10, 1982

*Marquis E. Jones,* of *Jones & Tiller Law Firm,* for appellant.

*Steve Clark,* Atty. Gen., by: *Theodore G. Holder,* Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. This case is appealed from a judgment revoking the appellant's, Carl Akins, probation which he previously received on a conviction for possession of heroin. For reversal, Akins argues he failed to receive proper notice or a hearing on the petition for revocation filed in this cause. The State concedes Akins did not receive a hearing on the petition but contends he was not prejudiced.

We first consider the issue of whether Akins received proper notice, and on the record before us, we find he did not. The burden was on the State to show Akins had been apprised of the revocation hearing, and the nature thereof, and had been given an opportunity to contact his counsel if he so desired. *Hawkins* v. *State,* 251 Ark. 955, 475 S.W. 2d 887 (1972), and *Milholland* v. *State,* 254 Ark. 922, 497 S.W. 2d 6 (1973).

The record reflects the State filed its petition on January 28, 1981, and alleged Akins violated the terms of his suspended sentence by committing the crime of theft of property on October 18, 1980. Akins was convicted of the theft charge, and on July 13, 1981, he appeared in court and requested the court to set a hearing date on his motion for a new trial. After the court set the date, the court proceeded to consider the State's petition for revocation that was filed on January 28. Counsel objected, stating he was not prepared to defend Akins on the revocation petition and that Akins' mother had only received a copy of the petition one day prior to the trial on the theft charge. Contrary to the State's contention, there is no evidence in the record which shows Akins was ever given notice of the revocation petition or of its contents. Also, there is nothing in the record which indicates when Akins' counsel first became aware of the revocation petition.

The notice and hearings required on revocation of

suspension or probation are provided for in Ark. Stat. Ann. § 41-1209 (Repl. 1977), and, among other things, § 41-1209 (2) requires that the defendant be given prior written notice of the time and place of the hearing, its purpose and the condition of suspension or probation he is alleged to have violated. Our review of the record reflects neither Akins nor his counsel received notice until July 13, 1981, the day the court set a hearing on Akins' motion for new trial. Nothing in the record shows the State's petition for revocation was to be considered on this same date.

We hold that the State failed to show Akins received proper notice of the revocation hearing and for that reason alone, would reverse and remand this matter for a hearing on the petition. See *Kuenstler* v. *State,* 486 S.W. 2d 367 (Tex. 1972). Aside from the notice issue, however, we would also have to reverse this cause because Akins was not afforded a hearing as is contemplated under § 41-1209, *supra.* On July 13, 1981, the trial court merely concluded that it had previously heard enough evidence at Akins' theft of property trial to revoke his probation. However, § 41-1209 provides for a procedure whereby a defendant is afforded a hearing, separate from any other trial. At that hearing, he has the right to hear and controvert evidence against him. Moreover, relevant evidence may be introduced at a revocation hearing regardless of its admissibility at criminal trial. *Lockett* v. *State,* 271 Ark. 860, 611 S.W. 2d 500 (1981). Thus, we not only conclude Akins was denied proper notice, but he was also denied the fundamental fairness of a hearing as is required under § 41-1209.

In its brief, the State candidly concedes error was most likely committed in this case. Of course, we agree. It argues further, however, any error made was harmless. On this point, we cannot agree.

It is fundamental that error is presumed to be prejudicial unless it is affirmatively shown otherwise. *Breeden* v. *State,* 270 Ark. 90, 603 S.W. 2d 459 (Ark. App. 1980), and *Shelton* v. *State,* 261 Ark. 816, 552 S.W. 2d 216 (1977). Given proper notice, we cannot anticipate what, if any, defense Akins may interpose. Additionally, we note that the trial

court and Akins' counsel disagreed over a sixty day hearing requirement set forth in § 41-1209 (2). Counsel for Akins refused to waive the requirement and it was this refusal which apparently prompted the court to immediately consider the revocation petition on July 13, 1981, rather than to schedule the matter on a later date. Suffice it to say, we are in no position to say, in view of the facts before us, that Akins was not prejudiced by the inadequate notice and lack of hearing afforded him on the State's revocation petition.

Reversed and remanded.

Bradford Lee COOLEY *v.* STATE of Arkansas

CA CR 81-150 629 S.W. 2d 311

Court of Appeals of Arkansas
Opinion delivered March 17, 1982
[Rehearing denied April 7, 1982.*]

*CORBIN and GLAZE, JJ., would grant the petition.

*Eilbott, Smith, Eilbott & Humphries,* for appellant.

*Steve Clark,* Atty. Gen., by: *William C. Mann, III,* Asst. Atty. Gen., for appellee.

MELVIN MAYFIELD, Chief Judge. Bradford Lee Cooley was convicted in a jury trial of the crimes of burglary and criminal attempt to commit rape and was sentenced to a term of 13 years on each charge to run consecutively. He argues five points for reversal.

I. Appellant's first point is that the trial court should have excused for cause a juror who was employed at the same institution as the prosecuting witness and that he was prejudiced by having to exercise a peremptory challenge to remove that juror.

We find no error. The record shows that the trial judge questioned the juror concerning her ability to listen to the testimony and instructions and follow the law and, based on her positive responses, refused to excuse her. As we said in *Davis* v. *State,* 267 Ark. 1159, 1162, 594 S.W. 2d 47 (Ark. App. 1980):

> Our Supreme Court has allowed large discretion in the trial court's determination of a prospective juror's bias or prejudice as affecting his qualifications to serve. The question of the impartiality of the jury is a judicial question of fact within the sound discretion of the trial court. *Strode* v. *State,* 257 Ark. 480, 517 S.W. 2d 954 (1975).

In addition, our Supreme Court has held that no prejudice results unless it is shown that the complaining party has been forced to accept a juror against that party's wishes. *Conley* v. *State,* 270 Ark. 886, 607 S.W. 2d 328 (1980); *Kirk* v. *State,* 270 Ark. 983, 606 S.W. 2d 755 (1980). In the instant case the record shows that only three jurors were called after appellant had exercised his last peremptory challenge. Two of the three were excused by the state and both the state and the appellant announced that the third one was "good."

II. With his second point appellant questions the court's ruling that appellant's previous convictions involving the use of a credit card could be introduced for impeachment purposes.

Appellant had been convicted in 1972 of four offenses of forgery and uttering for a total amount of $67.79, received a three-year sentence with one year suspended, and was subsequently paroled. He argues, based on the fact that almost ten years had elapsed since his convictions and on the small monetary amount involved, that the probative value of that evidence was outweighed by its prejudicial effect and should have been excluded under Rule 609 of the Uniform Rules of Evidence.

We are not convinced that prejudicial error was com-

mitted on this point. The prior convictions were for crimes involving dishonesty or false statement and less than ten years had elapsed. Rule 609 clearly permits the admission of such evidence. In *Young* v. *State,* 269 Ark. 12, 598 S.W. 2d 74 (1980), it is said that the trial court is accorded a wide discretion in determining whether the probative value of evidence outweighs its prejudicial effect and "we do not reverse absent an abuse of discretion."

III. The next alleged error concerns the violation of the witness-exclusion rule.[1]

After a witness had testified that he and the appellant were at the victim's home the *night before* the alleged assault, the witness, in a discussion outside the courtroom with the deputy prosecuting attorney and a police officer, was shown a prior statement where he said they were at the home *two weeks* before the incident. Over defense objection, the witness was recalled to the stand and testified that he was in error in his previous testimony and that he and appellant actually were at the victim's home two weeks before the incident. The officer involved in "refreshing" the witness' memory was also allowed to testify, over objection, and said he took the prior statement and at that time the witness said he and appellant were at the victim's home two weeks before the alleged assaults. Both witnesses were thoroughly cross-examined and admitted the outside-the-courtroom discussion.

During an in-chambers hearing on motions for mistrial and to strike, both of which were overruled, the trial judge stated the discussion should not have taken place but it was fairly obvious that the witness did make a mistake in his

[1]At one time Ark. Stat. Ann. § 28-702 (Repl. 1979) was the only statutory authority for the exclusion of witnesses from the courtroom during trial. Although a part of the Civil Code of 1869 it was followed in criminal cases but its application was discretionary. Act 243 of 1955 made the rule mandatory in criminal trials. *Vaughn* v. *State,* 252 Ark. 505, 479 S.W. 2d 873 (1972); *Chambers* v. *State,* 264 Ark. 279, 571 S.W. 2d 79 (1978). The act is codified as Ark. Stat. Ann. § 43-2021 (Repl. 1977) but *Gustafson* v. *State,* 267 Ark. 278, 284, 590 S.W. 2d 853 (1979) says it has been replaced by Rule 615 of the Uniform Rules of Evidence. Undoubtedly Rule 615 has also replaced Ark. Stat. Ann. § 28-702 in civil cases.

testimony; that the court, although the rule had been invoked, also made a mistake by failing to instruct the witnesses not to talk to anybody; that it did not seem to be of any great importance whether it was two weeks or the night before; and that it was all a matter of credibility.

The state argues that no reversible error occurred and cites *Williams* v. *State,* 258 Ark. 207, 523 S.W. 2d 377 (1975); *Cantrell* v. *State,* 265 Ark. 263, 577 S.W. 2d 605 (1979) and *Perez* v. *State,* 249 Ark. 1111, 463 S.W. 2d 394 (1971). *Williams* and *Cantrell* represent the general rule which holds that a violation of the rule goes to credibility, rather than competency; that the trial court's discretion in such matters is not generally disturbed; but that its discretion is more readily abused by exclusion of the testimony than by admitting it. In fact, *Williams* says "We have been unable to find any case in which this court has sustained the action of a trial court excluding the testimony of such a witness."

However, *Williams* and *Cantrell* are expressly bottomed on the proposition that the witness' violation occurred "through no fault of, or complicity with, the party calling him." Here, the appellant says, counsel for the state was a direct participant in the violation. But in the *Perez* case a witness who had finished testifying was reminded by the court that he was subject to the rule and was told not to discuss the case with anyone. Later, in the presence of that witness, the deputy prosecuting attorney discussed with other witnesses testimony to be given by them. The trial court refused to grant a mistrial and this was affirmed on the basis that "in the absence of any showing of prejudice to the defendant, we cannot say the circuit judge abused his discretion."

In view of the statements made by the court in ruling on this matter and in light of the law revealed in the above cases, we must agree that no reversible error occurred. While we do not approve of the outside-the-courtroom colloquy in this case we have to recognize that this did not change the testimony of the victim who testified that it was two weeks before the assault that this "refreshed" witness and the appellant were at her house. In addition, as we have noted,

both the witness and the police officer were thoroughly cross-examined and admitted what had happened outside the courtroom.

Our witness-exclusion rule, Uniform Evidence Rule 615, is the same as Rule 615 of the Federal Rules of Evidence. In applying that rule to a similar factual situation in *Brown* v. *United States,* 388 A. 2d 451, 456 (D.C. Cir. 1978) the court said:

> We consider here a situation in which the prosecutor arranged a meeting between a potential government witness, Detective Miller, and Frank Adams, a witness who had already testified. . . . it would have been within the court's discretion to have found it a violation of its sequestration order by the government and to have excluded (a) any further testimony by Mr. Adams and (b) any testimony at all by the detective. Instead of excluding either or both of these witnesses, however, the trial court spread the entire matter of the prosecution's action before the jury and permitted comprehensive cross-examination of the witnesses on this issue. While we recognize that the prosecutor could have presented the facts to the jury in a manner which would have avoided violating the rule on witnesses, we are not prepared to say that the way the trial court chose to deal with this matter provides grounds for reversal.

And finally, on this point, we note that an offender may be proceeded against by contempt for the violation of an order of a court. But if we reverse and remand this case for a new trial because the testimony of the "refreshed" witness was improperly influenced, would the effect of that influence be erased? Or would the result be a new trial without the testimony of this witness? We do not believe that the draconian solution of a new trial is required in this case.

IV. Appellant's next contention is that a mistrial should have been declared because of the following contact made by a juror with the deputy prosecuting attorney: The prosecutor and defense counsel came back up the elevator during the noon hour. A juror stopped the prosecutor to ask

a question. He was told he could do so as long as it was not about the trial. The juror then asked where he could go to get a hot check taken care of and was directed to the prosecutor's office down the hall.

The appellant's attorney told the judge that he was within hearing distance of this incident and there is no question about what was said. It is appellant's contention, however, that the occurrence revealed a lack of impartiality on the part of the juror and constituted a quid pro quo offer for assistance.

In *Bealmear* v. *State,* 104 Ark. 616, 150 S.W. 129 (1912) the court refused to reverse a conviction because the prosecuting attorney bought some of the jurors and two of the defendant's counsel a drink of limeade. The court said opinions might differ as to the propriety of the prosecuting attorney's action but the case would not be reversed on that account where it was shown that nothing was said which would tend to prejudice the rights of the parties.

Here, there was no discussion between the juror and the prosecutor about the case. A mistrial should be granted only where there has been an error so prejudicial that justice could not be served by continuing the trial. This is a matter which lies within the sound discretion of the trial judge and should not be disturbed unless an abuse of that discretion is shown. *Chaviers* v. *State,* 267 Ark. 6, 588 S.W. 2d 434 (1979). We do not think the trial court's action should be reversed on this point.

V. The final contention is that the court erred in refusing to prohibit the prosecutrix's in-court identification of appellant. This contention is based on the argument that the in-court identification should have been suppressed because it was tainted by an unduly suggestive show-up.

This show-up was conducted approximately one and one-half hours after the alleged offense was committed, when appellant was transported in a police vehicle to the prosecutrix's home, and stood, handcuffed, beside the police car some 20 feet away from the front door of the house where

she was standing. Appellant contends that, considering the previous brief periods the prosecutrix had seen him, her emotional state shortly after the alleged incident, the poor lighting conditions during the incident, and the circumstances of the show-up, the in-court identification should have been suppressed.

There is not much question about the law on this point. Any identification procedure that is so unnecessarily suggestive that it leads to a substantial likelihood of mistaken identification of the accused violates his right to due process of law granted by the Fourteenth Amendment to the United States Constitution. *Manson* v. *Brathwaite,* 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); *Beed* v. *State,* 271 Ark. 526, 609 S.W. 2d 898 (1980): *James & Elliott* v. *State,* 270 Ark. 596, 605 S.W. 2d 448 (1980). *James & Elliott,* cited by appellant, explains how this works.

> It is the likelihood of misidentification that taints the out-of-court identification process. In determining whether an in-court identification is tainted by pretrial occurrences, we consider the totality of the circumstances. In doing so, we consider the opportunity of the identifying witness to observe the accused at the time of the criminal act; the lapse of time between the occurrences and the identification; any inconsistencies of the description given by the witness; whether there was prior misidentification; the facts surrounding the identification; and all matters relating to the identification process. . . . We have stated reliability is the linchpin in determining the admissibility of identification testimony. In the determination of the admissibility we consider the totality of the circumstances. . . . In *Neil* v. *Biggers,* 409 U.S. 188 (1973), it was held that a "show-up" rather than a line-up does not violate a defendant's constitutional right unless there are other circumstances rendering the identification unreliable.

In the instant case the prosecutrix testified she had seen the appellant on two occasions prior to the alleged assault. One time was two weeks before the incident when he was at her house with the "refreshed" witness, Larry Reynolds,

and the other was a few days later when he came to her house alone and they had a brief conversation at her door. She also said she recognized appellant on the morning of the assault. This occurred, she said, on April 3, 1980, about 5:30 a.m.; that there was enough light from a bathroom and from daylight coming through the bedroom windows for her to recognize appellant; that he threatened to cut her throat; that they struggled about ten minutes; and that she finally kicked him off the bed and he jumped up and ran out of the house.

It was stipulated that she notified the police and told them that her assailant had been to her house with the witness Larry Reynolds; that he was contacted and gave them appellant's name; and that shortly afterwards the appellant was brought to the prosecutrix's house for the show-up.

We conclude as did *James & Elliott* v. *State*:

> We recognize there is a real danger of undue suggestiveness in a "show-up" identification, and such method should not ordinarily be arranged. We cannot say from the totality of the circumstances here involved that the "show-up" tainted the in-court identification sufficiently to render it inadmissible.

The judgment is affirmed.

COOPER, J., concurs.

CORBIN, J., dissents and would reverse and remand on Points III and IV.

GLAZE, J., dissents and would reverse and remand on Point III.

LIGGETT CONSTRUCTION COMPANY, Employer, and TRI-STATE INSURANCE COMPANY, Insurance Carrier *v.* Milton GRIFFIN

CA 81-387 629 S.W. 2d 316

Court of Appeals of Arkansas
Opinion delivered March 17, 1982

*Daily, West, Core, Coffman & Canfield,* by: *Eldon F. Coffman* and *Wyman R. Wade, Jr.,* for appellants.

*Shaw & Ledbetter,* for appellee.

JAMES R. COOPER, Judge. Appellee's status at the time of his injury is the central issue in this workers' compensation case. Appellee was injured while painting a house which was being constructed by the appellant, Liggett Construction Company, hereinafter referred to as Liggett. Appellee was working under the supervision of his brother, who had subcontracted the painting job from Liggett. Appellee had no workers' compensation insurance on himself, nor did his brother purchase a policy of insurance. Appellee contended that he was either an employee of Liggett or that he was an employee of a subcontractor (his brother) who either did not provide workers' compensation insurance, or who provided the insurance through Liggett. Liggett deducted amounts from the subcontractor's settlement check and noted that such deductions were for workers' compensation insurance.

On appeal, the appellant argues that the evidence is insufficient to support the findings of the Commission and that the evidence compels the conclusion that the appellee was an independent contractor or partner, rather than an employee.

At the time of his injury, the appellee was working under the direction of James Griffin, his brother, who was a

subcontractor of Liggett. James Griffin was doing work for Liggett on two houses. The appellee was injured while working on what will be referred to as the "Calhoun" house. On that project, James Griffin was paid on a per job basis, as was appellee.

It was the duty of the commission to follow a liberal approach and to draw all reasonable inferences favorable to the claimant. *Williams* v. *National Youth Corps,* 269 Ark. 649, 600 S.W. 2d 27 (Ark. App. 1980). The rule of liberal construction applies to the factual determination of whether the injured person is an employee or an independent contractor, and it requires that any doubts be resolved in favor of the person's status as an employee. *Purdy* v. *Livingston,* 262 Ark. 575, 559 S.W. 2d 24 (1977); *Feazell* v. *Summers,* 218 Ark. 136, 234 S.W. 2d 765 (1950). 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. Before we may 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 conclusion arrived at by the Commission. *Office of Emergency Services* v. *Home Ins. Co.,* 2 Ark. App. 185, 618 S.W. 2d 573 (1981); *Bunny Bread* v. *Shipman,* 267 Ark. 926, 591 S.W. 2d 692 (Ark. App. 1980).

There are many factors to be considered in determining whether an injured person is an employee or an independent contractor for purposes of workers' compensation coverage. Some of those factors are:

(1) the right to terminate the employment without liability;
(2) the method of payment, whether by time, job, piece or other unit of measurement;
(3) the right to control the means and the method by which the work is done;
(4) the furnishing, or the obligation to furnish, the necessary tools, equipment, and materials.

*Purdy* v. *Livingston, supra; Massey* v. *Poteau Trucking Co.,*

221 Ark. 589, 254 S.W. 2d 959 (1953); *Parker Stave Co.* v. *Hines,* 209 Ark. 438, 190 S.W. 2d 620 (1946).

We agree that the evidence is sufficient to support the Commission's finding that appellee was an employee of James Griffin rather than an independent contractor. The appellee's employment could have been terminated at will, either by himself or by James Griffin; he did work on the other residence on an hourly basis but was also hired for the purpose of completing a specific job on it as well as on the "Calhoun" residence; he was under the direct control and supervision of James Griffin, who in turn was under the direct control and supervision of Liggett as to the manner in which the work was to be completed; he supplied no materials or supplies on the "Calhoun" house, since those supplies and materials were supplied by James Griffin. Thus, from a review of the facts in this case, it appears that James Griffin was a subcontractor; that the appellee was an employee of James Griffin; and that the appellee was injured while working for his employer.

Having determined that the relationship of employer-employee existed between James Griffin and appellee, it now becomes necessary to determine the relationship between James Griffin and Liggett and its insurance carrier. The Commission found that James Griffin was an insured subcontractor of Liggett and that James Griffin was insured for the purposes of workers' compensation by Liggett's insurance carrier. The basis on which the Commission arrived at this conclusion was that Liggett withheld certain sums from monies due James Griffin. On the final settlement between Griffin and Liggett, the sum of $103.00 was withheld with a notation that that sum was for workers' compensation insurance. The Commission found that such sum was paid to, and accepted by, Liggett's insurance carrier and that Liggett was operating as an agent of James Griffin.

After a review of the record, we conclude that the Commission erred in this determination. There is no evidence in the record to show that the $103.00 was ever paid to, or accepted by, Liggett's carrier. The only thing the evidence proves is that certain sums were withheld for the

stated purpose of paying for workers' compensation insurance. Even if Liggett is estopped to deny coverage, that estoppel will not automatically apply to its insurance carrier. *Phoenix of Hartford* v. *Coney,* 249 Ark. 447, 459 S.W. 2d 558 (1970).

We hold that, on these facts, James Griffin was an uninsured subcontractor and that the appellee is entitled to recover workers' compensation benefits from Liggett's insurance carrier. Arkansas Statutes Annotated § 81-1306 (Repl. 1976) makes the prime contractor liable for compensation to employees of a subcontractor who has failed to secure workers' compensation coverage as required by the Workers' Compensation Act. The primary purpose of this provision is to protect the employees of subcontractors who are not financially responsible, and to prevent employers from relieving themselves from liability by doing through independent contractors what they would otherwise do through direct employees. *Hobbs Western Co.* v. *Craig,* 209 Ark. 630, 192 S.W. 2d 116 (1946).

Other rights and liabilities of the respective parties, and persons not parties to this litigation, may be determined in due course, but those matters are not now before us.

Affirmed in part; reversed in part.

MOUNTAIN VALLEY SUPERETTE, INC.
*v.* Carolyn BOTTORFF

CA 81-392 629 S.W. 2d 320

Court of Appeals of Arkansas
Opinion delivered March 17, 1982

*Clark & Reis,* by: *Mark P. Clark,* for appellant.

*Lane, Muse, Arman & Pullen,* by: *Donald C. Pullen,* for appellee.

JAMES R. COOPER, Judge. In this workers' compensation case, the appellant raises two issues for reversal. First, that the appellant had an insufficient number of employees in order to subject it to the requirements of the Workers' Compensation Act and second, that the Commission erred in finding that the appellee was entitled to temporary total disability benefits exclusive of certain days on which she worked.

The evidence reflects that two couples, Mr. and Mrs. Campbell and Mr. and Mrs. Denham, were the owners of all the stock in Mountain Valley Superette, Inc. They owned twenty-five shares each out of a total of one hundred outstanding shares. The evidence reflected that all of the stockholders worked in the daily operation of the corporation, and that appellee was employed to work two days a week in order that one couple could be off every other week. Appellee also worked when any of the stockholders were ill. Mr. Campbell testified that none of the stockholders received any salary from the corporation and that the only income received from the corporation was in the form of dividends, which were declared on a monthly basis. The evidence further reflects that Mountain Valley Superette, Inc. was a corporation that elected tax treatment under § 1371 et. seq. of the Internal Revenue Code. Such corporations are commonly referred to as subchapter "S" corporations and are taxed as if their income was partnership income. Arkansas Statutes Annotated § 81-1302 (a) (Repl. 1976) defines "employer" as any individual, partnership, association, or *corporation* carrying on any employment. Under Ark. Stat. Ann. § 81-1302 (c) (1) (Repl. 1976), "employment" is defined as:

> Every employment carried on in the State in which

> three (3) or more employees are regularly employed by the same employer in the course of business or businesses. . .

The question of whether the employer has the minimum number of employees in order to subject that employer to the requirements of the Workers' Compensation Act is a factual determination for the Commission. *Stewart* v. *Cosby-Parsons Quarter Horse Ranch,* 269 Ark. 866, 601 S.W. 2d 590 (Ark. App. 1980). It was the duty of the Commission to follow a liberal approach and to draw all reasonable inferences favorable to the claimant. *Williams* v. *National Youth Corps,* 269 Ark. 649, 600 S.W. 2d 27 (Ark. App. 1980). 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. Before we may 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 conclusion arrived at by the Commission. *Office of Emergency Services* v. *Home Ins. Co.,* 2 Ark. App. 185, 618 S.W. 2d 573 (1981); *Bunny Bread* v. *Shipman,* 267 Ark. 926, 591 S.W. 2d 692 (Ark. App. 1980).

Arkansas Statutes Annotated § 81-1302 (Repl. 1976) defines "employee" as any person employed in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied, but it excludes a person whose employment is casual and not in the course of the employer's trade or business.[1] Therefore, the question is whether the stockholders of the appellant can be counted as employees in order to arrive at the requisite number of employees to subject the appellant to the requirements of the Workers' Compensation Act.

In the case at bar, the stockholders who created the corporation in order to enjoy the advantages from its existence as a separate legal entity are asking that its existence be disregarded where it works a disadvantage to them. They ask us to treat the corporation as if it were a

[1]This statute was amended by Act 119 of 1979 and Act 290 of 1981.

partnership. The corporate structure cannot be so lightly disregarded. A corporation is a legal entity separate and apart from its stockholders. *Shipp* v. *Bell & Ross Enterprises, Inc.*, 256 Ark. 89, 505 S.W. 2d 509 (1974); *Banks* v. *Jones,* 239 Ark. 396, 390 S.W. 2d 108 (1965); *Atkinson* v. *Reid,* 185 Ark. 301, 47 S.W. 2d 571 (1932).

The only real difference in this case and that of *Aerial Crop Care, Inc.* v. *Landry,* 235 Ark. 406, 360 S.W. 2d 185 (1962), is that in the case at bar, the corporation is what is commonly referred to as a subchapter "S" corporation whereas the corporation in *Landry* was what is commonly referred to as a straight corporation. In *Landry,* the Arkansas Supreme Court found that the three individual officers/stockholders were employees of the corporation for purposes of the Workers' Compensation Act. The court based its ruling on the fact that the three individual officers/stockholders' pay depended to some extent on the number of flights they made for the corporation in its crop dusting business, and that the monies they received from the corporation bore a direct relationship to the services performed by them.

In the case at bar, the stockholders took an active part in the principal operation of the corporation. The corporation's income was dependent on the services provided by the stockholders. Although it is true that the stock ownership determined the share of profits payable to each of the stockholders, it is obvious that the monies which they received as dividends from the corporation bore a direct relationship to the work performed by each of the stockholders.

We hold that the Commission was correct in finding that the appellant had a sufficient number of employees so as to subject it to the requirements of the Workers' Compensation Act and therefore, we find no merit to appellant's first point.

Appellant also argues that there is no substantial evidence to support a finding that the appellee was temporarily and totally disabled from January 23, 1978,

through December 11, 1979. The record reflects that appellee's condition had not changed during the period in which the Commission found her to be temporarily and totally disabled, but that she had worked for a short period of time as a cashier in a restaurant and that she had been compensated for sitting with an elderly individual. The Commission directed that the appellant be credited for each day of gainful employment of the appellee, at the rate of one-seventh (1/7) of the appellee's weekly benefit rate. Appellant argues on appeal that the fact that appellee returned to work demonstrated that she was not temporarily and totally disabled.

Appellee was released from medical treatment by Dr. DuBose Murray on December 11, 1979. The administrative law judge found that appellee had a permanent partial disability of twenty per cent to the right elbow and ten per cent to the left elbow. Thus, appellee's injury was a scheduled one. Ark. Stat. Ann. § 81-1313 (c) (Repl. 1976). Appellee was entitled to temporary total disability benefits from the date of injury through the end of the healing period. *International Paper Co.* v. *McGoogan,* 255 Ark. 1025, 504 S.W. 2d 739 (1974). The healing period ends when the employee is as far restored as the permanent character of his injury will permit. *Mad Butcher, Inc.* v. *Parker,* 4 Ark. App. 124, 628 S.W. 2d 582 (1982). Disability is defined under Ark. Stat. Ann. § 81-1302 (e) (Repl. 1976) as the incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury.

There was conflict in the testimony as to the type of work that the appellee did at the restaurant and also as to the amout of time she spent working there following her injury. After reviewing the testimony, we are of the opinion that the full Commisson was correct in finding that appellee was temporarily and totally disabled from January 23, 1978, through December 11, 1979.

Affirmed.

# Raymond ATKINS *v.* PILOT LIFE INSURANCE COMPANY and VERTAC, INC.

CA 81-187 630 S.W. 2d 50

Court of Appeals of Arkansas
Opinion delivered March 17, 1982
[Rehearing denied April 14, 1982.]

*McMath & Leatherman, P.A.*, by: *Junius Bracy Cross, Jr.*, for appellant.

*David Solomon,* for appellee Pilot Life Insurance Company.

*Allen T. Malone,* of *Apperson, Crump, Duzane & Maxwell,* Memphis, Tenn., for appellee Vertac, Inc.

*D. Allan Gates* of *Mitchell, Williams, Gill & Selig,* of counsel to Vertac, Inc.

TOM GLAZE, Judge. This appeal is from a summary judgment in favor of Pilot Life Insurance Company (Pilot) and Vertac, Inc. (Vertac).[1] Appellant, Raymond Atkins (Atkins), was employed by Vertac and in November, 1976, was hospitalized for a lung problem. During his medical treatment, he also developed a brain abscess. Atkins filed a Workers' Compensation claim, contending both the lung and brain abscess problems were compensable. Vertac denied that either problem was work-related, but on December 20, 1977, Atkins and Vertac submitted a joint petition to the Workers' Compensation Commission, settling their differences for the total sum of $15,000. In the same joint petition, approved by the Commission, Atkins released Vertac from all claims resulting from or related to the injury or injuries claimed by Atkins.

[1] Vertac is successor in interest to Eagle River Chemical Corporation, which was Atkins' employer prior to December 29, 1978. For purposes of simplicity, we refer in this opinion only to Vertac since its interests and potential liabilities are the same in this cause.

After settlement of the Workers' Compensation claim, Atkins filed suit against Pilot and Vertac, seeking benefits for his lung and brain abscess ailments under a health care insurance plan provided by Vertac. Vertac denied Atkins any benefits under the health plan because: (1) The plan provided expenses were not payable for injuries arising out of or in the course of any employment, and (2) The plan did not cover expenses for any illness which entitled Atkins to benefits under the Workers' Compensation Act. In addition, Vertac contended Atkins released Vertac from further claims due to the lung and brain abscess injuries in their prior joint Workers' Compensation petition and he was estopped from asserting any claims after the Commission approved their settlement.

Concerning Vertac's release and estoppel defenses, Atkins contended below, and argues on appeal, that Pilot appeared to provide the health care insurance plan for Vertac's employees, when, in fact, Vertac was self-insured. Atkins argued that since Pilot failed to disclose Vertac as its principal and as a self-insurer, Pilot became personally liable on Atkins' claims. The trial court rejected all of Atkins' assertions and held as a matter of law: (1) The health care insurance provisions excluded work-related injuries and illnesses as those incurred by Atkins, and (2) Pilot disclosed its agency status as to Vertac, and it, therefore, was not personally liable.

We first consider that part of the trial court's decision upholding the clause in Vertac's health insurance plan and excluding benefits to Atkins because he had received Workers' Compensation benefits. In this connection, it is undisputed that the medical expenses or benefits Atkins seeks to recover in this action relate to the same injury and illness (lung and brain abscess) for which Atkins received benefits in his earlier Workers' Compensation settlement.

Our Supreme Court has considered similar exclusion or reduction clauses where they appeared in automobile insurance policies. *Aetna Insurance Company* v. *Smith,* 263 Ark. 849, 568 S.W. 2d 11 (1978), and *O'Bar* v. *M.F.A. Mutual Insurance Company,* 275 Ark. 247, 628 S.W. 2d 561 (1982). In

*Aetna,* the Court held a policy valid which provided medical payments coverage but which contained a clause that limited the amount of medical payments to the extent the insured had received benefits under any Workers' Compensation law. The court said:

> An insurer may contract with its insured upon whatever terms the parties may agree upon which are not contrary to statute or public policy. The insured, by accepting the policy, was deemed to have approved it with all conditions and limitations expressed therein which are reasonable and not contrary to public policy. *M.F.A. Mutual Insurance Co.* v. *Bradshaw,* 245 Ark. 95, 431 S.W. 2d 252.

In *O'Bar,* the Supreme Court recently construed another automobile insurance policy which contained a reduction clause. The clause provided that any accidental death benefits must be reduced by all amounts paid on account of such death of the insured under Workers' Compensation. The Court held the clause void as against public policy because the Arkansas General Assembly had not provided by law that an insurance company had the right to reduce or claim reimbursement for any accidental death benefits. The Court in *O'Bar* stated it upheld a similar reduction clause in *Aetna* because that case involved medical benefits, and under Ark. Stat. Ann. § 66-4019 (Repl. 1980), an insurance company had the right to reduce or claim reimbursement for any medical hospital benefits or income disability benefits paid out.

While the reduction or exclusion clauses in *O'Bar* and *Aetna* involved automobile insurance policies and Arkansas' no fault insurance law, we believe the Court's reasoning in *O'Bar,* as it pertains to the validity or invalidity of such clauses, is instructive in our consideration of the facts before us. The Court said:

> While requiring automobile insurance policies to provide for three different types of benefits, the General Assembly granted the insurer the right to reduce only medical and income disability benefits by any amount

> recovered by the insured from another source. *Obviously medical or income disability benefits if not so reduced would allow double recovery to certain beneficiaries.* Accidental death benefits are like life insurance and life insurance is treated differently from medical and income disability benefits so far as double coverage is concerned. Life insurance is more in the nature of an investment and is actually a contract to pay a sum certain upon the death of the insured. [Emphasis supplied.]

In sum, we conclude that Vertac could contract with its insureds upon whatever terms the parties may agree which are not contrary to statute or public policy. *Aetna Insurance Company* v. *Smith, supra.* We are unaware of any statute which prohibited Atkins and Vertac from excluding health care insurance benefits for injuries on illnesses covered by Workers' Compensation. Moreover, without such a clause, Atkins and other insureds might otherwise be allowed double recovery for certain medical or income disability expenses already paid for by Workers' Compensation. Therefore, we can think of no reason why an insurance clause that precludes the prospects of double recovery of medical benefits would be against public policy.

Counsel for Atkins and Vertac have cited cases from other jurisdictions that involve hospital or medical policies, containing Workers' Compensation exclusion clauses. For differing reasons, the courts have been mixed in their decisions whether to enforce such clauses. *Smith* v. *Allied Mutual Casualty Company,* 184 Kan. 814, 339 P. 2d 19 (1959) (Court permitted benefits where Workers' Compensation and insurance policy overlapped in coverage), and *North Kansas City Memorial Hospital* v. *Wiley,* 385 S.W. 2d 218 (Mo. App. 1964) (Court found insurance company failed to prove accident arose out of employment, so as to avoid liability under exclusion clause); *Contra, Hammond* v. *Prudential Insurance Company,* 75 Ill. App. 2d 15, 220 N.E. 2d 26 (1966) (Court held Workers' Compensation settlement precluded recovery for expenses under health policy) and other cases in annotation captioned "Insured's Receipt of or Right to Workmen's Compensation Benefits as Affecting

Recovery under Accident, Hospital or Medical Expense Policy," Annot. 40 A.L.R. 3d 1012, at 1022-1025 (1971).

In *Hammond* v. *Prudential Insurance Company, supra,* the Illinois court held that a lump sum Workers' Compensation settlement, which included hospital and medical expenses, precluded recovery for such expenses under the insured's/claimant's health policy. In important part, the *Hammond* case is indistinguishable from the case at bar, and in view of our Supreme Court's treatment of exclusion or reduction clauses in *Aetna* and *O'Bar,* we know of no reason why Vertac could not offer and Atkins accept an insurance health policy which excluded medical benefits for injuries or illnesses covered by Workers' Compensation. Accordingly, we hold Atkins is precluded from medical benefits under the health plan for his lung and brain abscess illnesses since Atkins previously received a lump sum Workers' Compensation settlement which included medical expenses relative to the same illnesses. The benefits claimed by Atkins are clearly excluded by the express terms of the health insurance plan. Thus, whether the health care plan was offered by Vertac or Pilot, the result would be the same.

Atkins argues a second issue which we will briefly discuss. Although he contended in his Workers' Compensation claim that both his lung and brain abscess problems were work-related, Atkins now argues that the brain abscess illness is not work-related. Of course, if this were true, the exclusion clause in the health care policy would not be applicable since the brain abscess sickness would not have entitled Atkins to Workers' Compensation benefits.

An argument similar to that made by Atkins was made in *Aetna Life Insurance Company* v. *Bocanegra,* 572 S.W. 2d 355 (Tex. Civ. Ct. App. 1978), wherein the insured successfully contended (in a Workers' Compensation case) that her illness was work-related. Later, however, the insured argued this same illness was not work-related in an action she filed against the insurance company seeking benefits under a health policy. The Texas Court of Appeals held the insured's remedies in the two causes of action were repugnant and inconsistent. The Court held she was precluded from

bringing suit against the insurance company. In so holding, the Court stated the controlling rule as follows:

> If one having a right to pursue one of several inconsistent remedies makes his election, institutes suit, and prosecutes it to final judgment, or receives anything of value under the claim thus asserted, or if the other party has been affected adversely, such election constitutes an estoppel thereafter to pursue another and inconsistent remedy.

In the instant case, Atkins signed a sworn joint petition in which he maintained his lung and brain abscess problems were work-related. The same petition reflects Vertac disagreed with both of Atkins' contentions but settled the Workers' Compensation dispute by joint petition in order to resolve the matter. In doing so, Atkins agreed that the $15,000 settlement constituted a "full, final and complete settlement of all claims" he has or may have against Vertac for the injury or injuries claimed. The injuries claimed in the parties' joint petition included Atkins' lung and brain abscess illnesses, and we, therefore, hold that he is now estopped from claiming either illness to be non-work related in his efforts to collect under a health care policy.

The trial court's judgment is affirmed.

Affirmed.

Eugene Clyde ROGERS *v.* UNIVERSITY SERVICES and SEARCY MEDICAL CENTER

CA 81-265 629 S.W. 2d 319

Court of Appeals of Arkansas
Opinion delivered March 17, 1982

*S. Graham Catlett,* of *Catlett & Stubblefield,* for appellant.

*Raymond Harrill,* for appellees.

TOM GLAZE, Judge. This appeal arises out of appellees' suit against appellant on a debt which appellant claimed was barred by the statute of limitations. The trial court found that during the applicable three-year period of limitations one payment of $15 was made on appellant's account, which tolled the statute of limitations. The court entered judgment for appellees, and appellant raises two issues for reversal, but we need only consider appellant's first issue since it is dispositive of this case.

Appellant contends appellees failed to prove appellant ever recognized the debt since he did not make the $15 payment on the account or authorize or consent to such payment. We agree.

The facts are undisputed. The debt in question was for medical services rendered to appellant's wife during their marriage. Appellant and his wife later divorced, and apparently neither appellant nor his former wife assumed the responsibility for the debt owed appellees. As previously stated, appellant denied ever recognizing the disputed debt and no proof was offered to show that his former wife had recognized or paid on the account. On these facts, the trial court held appellant liable for the medical services on the bases that: (1) A husband is liable for the medical expenses incurred by and rendered to his wife; (2) An unauthorized and unratified partial payment on an account by one debtor tolls the statute of limitations and revives the debt as to the other obligors.

For appellees to prevail in this case, they were required to show that the $15 payment on the account was voluntarily made by appellant or his former wife or that either or both of them authorized or consented to such a payment. Accordingly, the law is well settled that a voluntary partial payment arrests the running of the statute of limitations, and forms a new period from which the statute must be computed. *Taylor* v. *White,* 182 Ark. 433, 31 S.W. 2d 745 (1930).

In the instant case, there is a dearth of evidence showing who actually made the $15 payment in question although appellees argue that the partial payment was "presumably" made by appellant's former wife. In its findings, the trial court did not draw such a presumption, and we believe rightly so in view of the evidence presented. If the court had done so, we believe it would have entered into the realm of conjecture or speculation. Since no one was identified as having made the $15 payment, the court could have just as easily speculated that appellees had made an error in crediting the account with such a payment.

We conclude that appellees did not sustain their burden of proving their claim since the trial court specifically found that the partial payment of $15 was made without the knowledge, authorization or consent of appellant and that it was unknown who actually made the payment.

Therefore, we reverse and remand. See *Crisp* v. *Brown*, 4 Ark. App. 208, 628 S.W. 2d 596 (1982).

Reversed and remanded.

Thelma STOUT *v.* Tom C. STOUT

CA 81-278 630 S.W. 2d 53

Court of Appeals of Arkansas
Opinion delivered March 24, 1982

*Dan M. Orr* and *H. David Blair,* for appellant.

*Harkey, Walmsley, Belew & Blankenship,* by: *John M. Belew,* for appellee.

GEORGE K. CRACRAFT, Judge. The appellant brings this action from a decree of divorce entered in the Chancery Court of Sharp County on May 27, 1980, which granted appellee a divorce, ordered all of their marital property, except an individual retirement account in the name of the husband, sold and proceeds equally divided, and awarded the appellant alimony in the amount of $300 per month for a one year period. The appellant, Thelma Stout, maintains on this appeal the chancellor erred in not awarding her more adequate continuing alimony and in not making an equal division of the individual retirement account.

These parties were married in 1947 and apparently lived together in harmony for a number of years. The husband was a petroleum engineer and made a substantial salary at his jobs which took him from oil field to oil field. In 1974 his employment took him to Libya under a contract of employment which made provisions for liberal returns to the United States. In 1977 he moved his wife back to Cave City in her native state of Arkansas, where they designed and built an expensive home in which she lived during his absence. He continued to work at his job in Africa for about six months thereafter and then terminated that employment and returned to Cave City where he purchased a cafe which he and his wife operated. It was his testimony that during their stay in Cave City they maintained themselves from the profits of that cafe which he stated amounted to $1200 a month plus their meals.

Appellee testified that prior to his employment in Africa the marital relationship had deteriorated and that during the period they resided in Cave City it deteriorated even further. It was his testimony that during this period he was subjected to constant unmerited reproach and unwar-

ranted accusations of infidelity. His allegations of unmerited reproach were corroborated by other witnesses and the record contains a number of letters the appellant wrote to him after their separation in which the accusations of infidelity were continued and her settled hatred of him clearly manifested. In July 1980 the appellee left Cave City and accepted employment in Oklahoma with the Triple D Drilling Company at a salary of $800 a week plus an expense allowance of $250 a month. He thereafter continued to make the payments on the home and pay substantial bills by sending monies to the wife. In October 1980 he brought this action for divorce. Appellant answered and counterclaimed for divorce.

In the late fall of 1980 personality conflicts developed between the appellee and those with whom he worked at Triple D Drilling Company. In February of 1980 when his contrct was up for renewal he terminated himself because of those conflicts which he said were intensified by telephone calls to his employer and fellow workers from the appellant.

On leaving Triple D Drilling Company he went into business for himself as a drilling supervisor. This was his sole employment at the time of the trial. As a drilling supervisor he oversees the drilling operations conducted by other companies from start to completion. In such a business he is required to keep up old contacts and make new ones in the petroleum business from coast to coast, which involves constant travel. He is required to pay his own expenses. As he supervises only one oil well at a time he is required to keep in constant touch with activity in the industry in order to obtain new employment when current wells are completed. Appellee testified that on his present income in the new employment he was merely breaking even, with the exception of the $600 he was paying on the house note. He was optimistic about the future of this new occupation but at the time of the trial could not speculate what the future held in store for him. When asked by the court about his prospects for the following year he responded: "I hope it will be at least twice as good as it is now. I should be busy all the time." He indicated that any further

statement by him would be based on pure speculation and surmise.

At the time of the trial the parties had sold the cafe in Cave City and divided the proceeds between them, each receiving $5,250. After hearing the evidence the chancellor granted the appellee a divorce and with the exception of the individual retirement account ordered all of their property sold and the proceeds equally divided. He awarded the wife alimony in the amount of $300 per month for a period of one year.

The appellant first contends that the court erred in not making a more adequate allowance of alimony on a permanent basis. We find no merit to this contention.

While chancery cases are tried *de novo* on appeal the findings of a chancellor will not be reversed unless clearly against a preponderance of the evidence. Since the question of the preponderance of the evidence turns largely on the credibility of the witnesses, we defer to the superior position of the chancellor. *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W. 2d 409 (1981); Rule 52 (a), Arkansas Rules of Civil Procedure. The award of alimony in a divorce action is not mandatory but is a question which addresses itself to the sound discretion of the chancellor. We do not reverse the chancellor's determination unless we find a clear abuse of that discretion. *Narisi* v. *Narisi,* 229 Ark. 1059, 320 S.W. 2d 757 (1959); *Neal* v. *Neal,* 258 Ark. 338, 524 S.W. 2d 460 (1975). In determining whether to allow alimony and in fixing the amount to be allowed our court has stated many factors which may be considered by the court. In *Boyles* v. *Boyles,* 268 Ark. 120, 594 S.W. 2d 17 (1980) the court stated:

> In fixing the amount of alimony, the courts consider many factors. Among them are the financial circumstances of both parties, the financial needs and obligations of both the couple's past standard of living, the value of jointly owned property, the amount and nature of the income, both current and anticipated, of both husband and wife, the extent and nature of the resources and assets of each of the parties, the amount

> of income of each that is "spendable," the amounts which, after entry of the decree, will be available to each of the parties for the payment of living expenses, the earning ability and capacity of both husband and wife, property awarded or given to one of the parties, either by the court or the other party, the disposition made of the homestead or jointly owned property, the condition of health and medical needs of both husband and wife, the relative fault of the parties and their conduct, both before and after separation, in relation to the marital status, to each other and to the property of one or the other or both, the duration of the marriage and even the amount of child support.

However, in *Lewis* v. *Lewis,* 202 Ark. 740, 151 S.W. 2d 998 (1941), and *Boyles* v. *Boyles,* supra, the court has stated that in fixing the amount of alimony the primary consideration is the ability of the husband to pay regardless of what other factors may indicate. In the case now before us for review the testimony as to the present earning capacity of the appellee was that he was merely "breaking even" in his new employment. While he was optimistic about the future he could only speculate as to what he might earn during the coming year or what his economic future might be. We find no error in the chancellor's refusal to speculate what the appellee's earnings might be.

Also, as indicated in our cases, the chancellor could consider the ability of the wife to earn. There was evidence before the court that she had worked in various employments and had for a number of years immediately prior to the commencement of the action worked full time in the cafe. He also might consider the property settlement the wife is to receive. He has directed that she receive one-half of the proceeds of the sale of a home in which the equity was stated to be substantial, one-half of $7800 savings, one-half of the proceeds of all other personal property including a participating royalty in two oil wells which then produced $80 a month. It was also stipulated by the parties that under appropriate regulation she would, because of the duration of this marriage, be eligible to receive social security on

appellee's contributions even though the divorce had been granted.

Also a permissible factor for the court to consider is the relative fault of the parties. Here the court found that the fault lay entirely with the appellant and the record fully warrants such a finding. When all of these prescribed factors are considered with the facts and circumstances of this case we cannot say that the chancellor abused his discretion in not awarding continuing alimony.

Nor do we find error in limiting the $300 payment to a period of one year. Our court has declared that award of alimony in a gross sum payable in installments is contrary to its long established rule that alimony should not be a fixed sum but a continuing allowance payable at regular intervals. *McIlroy* v. *McIlroy,* 191 Ark. 45, 83 S.W. 2d 550 (1935). In *Beasley* v. *Beasley,* 247 Ark. 338, 445 S.W. 2d 500 (1969) and *Webb* v. *Webb,* 262 Ark. 461, 557 S.W. 2d 878 (1977) the court recognized an exception for allowance of short term awards as a method of allocating to the wife an interest in her husband's property to balance some inequity in the division of property. Here the chancellor stated as his reason for ordering installment payments was to "aid her in the transition." While these payments were referred to as "alimony" in the decree, when all circumstances surrounding the award are considered, we conclude that this was not an award of alimony "in gross."

The appellant next contends that the chancellor erred in failing to make equal division of an individual retirement account established by the appellee which the court found to be marital property. She maintains that the trial court did not divide that asset equally because of his erroneous interpretation of the law. The court, in his findings rendered in open court, stated with respect to that item as follows:

> The Court is not ordering that sold because we must consider Mr. Stout. He's getting along in years too, and it's a retirement fund that *he has built up.* And I want it stated in there, that that is an exception for the reason that it will cost him income tax because it's

> purposely put in there to avoid it, and if it's sold right now, he will have to pay income tax on it. It will be income under the I.R.S. regulations and also he will have a penalty of interest there. (Emphasis added)

Appellant contends that the chancellor's refusal to divide the account upon the basis that a division would cause income taxes to be paid on a portion of it was erroneous. 26 USCA § 408 (d) (6) and pertinent regulations provide that the transfer of an individual interest in whole or in part of an individual retirement account to a former spouse under a valid decree or written instrument incident to a divorce shall not be considered to be a taxable transfer by the individual to his former spouse.

While the court may have been in error in its declaration, the court declared two reasons for not dividing that account equally. Ark. Stat. Ann. § 34-1214 (A) (1) (Supp. 1981) provides that all marital property shall be distributed equally unless the court finds such division to be inequitable, in which event it may make some other division which it deems equitable. Section 34-1214 (A) (1) (8) provides that in such event the court may take into account "the contribution of each party in acquisition, preservation or appreciation of marital property." The second reason stated by the court for refusing to divide this asset equally is an acceptable one under that section.

Affirmed.

GLAZE, J., dissents.

# Harley CURTIS *v.* ERMERT FUNERAL HOME and INSURANCE COMPANY OF NORTH AMERICA

CA 81-352 630 S.W. 2d 57

Court of Appeals of Arkansas
Opinion delivered March 24, 1982

*Frierson, Walker, Snellgrove & Laser,* by: *Glenn Lovett, Jr.,* for appellant.

*Penix, Penix & Mixon,* by: *Richard Lusby,* for appellees.

GEORGE K. CRACRAFT, Judge. This appeal primarily presents the question of the proper method for determination under Ark. Stat. Ann. § 81-1312 (Repl. 1976) of the average weekly wage of an employee who holds two concurrent jobs with different employers and suffers a compensable injury which arises out of his employment with only one of them.

The Commission found that the appellant, Harley Curtis, had been employed by the City of Corning for over ten years as a grave digger and general maintenance man at the Corning Cemetery. During that same period he was also employed by appellee, Ermert Funeral Home, doing the same type work for them at burial places other than at the Corning Cemetery. On October 3, 1978, he sustained a compensable injury while performing such work in the employ of Ermert Funeral Home.

The appellant contended before the Arkansas Workers' Compensation Commission that inasmuch as he was employed by two employers in similar work, his earnings in both employments should be combined in the calculation of the applicable compensation rate. The Commission ruled that under our statute and decisions construing it only those wages paid by the employer on whose job claimant was injured should be considered. From that determination the appellant has appealed. The appellees have cross-appealed contending that the finding of the Commission that the appellant was employed by Ermert Funeral Home at the time of injury is not supported by substantial evidence.

## THE CROSS-APPEAL

The appellees contend that at the time of the injury the appellant was acting in the capacity of an independent contractor. In support of that position appellees point out

testimony tending to prove that appellant was first contacted by a Mr. Hower to do work for him in moving two burial vaults located outside the City of Corning, and that Hower and appellant had agreed upon the time and price for the work independently of his employment with Ermert Funeral Home.

While there was conflicting testimony as to appellant's status at the time of his injury there was evidence tending to prove that Ermert Funeral Home contacted him with respect to this private work and that appellant expected to be paid by Ermert. There was testimony that he used Ermert's tools in moving the vaults and that after he was injured Ermert supplied another employee to finish the job. There was testimony that the owner of the vaults first contacted appellee-funeral home about the work and sent his check in payment for the work to the appellee, rather than to appellant Curtis. There was also evidence that whenever appellant had done similar work for appellee in the past he had been paid by appellee-funeral home.

It is well settled that this court on appeal is required to review the evidence in the light most favorable to the findings of the Commission and to give the testimony its strongest probative value in favor of the order of the Arkansas Workers' Compensation Commission. The issue on appeal is whether the evidence supports the finding which the Commission made. When a commission makes a finding of fact, that finding carries the weight of a jury conclusion. The decision of the Commission must stand if supported by substantial evidence. *Bankston* v. *Prime West Corporation,* 271 Ark. 727, 610 S.W. 2d 586 (Ark. App. 1981). When the testimony is viewed in the proper light we cannot say that the finding of the Commission that appellant was an employee of appellee-funeral home at the time of his injury is not supported by substantial evidence.

## THE DIRECT APPEAL

The appellant contends in his direct appeal that the Arkansas Workers' Compensation Commission erred in determining his average weekly wage by considering only

those wages earned by him under his contract of hire with the appellee-funeral home and in refusing to combine those wages with the wages earned from the City of Corning. In his brief the appellant concedes that the Court of Appeals in *Hart's Exxon Service Station* v. *Prater,* 268 Ark. 961, 597 S.W. 2d 130 (Ark. App. 1980), rejected this same argument by declaring that the Arkansas Workers' Compensation Act makes no provision for combining wages earned in concurrent employments but, to the contrary, specifically limits the determination of an employee's average weekly wage to those wages earned by the employee *under the contract of hire in force at the time he receives his injury.* He submits, however, that this was an erroneous and illogical construction of the statutes which should not be binding upon the Workers' Compensation Commission, and that we should expressly overrule it. We do not agree and have no difficulty in sustaining the soundness of the prior decision.

In support of his argument the appellant states that the majority rule in sister states is that earnings from concurrent employments may be combined for this purpose if the employments are "related" or "similar," citing *Larson's Workmen's Compensation Law* § 60.31 at page 10-401 and the many cases cited therein. While this may be a correct statement of a majority rule, we note from the cases analyzed by Larson that the statutory provisions fixing the wage base of injured employees entitled to compensation vary widely. Some states, including New York and Texas, have express provisions in their statutes which provide for the aggregation of earnings from concurrent "related" or "similar" employments. Other states have statutes which require that the wages from all employments be combined. Others define wages as "earning capacity," and some define these words as "wages earned while working full time." In our resolution of the issue we are not to be persuaded by what other courts may have held under statutes worded differently from our own, but we are required to look to the provisions of our own Act.

Our Workers' Compensation Act does *not* provide benefits for an injured worker based upon his "earning capacity," "wages earned while working full time," or "the

amount the injured worker would be earning if it were not for the injury" but allows benefits based on his "average weekly wage." Ark. Stat. Ann. § 81-1302 (h) (Repl. 1979) defines the word "wages" as used in the Act as follows:

> DEFINITIONS — As used in this act:
>
> (h) "Wages" means the money rate at which the service rendered is recompensed *under the contract of hire in force at the time of the accident,* including the reasonable cash value of board, rent, housing, lodging or similar advantage received from the employer and including gratuities received in the course of employment from others than the employer when such gratuities are received with the knowledge of the employer. (Emphasis added)

Ark. Stat. Ann. § 81-1312 (Repl. 1976) provides the method by which the basis for compensation — the "average weekly wage" — is to be determined. That section is as follows:

> 81-1312. Basis for compensation — Determination of weekly wages. — Compensation shall be computed on the average weekly *wage* earned by the employee *under the contract of hire in force at the time of accident,* and in no case shall be computed on less than a full time work week in the employment. Where the injured employee was working on a piece basis, the average weekly *wage* shall be determined by dividing the earnings of the employee by the number of hours required to earn the *wages,* during the period not to exceed fifty-two [52] weeks preceding the week in which the accident occurred, and by multiplying this hourly *wage* by the number of hours in a full time work week in the employment. Overtime earnings are to be added to the regular weekly *wages* and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two [52] weeks preceding the accident. If, because of exceptional circumstances, the average weekly *wage* cannot be fairly

> and justly determined by the above forumlas, the Commission may determine the average weekly *wage* by a method that is just and fair to all parties concerned. [Init. Meas. 1948, No. 4, § 12, Acts 1949, p. 1420.] (Emphasis added)

The appellant argues that while § 81-1312 contains two specific formulas for determining average weekly wage which do limit the determination to wages "earned under the contract of hire in force at the time of the accident" it also contains a "catchall" clause which is not so limited and thus permits the Commission in exceptional circumstances to determine the weekly wage by combining all wages in concurrent employments where this is found to be fair and reasonable. He contends that the failure to include the limiting language in the "catchall" proviso was by specific omission and had the legislative branch intended to so limit that proviso to a particular employment it might easily have said so. In support of this argument the appellant relies heavily upon *Foreman* v. *Jackson Minute Markets,* 265 S.C. 164, 217 S.E. 2d 214 (1975) and *Larson's Workmen's Compensation Law* § 60.31. In *Foreman* the provisions of the South Carolina Workers' Compensation Act being construed by the court were not similar to our own. That statute directed the Commission, in exceptional circumstances, to determine "the amount the injured employee would be earning were it not for the injury." This language was interpreted to permit a consideration of the worker's "earning capacity" and hence did not limit him to the contract in force at the time of the injury.

Our Act is quite different. Section 81-1302 (h) declares that any time the word "wage" is used in the Act it shall be construed to mean the "money rate at which the service rendered is compensated *under the contract of hire in force at the time of the accident.*" Section 81-1312 concerns itself exclusively with the determination of "average weekly wage," and the definition of the word "wage" is controlled and supplied by § 81-1302 (h). It makes no provision for combining those wages with concurrent employment whether similar or otherwise. The fact that the word "wage"

is not redefined in the "catchall" proviso to § 81-1312 is not controlling. That definition was supplied by § 81-1302 (h).

In *Barnhardt* v. *Yellow Cab Co.*, 266 N.C. 419, 146 S.E. 2d 479 (1966) the court in construing its statute, very similar to our own, said:

> A worker injured in one such employment, but which injury prevents him from working in his other employment as well, may suffer financial hardship by reason of the fact that the compensation he can receive must be based only upon his wages from the employment in which he received the injury.
>
> But Courts are limited to the interpretation of statutes to effect the purpose expressed by the Legislature which enacted them. If a statute seems unfair or unjust the remedy must be sought in a legislative change or modification. It cannot be furnished by judicial action in the guise of interpretation. *Quinn* v. *Pate,* supra 124 Vt. at 127, 197 A. 2d at 799.

Although our Workers' Compensation Act is remedial and should be construed liberally in favor of the worker, this does not mean that we should either enlarge or restrict plain provisions of the Act. We hold that the clear wording of our statutory definition of "wages" makes no provision for combining wages from concurrent employments in determining benefits.

We affirm.

GLAZE, J., dissents.

Patricia CHRESTMAN *v.* R. L. CHRESTMAN

CA 81-228 630 S.W. 2d 60

Court of Appeals of Arkansas
Opinion delivered March 24, 1982

*David Solomon,* for appellant.

*Charles B. Roscopf, P.A.*, for appellee.

JAMES R. COOPER, Judge. This case involves a petition for divorce filed in March of 1976. The chancellor, in a memorandum opinion dated April 24, 1978, determined that the various transfers of property to the appellant were the result of a scheme to deprive the husband of his assets. The court granted a divorce on December 17, 1979, and held the matter of property division in abeyance. A final decree, entered December 29, 1980, divided the property in basically the same manner proposed by the memorandum opinion of April 24, 1978. From the decision of the chancellor dividing the property, the appellant appeals, urging four grounds for reversal.

## APPLICABILITY OF ACT 705 OF 1979

The appellant argues that Act 705 of 1979 (Ark. Stat. Ann. § 34-1214 (Supp. 1981)), has no application in this case since it was not in effect as of the date of the effective division of the property. The appellant's argument is based on the premise that the chancellor actually divided the property by virtue of his memorandum opinion of April 24, 1978, rather than the final decree entered December 29, 1980.

Act 705 of 1979 became effective ninety days after the legislature recessed on April 20, 1979. The decree of divorce was granted December 17, 1979. Therefore, Act 705 of 1979 was in effect at the time the divorce decree was granted and also at the time the property was divided. See, *Ford* v. *Ford*, 272 Ark. 506, 616 S.W. 2d 3 (1981); *Noble* v. *Noble*, 270 Ark. 602, 605 S.W. 2d 453 (1980).

## THE BRAMLETT PROPERTY

The controversy over this particular 41.9 acre tract of land arose when, according to the chancellor, appellant notified appellee's mother asking that appellee's mother convey the Bramlett property to provide security for a loan to prevent foreclosure on the parties' residence. Originally, the Bramlett property had been owned by Chrestman Nursing Home, Inc., but it was conveyed on May 16, 1972, to

appellee's parents for consideration in excess of $30,000.00. The chancellor found that there was no evidence of any threatened foreclosure on the parties' residence. Appellee's mother agreed to convey the property back to the parties, but appellant instructed her to convey the property to one of the corporations over which appellant had gained control. Appellee's mother refused to execute that deed but conveyed title to appellee individually. Appellee later executed a deed which created an estate by the entirety in that property, as was the case with certain other properties. The chancellor found that this conveyance should be set aside, as should the other transactions whereby appellant gained control over the total assets of appellee.

Appellant argues that if Act 705 of 1979 is applicable, then the Bramlett property is marital property and she should share in the division of this property. The chancellor set aside the conveyance by appellee which created an estate by the entirety in the Bramlett property. With the setting aside of the above conveyance, the property reverted to ownership by appellee individually. Act 705 of 1979 exempts from "marital property" all property acquired by gift or devise by either spouse. Ark. Stat. Ann. § 34-1214 (B) (1) (Supp. 1981). Thus, the trial court could properly determine that the Bramlett property was not "marital property" and that the appellant should not share in it.

## THE TRANSFER OF STOCK IN THE TWO CORPORATIONS

When the parties were married, appellee was the sole stockholder of Chrestman Nursing Homes, Inc. and Phillips Enterprises, Inc. After the marriage, appellant acquired all the stock of both corporations. It was a matter of some controversy as to the actual time that these transfers took place, but the chancellor found that the transfers should be set aside. Appellant argues that the transfer to the wife was in fraud of creditors and therefore appellee should not be allowed to petition the court to set aside the transfer.

The exact purpose for the transfer is not clear, although the appellant is correct in indicating that it is possible those

transfers were for the purpose of defrauding creditors. However, the chancellor heard the witnesses and determined that the underlying reason for the transfer was appellant's scheme to gain control of appellee's assets, rather than a scheme to defraud creditors. We find that such a holding is not clearly erroneous nor against a preponderance of the evidence and therefore we find no merit in this point.

## THE PREPONDERANCE OF THE EVIDENCE

The appellant argues that the finding of the chancellor that the appellant practiced fraud and deceit from the inception of the marriage, or shortly thereafter, is clearly erroneous. We disagree. This case involved numerous hearings and opportunities for the chancellor to observe the demeanor of the witnesses and to determine the truth of the matter. The findings of the chancellor in his memorandum opinion clearly indicate that the chancellor carefully weighed the credibility of the witnesses. He found that during the first eighteen months of the marriage between the parties, the wife acquired virtually every income producing asset owned by the appellee prior to the marriage. The court pointed out that appellee testified that he had first resisted her efforts to obtain control of these assets but later acquiesced; that every transfer was obtained at her insistence through documents prepared by her attorneys on her instructions; and that those documents were brought to him for execution late in the evening when he was intoxicated. The court further found as follows:

> The evidence preponderates heavily in favor of the finding that all her interest in his property was obtained in the manner and under the conditions testified to by the doctor. They were obtained in violation and betrayal of her confidential relationship as his wife at times when he was known to her to be incapable of exercising sound judgment. The Court will further find that the wife entered into this marriage motivated by his apparent wealth and position and with the design then, or shortly thereafter formed, to despoil him of his assets and that this purpose was accomplished by that betrayal of her relationship and

abuse of her position of advantage over his impaired judgment.

In reaching these conclusions the Court has given careful consideration to the manner and demeanor of the parties while on the stand, of the evidence tending to corroborate or discredit such testimony, and the reasonableness and worthiness of belief thereof.

The Court found Dr. Chrestman to be most candid and unequivocal in his answers, whether or not favorable to his position. The wife, on the other hand, was found to be much less than candid, quite evasive on critical points and often contradictory.

A preponderance of the credible evidence appears to fully corroborate Dr. Chrestman as to time, places and circumstances under which the documents were executed and of his physical and mental condition at the time thereof. It fully corroborates his evidence that each transfer was at her insistence and suggestion and that all such instruments were prepared by others on her instructions, picked up by her and presented to him elsewhere for execution. All witnesses agreed that she could influence him and that he seemed to do whatever she asked or demanded of him. (T. 61)

Once the appellee showed that a confidential relationship existed between appellant and himself, and that the appellant was the dominant party in that relationship, then it is presumed that the transfer of property from the appellee to the appellant was invalid due to coercion and undue influence. Therefore, the appellant had the burden of rebutting that presumption by producing evidence to show that the transfers were freely and voluntarily executed. *Dunn* v. *Dunn,* 255 Ark. 764, 503 S.W. 2d 168 (1973); *Marshall* v. *Marshall,* 271 Ark. 116, 607 S.W. 2d 90 (Ark. App. 1980).

After reviewing the record, and the excellent briefs prepared by both counsel, we believe that the chancellor's decision must be affirmed. In chancery cases, we review the record *de novo,* but we will not reverse the chancellor unless

his findings are clearly erroneous or against the preponderance of the evidence, after giving due regard to his opportunity to judge the credibility of the witnesses. Ark. Rules of Civ. Proc. Rule 52 (a); *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W. 2d 404 (1981); *Hackworth* v. *First National Bank of Crossett,* 265 Ark. 668, 580 S.W. 2d 465 (1979). We cannot say that the chancellor's findings were against the preponderance of the evidence or that they were clearly erroneous.

The evidence supports a finding that appellant entered into the marriage with a deliberate intention to defraud the appellee of all his assets. The appellant would have been completely successful in her scheme, had she not been prevented by this lawsuit. The decision of the chancellor is affirmed.

Affirmed.

CRACRAFT, J., not participating.

Toni Gale FORSGREN *v.* Larry G. FORSGREN

CA 81-292 630 S.W. 2d 64

Court of Appeals of Arkansas
Opinion delivered March 24, 1982

*Gene O'Daniel,* for appellant.

*Franklin Wilder,* for appellee.

JAMES R. COOPER, Judge. Appellant argues that the evidence presented in this case was insufficient to justify the granting of divorce to appellee. We disagree. Appellee sought a divorce on the grounds of general indignities under the provisions of Ark. Stat. Ann. § 34-1202 (Supp. 1981). There was sufficient testimony to indicate that appellant, during the three years of her marriage, was guilty of excessive consumption of alcohol and drugs and that this activity resulted in massive medical bills and marital problems between the parties. These allegations were corroborated by one disinterested witness, as well as the testimony of appellee's parents.

Drunken conduct may be proved, along with other acts, to establish the general indignities which have rendered the plaintiff's marital life intolerable. *Carmical* v. *Carmical,* 246 Ark. 1142, 441 S.W. 2d 103 (1969). In a contested divorce case, relatively slight corroboration is required to establish the grounds for divorce. *Hair* v. *Hair,* 272 Ark. 80, 613 S.W. 2d 376 (1981). The chancellor's decision will be reversed, only when the appellate court finds that decision to be clearly erroneous or against a preponderance of the evidence, after giving due regard to his opportunity to determine the credibility of the witnesses. Ark. Rules of Civ. Proc. Rule 52 (a); *Andres* v. *Andres,* 1 Ark. App. 75, 613 S.W. 2d 404 (1981).

We hold that the chancellor had sufficient evidence from which he could find that the appellant had subjected the appellee to continued indignities so as to justify a granting of the divorce to appellee.

Appellant originally sought custody of the minor children, but she has since withdrawn her request for custody. Therefore, the custody issue is moot.

Appellant also argues that the chancellor erred in his unequal distribution of the stock owned by the parties. The chancellor found that the stock was acquired solely through the contributions, efforts, and contacts of the appellee and that the appellant contributed nothing to the acquisition of the stock, except her efforts as a homemaker. Arkansas Statutes Annotated § 34-1214 (Supp. 1981) provides that marital property is to be divided equally between the parties, unless the chancellor finds such a division to be inequitable. If the chancellor makes an unequal distribution of the property, he must set forth his reasons for doing so. That is exactly what happened in this case and we are unable to say that the chancellor, who observed the witnesses and was in a better position than we to judge their demeanor, was in error in making an unequal distribution of this property.

We also note that had appellee's counsel not submitted a supplemental abstract, this case would have had to be affirmed for failure of the appellant to properly abstract as required by Rules of the Supreme Court and Court of Appeals, Rule 9 (d), Ark. Stat. Ann. Vol. 3A (Repl. 1979).

Affirmed.

MAYFIELD, C.J., concurs.

CLONINGER, J., not participating.

MELVIN MAYFIELD, Chief Judge, concurring. I agree with the decision in this case, but, in my judgment, the last paragraph of the opinion needs clarification.

If the appellant's abstract is flagrantly deficient, I think

the judgment or decree may be affirmed without considering the merits of the appeal; that this may be done despite the fact that the appellee has submitted an abstract supplementing those deficiencies; and that this may be done whether or not the appellee has called the matter to the court's attention.

Houston E. ROOD *v.* STATE of Arkansas

CA CR 81-137 630 S.W. 2d 543

Court of Appeals of Arkansas
Opinion delivered March 24, 1982
[Rehearing denied April 21, 1982.]

*Kay L. Matthews* and *Henry N. Means, III,* for appellant.

*Steve Clark,* Atty. Gen., by: *Arnold M. Jochums,* Asst. Atty. Gen., for appellee.

JAMES R. COOPER, Judge. Appellant was charged with second degree murder in the death of Robert L. Meredith. After a trial by jury, he was convicted and sentenced to seven years in the Arkansas Department of Corrections. During the course of the trial, the appellant sought a ruling by the trial court granting immunity to a defense witness, who was also charged with a murder arising out of the same altercation. After the request for immunity was denied, appellant then sought to introduce a prior statement of the defense witness who had refused to testify. During closing argument, appellant's counsel attempted to suggest to the jury that the jury write a recommendation of leniency on its verdict form. The prosecuting attorney objected, and the objection was sustained. The trial court refused to discuss the basis for that ruling. Appellant urges that these three rulings were erroneous.

## THE DENIAL OF IMMUNITY

The appellant contends that he was denied a fair trial by virtue of the fact that James Long, who was charged with murdering a different individual during the same altercation which resulted in the death of Mr. Meredith, refused to testify. Appellant's counsel requested that the trial court grant Mr. Long immunity. The trial court indicated that it was not inclined to do so as it was a discretionary matter.

When Mr. Long was called to testify, he refused to answer a series of questions, claiming his privilege against self-incrimination under the fifth amendment to the United States Constitution. There is nothing in the record to indicate that Mr. Long would have responded to questions had he been granted immunity. The record also reflects that no request was made by the appellant to the prosecutor that he seek immunity for Mr. Long for the purpose of testifying in this trial.

Arkansas Statutes Annotated § 28-534 (Repl. 1979) provides that a prosecuting attorney may grant immunity after he has applied for and obtained a written order from the circuit court. The statute also provides that no immunity is to be granted until after the individual has declined to answer questions or has requested immunity before answering questions. In *United States* v. *Allesio,* 528 F. 2d 1079 (9th Cir. 1976), the United States Court of Appeals, Ninth Circuit stated:

> It has repeatedly been held by this Court that the government may not be compelled to seek a grant of immunity for a prospective defense witness. *United States* v. *Bautista,* 509 F. 2d 675, 677 (9th Cir. 1975); *Cerda* v. *United States,* 488 F. 2d 720 (9th Cir. 1973); *United States* v. *Jenkins,* 470 F. 2d 1061 (9th Cir. 1972). It was noted in *Earl* v. *United States,* 124 U.S. App. D.C. 77, 361 F. 2d 531 (1966), however, that a defendant might be denied due process if the government uses its authority to seek immunity for its own witnesses, but declines to do so on behalf of the defendant.

In *Fears* v. *State,* 262 Ark. 355, 556 S.W. 2d 659 (1977), the Arkansas Supreme Court dealt with a situation where the defendant had sought immunity for a defense witness, whose proposed testimony was designed to impeach the character of a confidential informant who testified for the prosecution. In affirming the trial court's refusal to grant immunity to the defense witness, the Court stated:

> The granting of immunity is not a constitutional right but only one authorized by statute. Under Ark. Stat. Ann. § 28-533 (Supp. 1975) the granting of immunity is within the discretion of the prosecutor when in his judgment such a grant of immunity is necessary to the public interest. The purpose of immunity statutes is to aid the prosecution in apprehending criminals by inducing witnesses to testify for the State. See 22 C.J.S. Criminal Law § 46 (1).
>
> The testimony of [the defense witness] was not offered to prove appellant's guilt or innocence but as a collateral attack on [the informant's] credibility. To have granted her immunity would have defeated the purpose of the statutory provisions.

After considering the statutory provisions and *Fears, supra,* we hold that the trial court was correct in not granting immunity in this case. It is the duty of the prosecuting attorney to request immunity when, in his judgment, the interests of justice are best served. There is no allegation that the prosecutor abused his discretion by failing to request immunity, and in fact, no one requested that the prosecutor grant immunity. The only request to the trial court for a grant of immunity for Mr. Long was by defense counsel. We are unable to find any statutory authority for a request of a grant of immunity by anyone other than the prosecuting attorney. The question of whether immunity should have been granted to Mr. Long had prosecution witnesses been granted immunity on a request by the prosecutor is not before us.

## THE EXCLUSION OF MR. LONG'S PRIOR STATEMENT

An attempt was made to introduce a prior statement allegedly made by Mr. Long. The unsworn statement was written by Sgt. Cotton of the North Little Rock Police Department. Appellant's counsel indicated he did not intend to introduce the document for any purpose other than to discredit Donna Meredith, the wife of the victim, who had testified in a manner which tended to incriminate the appellant. The short answer to this point is that the statement was not properly authenticated and was therefore inadmissible. See, Uniform Rules of Evidence, Rule 901, Ark. Stat. Ann. § 28-1001 (Repl. 1979).

## DEFENSE COUNSEL'S CLOSING ARGUMENT

During closing argument, appellant's counsel indicated that if the jury believed that appellant killed Mr. Meredith negligently but that he did not need to go to the penitentiary, then the jury should write just above the guilty portion that "the jury recommends leniency". The prosecuting attorney objected on the grounds that such an argument was improper and the trial court sustained the objection. Appellant's counsel sought to discuss the matter further with the court but the court declined to do so.

Appellant's counsel alleges that he was entitled to advise the jury on how to recommend a suspended sentence. He appears to argue that he should have been allowed to discuss with the trial court the manner of providing such an instruction on this point to the jury. Jury instructions had already been given and we note that counsel had not proffered any instruction on this point. Therefore, the contention that the trial court should have allowed a discussion about jury instructions during closing argument is without merit. Even if this type of instruction had been proper, which we do not hold, appellant's request was untimely. Ark. Stat. Ann. § 43-2134 (Repl. 1977); *Lee* v. *State,* 145 Ark. 75, 223 S.W. 373 (1920).

Appellant's counsel urges the Court of Appeals to set

out an acceptable procedure for instructing the jury on how to recommend a suspended sentence or probation. We are disinclined to do so for any number of reasons. However, only one need be mentioned. It is the function of the Arkansas Supreme Court to adopt jury instructions or new verdict forms to amend the Arkansas Model Criminal Instructions, not the Court of Appeals. Attorneys are free to argue those penalties which are authorized under the statute. Since the jury has no authority to suspend sentences or grant probations, it is useless to argue such a point to the jury at best, and at worst it is highly misleading. We believe the trial court properly controlled and supervised defense counsel's closing argument. *Shaw* v. *State,* 271 Ark. 926, 611 S.W. 2d 522 (1981).

We find no merit in any of the points raised by appellant and therefore we affirm.

Affirmed.

Dr. Jimmie E. LYTLE *v.* THE CITIZENS BANK OF BATESVILLE

CA 81-177 630 S.W. 2d 546

Court of Appeals of Arkansas
Opinion delivered March 24, 1982
[Rehearing denied April 21, 1982.]

*Bennett & Purtle,* for appellant.

*L. Gray Dellinger,* for appellee.

TOM GLAZE, Judge. In August of 1979, the appellant sold a tractor and trailer to Bobby Reeves and his wife for $20,000. The Citizens Bank of Batesville, hereinafter referred to as Bank, loaned the Reeveses $20,000 to finance the purchase, with the proceeds from the loan going to appellant to satisfy other indebtedness to the Bank. The Reeveses granted a lien to the Bank on the tractor, trailer and on certain lots in Calico Rock, Arkansas. Appellant individually guaranteed the loan.

The Reeveses defaulted after making two payments, and the Bank foreclosed on the security, naming appellant, the Reeveses and an individual who claimed a repairman's lien on the truck. The repairman is no longer a party to the suit. The Reeveses were totally in default and, after a hearing, the court entered a decree on October 21, 1980, granting judgment in favor of the Bank against the Reeveses and appellant jointly and severally for the balance due on the $20,000 loan.[1]

The personal property was sold to appellant on November 7, 1980, and the real estate was set for sale on December 16, 1980. The Bank entered a bid for $13,000 on the property, which was approximately the amount needed to satisfy appellant's debt. On December 18, 1980, the Bank filed a motion to withdraw its bid and deny confirmation of the sale. A hearing was held on January 23, 1981, and the chancellor entered an order on February 12, 1981, denying confirmation of the December 16 sale and reforming the mortgages between the Reeveses and the Bank so as to delete the two lots. A second sale of the remaining five lots was ordered. That sale was held on March 18, 1981, at which time

[1]After the $20,000 loan was made, the Reeveses obtained an additional $10,000, which was secured by his second lien on the same collateral, plus a lien on another vehicle. That transaction is not a part of this lawsuit since the chancellor ruled that appellant had not given a continuing guarantee and, therefore, had not guaranteed the subsequent $10,000 advance.

appellant bid $100 for the lots. The lots were sold and deeded to him and this sale was confirmed. A deficiency judgment was entered, which appellant satisfied on May 7, 1981.

Appellant argues that the trial court erred in not confirming the first sale, and it also erred in reforming the mortgage to delete two lots. He contends the first sale should have been confirmed because the attorney for the Bank testified at the trial. He argues further that even though the Bank's attorney withdrew during the trial, he still later participated in the case by preparing and approving the proposed decree. On the other side, the Bank urges that this appeal should be dismissed as moot since appellant paid the judgment, and it has been satisfied.

## MOOTNESS OF THE APPEAL

No motion for dismissal of the appeal on the grounds of mootness was filed by the Bank, but the point was raised in the Bank's brief. We chose to treat this issue as though it was raised by a motion to dismiss, and time was granted both parties to submit affidavits in support of and in contravention of such a motion. Ark. Stat. Ann. § 27-2139 (Repl. 1979).

Appellant has filed an affidavit which states that a supersedeas bond was not available to be posted because of appellant's financial condition. The affidavit further states that since the judgment had not been stayed by a supersedeas bond, the Bank's attorney indicated that he intended to execute on appellant's office equipment and bank account. Appellant then claims he borrowed the money to pay the judgment as a result of the threat of execution. That sworn allegation has not been contradicted.

Some jurisdictions hold that the payment of a judgment under any circumstances bars the payer's right to appeal. However, in the majority of jurisdictions, the effect of the payment of a judgment upon the right of appeal by the payer is determined by whether the payment was voluntary or involuntary. In other words, if the payment was voluntary, then the case is moot, but if the payment was involuntary, the appeal is not precluded. The question which often arises

under this rule is what constitutes an involuntary payment of a judgment. For instance, in some jurisdictions the courts have held that a payment is involuntary if it is made under threat of execution or garnishment. There are other jurisdictions, however, which adhere to the rule that a payment is involuntary only if it is made after the issuance of an execution or garnishment. Another variation of this majority rule is a requirement that if, as a matter of right, the payer could have posted a supersedeas bond, he must show that he was unable to post such a bond, or his payment of the judgment is deemed voluntary. For a discussion of the various rules, along with citations to the various jurisdictions, see: Defeated Party's Payment or Satisfaction of, or Other Compliance With, Civil Judgment as Barring His Right to Appeal, Annot. 39 A.L.R. 2d 153 (1955); 4 Am. Jur. 2d *Appeal and Error,* § 260 at 755 (1962); *Metropolitan Development and Housing Agency* v. *Hill,* 518 S.W. 2d 754 (Tenn. App. 1974).

We adopt the majority rule as the better reasoned rule. Thus, if appellant's payment was voluntary, then the case is moot, but if the payment was involuntary, this appeal is not precluded. In applying this rule to the facts at bar, we must determine whether the payment made by appellant was voluntary or involuntary. In doing so, we believe that one of the most important factors to be considered is whether appellant was able to post a supersedeas bond at the time he satisfied the judgment.[2] The record supports the conclusion that he could have done so.

There is nothing in the record which shows appellant even requested the court to set the amount of a supersedeas bond, much less to show his financial inability to pay such cost. Obviously, appellant had the financial ability and resources to borrow $13,364 so he could satisfy the judgment in full. There is no evidence to indicate the posting of a supersedeas bond would have been a greater or lesser

[2]Arkansas Rules of Appellate Procedure, Rule 8, Ark. Stat. Ann. Vol. 3A (Repl. 1979), provides that a supersedeas bond is necessary to stay appellee's proceeding on the judgment. Rule 8 provides that whenever the appellant "desires a stay on appeal" he must post a supersedeas bond, but it does not require the posting of a bond in order to appeal.

financial burden on appellant than his full payment of the obligation imposed under the judgment. For whatever reasons, appellant simply chose to forego his right to request a bond in an effort to stay the trial court's judgment and any subsequent proceedings to enforce it.

In view of the state of the record before us, we find appellant's payment was voluntary. Therefore, we hold this appeal should be dismissed because appellant's satisfaction of the trial court's judgment rendered the issues on appeal moot.

Dismissed.

MAYFIELD, C.J., concurs.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. I agree with the majority's opinion which adopts the majority rule. That rule states that if the appellant's payment was voluntary, then the case is moot, but if the payment was involuntary, the appeal is not precluded. However, I do not believe that the appellant should be required to show that he could not, because of financial inability, obtain a supersedeas bond.

The Arkansas Rules of Appellate Procedure, Ark. Stat. Ann. Vol. 3A (Repl. 1979) do not require the posting of a supersedeas bond in order to appeal. Rule 8 only states that whenever an appellant "desires a stay on appeal" he must post a supersedeas bond.

The only real issue here is whether the appellant's payment was voluntary or involuntary. The appellant was threatened with execution on the judgment and only paid the judgment under that threat. The appellant did not acquiesce in the judgment, and he did not pay the judgment with the intent to forego his appeal. His payment was obviously involuntary. Having so found, I believe the merits of the case should be considered, particularly since several of the points raised are important ones. Because I believe the merits of the case should be considered, I have done so.

## THE ATTORNEY AS WITNESS

Appellant and Mr. John C. Gregg, then attorney for the Bank, attended the foreclosure sale on December 16, 1980. At the hearing held on the motion of the Bank to withdraw its bid, it became necessary for Mr. Gregg to testify as to the reasons he entered the bid for the Bank. In its motion to withdraw the bid, the Bank alleged that Mr. Gregg did not have the authority to enter any bid whatsoever on the property on behalf of the Bank. Mr. Gregg's testimony indicated that he thought appellant was confused and did not know what to do at the sale and that he was attempting to protect appellant's interests as well as those of the Bank.

The chancellor correctly pointed out, when Mr. Gregg indicated he wished to testify, that he should have known that he would have to testify, based on allegations made in his opening statement. Mr. Gregg withdrew from the case and Mr. L. Gray Dellinger assumed representation of the Bank. There was no objection made to this substitution of counsel. Mr. Gregg then took the stand and testified regarding his actions at the sale.

The *Arkansas Code of Professional Responsibility,*[1] 33 Ark. L. Rev. 605 (1980), provides in Disciplinary Rule 5-102 as follows:

> (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101 (B) (1) through (4).

Disciplinary Rule 5-101 provides in part as follows:

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[1]Adopted by the Arkansas Supreme Court. *Per Curiam,* 260 Ark. 910 (June 21, 1976).

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

The Arkansas Supreme Court has dealt with the problem of testimony by attorneys engaged as trial counsel in several cases. In *Boling* v. *Gibson,* 266 Ark. 310, 584 S.W. 2d 14 (1979), the Court stated:

> In some of these cases [previously cited] we have recognized that there are cases in which the necessity for the lawyer testifying cannot be anticipated until a stage of the trial at which his withdrawal, or that of his firm, would be impossible without serious injustice to his client, and that withdrawal should not be expected in such cases. '[B]ut it should be clear that the necessity for the lawyer's testimony could not have been anticipated.' [citing cases] If the lawyer's testimony was necessary in this instance, it should have been known two months prior to trial. It is not sufficient to leave further trial to a member of the testifying attorney's firm. [citing cases] . . . .
>
> In *Dingledine* v. *Dingledine,* supra, we pointed out observations in the Code of Professional Responsibility that an advocate who becomes a witness is put in the position of arguing his own credibility and that

there is inconsistency in the function of an advocate to advance or argue the cause of another and that of a witness to state facts objectively. Credibility was the issue here.

In *Boling, supra,* the Supreme Court reversed and remanded for a new trial because of the testimony of the attorney. I do not believe it necessary to do so here. First, Mr. Gregg did not testify at the trial of this case, but testified only with regard to the motion of the Bank to withdraw its bid. Also, he testified only after he had withdrawn from the case and substitute counsel was employed. The substitution of counsel was done without objection. The substitute counsel was not a member of Mr. Gregg's law firm. Even if this Court did reverse, the only new hearing that would be required would be a new nearing on whether the Bank should be allowed to withdraw its bid and whether the mortgages should be reformed. This new hearing would then be conducted by a different trial counsel.

Only a small portion of the entire testimony in this case could possibly be tainted by Mr. Gregg's testimony. I do not believe that the appellant was so prejudiced as to require reversal. In fact, even if the testimony of the attorney was stricken, there was sufficient evidence on which the chancellor could have allowed the withdrawal of the bid. In *Montgomery* v. *First National Bank of Newport,* 246 Ark. 502, 439 S.W. 2d 299 (1969), our Supreme Court pointed out that it had not yet held that testimony by an attorney in violation of the canons of ethics was, standing alone, a basis for holding the testimony inadmissible, nor had the Court held that an attorney was incompetent as a witness.

## CONFIRMATION OF JUDICIAL SALE

Following the hearing on the Bank's motion to withdraw its bid, the trial court issued a letter opinion in which he found that Mr. Gregg entered the bid for the Bank without authorization. The court further found that the bid entered by the Bank was far in excess of the actual value of the property, and the practical effect of a confirmation of the

sale would be to unfairly reward appellant by virtue of a mistake made by the Bank and its attorney.

It is well established that in judicial sales, the court is the vendor and is vested with great discretion in deciding whether to confirm or refuse to confirm a sale. It is clear that the function of the appellate court is not to substitute its decision for that of the trial court where confirmation is refused, but we are to review the case to determine whether the trial court abused his discretion in refusing to confirm a sale. In this case, it is obvious that an error was made by the entry of the original bid, and it is uncontradicted that the Bank's attorney acted without authority to enter such a bid. I agree with the chancellor that confirmation of the first sale would unfairly inure to the benefit of appellant and I find no abuse of the chancellor's discretion in refusing to confirm the first sale and in ordering a resale. See *Keirs* v. *Mt. Comfort Enterprises, Inc.*, 266 Ark. 523, 587 S.W. 2d 8 (1979): *Fleming* v. *Southland Life Insurance Co.*, 263 Ark. 272, 564 S.W. 2d 216 (1978).

## REFORMATION OF THE MORTGAGE

The trial court reformed the mortgage from Reeves to the Bank to exclude the two lots on which Reeves' home was located. Those lots had a mortgage to Jim Walter Homes. The trial court specifically found that all interested parties did not intend that those lots be covered by the mortgage.

Reeves' testimony was that he believed the mortgage to the Bank only covered the vacant lots. An officer of the Bank indicated that he did not believe the Bank's mortgage covered the land on which the house sat and that the Bank had relied on the description furnished by Reeves. Appellant's testimony indicated that he did not believe that any lots except the vacant ones were covered by the mortgage. Thus, it appears that the chancellor was correct in finding that there was a mutual mistake as to the lands which were intended to be covered by the mortgage. All parties to this litigation were laboring under the misconception that the land mortgaged were the vacant lots. The mistake was shared by all parties, and there is ample evidence from which

the chancellor could find that the parties did not intend that the mortgage cover the lots on which the residence was located. I believe that the trial court had sufficient evidence of a mutual mistake and that the court was correct in reforming the mortgage. *Yeargan* v. *Bank of Montgomery County,* 268 Ark. 752, 595 S.W. 2d 704 (Ark. App. 1980); *Winkle* v. *Grand National Bank,* 267 Ark. 123, 601 S.W. 2d 559 (1980).

I would affirm this case on the merits.

Joe A. SIMS, III *v.* STATE of Arkansas

CA CR 81-166 631 S.W. 2d 14

Court of Appeals of Arkansas
Opinion delivered March 31, 1982

*Tom Carpenter* and *James P. Massie,* for appellant.

*Steve Clark,* Atty. Gen., by: *Theodore Holder,* Asst. Atty. Gen., for appellee.

MELVIN MAYFIELD, Chief Judge. The jury found Joe Sims guilty of battery in the first degree and fixed his punishment at twenty years with a $15,000 fine. In this appeal he contends the state committed error by calling Lynn Hickman as a witness when it knew he would assert the privilege against self-incrimination.

According to the testimony of the complaining witness, Roy Dancey, he was playing pool in a Little Rock recreation center on March 27, 1978, when someone kicked the doors open and three men with guns burst in. Two of them stood by the door while the appellant shot Dancey five times. Dancey knew and recognized appellant and one of the other men, Lynn Hickman, but not the third one.

During the prosecuting attorney's opening statement to the jury there was no objection to the following remarks:

> The state's primary witness today is the victim in this case. That's Mr. Roy Lee Dancey, Jr. Mr. Dancey had known Mr. Sims for quite a while. He had also known the codefendant in this case, Mr. Lynn Hickman. . . . Mr. Hickman was tried in this court back on July the 20th, 1979, for his participation in this case and was found guilty by the Court.
>
> . . . .
>
> Mr. Hickman will take the stand and I will examine him about the incident. Mr. Hickman, I am sure, will be quite uncooperative. In fact, he has so told me previous to trial. But we'll see how that goes.

After opening statements the state called Roy Dancey who testified as above outlined and then Hickman was called. After giving his name, he asked for his court-appointed public defender who announced that the witness had indicated he wished to assert his Fifth Amendment privilege against self-incrimination. The jury was then excused.

In the ensuing discussion it was discovered that the time had run for Hickman to perfect an appeal of his conviction. The prosecuting attorney stated his belief that Hickman had no Fifth Amendment right in this case and offered him immunity regarding any other acts committed on the night in question. Hickman still refused to testify. The court then informed him that he would be ordered to testify and the jury was returned to the courtroom over the objection by defense counsel that Hickman's refusal to testify might give rise to an inference of a conspiracy and prejudice appellant.

Hickman was called to the stand again and, after answering a few identification questions and admitting that he had been convicted of battery in connection with this incident, stated that he wished to "take the Fifth." The court then ordered him to answer questions but the witness said he was "going with the Fifth." The jury was again removed from the courtroom and the court instructed his appointed counsel to inform Hickman that he could be held in

contempt and that his parole eligibility could be affected. After this was done and the court was assured that Hickman understood the possible effect of not testifying and that he still elected not to testify, the court had the jury brought back into the courtroom.

Before the jury returned, however, the court denied appellant's motion for mistrial. During the discussion of that motion it was revealed that the court had appointed counsel for Hickman earlier that morning upon being informed (possibly by the prosecutor) that Hickman intended to invoke his privilege against self-incrimination. But the court stated that as early as five minutes before "we came in court" the appointed attorney said he had no idea of what Hickman would do.

The state admits that reversible error can be made by calling and questioning a witness who refuses to testify on the basis of the Fifth Amendment. The state's brief puts it this way:

> The evil in the non-testimony of such a witness is not the mere calling of the witness, but the obvious inferences drawn by a jury to a series of questions, to all of which the witness refuses to answer on Fifth Amendment grounds. In that case the questions themselves "may well have been the equivalent in the jury's mind of testimony." *Douglas* v. *Alabama,* 380 U.S. 415, 419, 85 S. Ct. 1074, 13 L. Ed. 2d 934, 937 (1965). Such improper questioning, not technically being testimony at all, deprives an accused of his right to cross-examine the witnesses against him as guaranteed by the Confrontation Clause of the Sixth Amendment to the federal constitution [made obligatory on the states by the Fourteenth Amendment.] *Dutton* v. *Evans,* 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970); *Frazier* v. *Cupp,* 394 U.S. 731, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969); *Douglas* v. *Alabama, supra.*

In *Douglas* v. *Alabama* a witness who refused to testify on the basis of the privilege against self-incrimination was declared a hostile witness and in the form of cross-examina-

tion the state was permitted to read from a confession signed by the witness with the prosecutor pausing after every few sentences to ask: "Did you make that statement?" The court said:

> The alleged statements clearly bore on a fundamental part of the State's case against petitioner. The circumstances are therefore such that "inferences from a witness' refusal to answer" added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.

On the other hand, in *Frazier* v. *Cupp* the prosecutor included in his opening statement a summary of the testimony he expected to receive from a witness who subsequently refused to testify. The court found no constitutional violation because the testimony was not a "vitally important part of the prosecution's case." And in *Dutton* v. *Evans* the court rejected the contention that the state court conviction should be reversed because of denial of the constitutional right of confrontation saying, "This case does not involve evidence in any sense 'crucial' or 'devastating' as did all the cases just discussed."

There is another dimension to this matter illustrated by the case of *United States* v. *Compton,* 365 F. 2d 1 (6th Cir. 1966). That case, an appeal from a federal district court, dealt with a question of prosecutorial misconduct and stated this general rule:

> Government counsel need not refrain from calling a witness whose attorney appears in court and advises court and counsel that the witness will claim his privilege and will not testify. However, to call such a witness, counsel must have an honest belief that the witness has information which is pertinent to the issues in the case and which is admissible under applicable rules of evidence, if no privilege were claimed. It is an unfair trial tactic if it appears that counsel calls such a witness merely to get him to claim his privilege before the jury to a series of questions not pertinent to the

issues on trial or not admissible under the applicable rules of evidence.

The conviction in *Compton* was reversed because counsel for the government, under the guise of a question, was allowed to read a long statement alleged to have been given to an F.B.I. agent by the witness who invoked the privilege against self-incrimination. The court said only the last sentence of the statement had any bearing on the case and "by reason of this prejudicial trial tactic we must reverse the judgment."

On the other hand, this issue was before the United States Supreme Court in *Namet* v. *United States,* 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963) where the court said the record would not support a finding of prosecutorial misconduct and that any inferences raised by questions to which testimonial privilege was invoked were at most cumulative.

In *Price* v. *State,* 37 Wis. 2d 117, 154 N.W. 2d 222 (1967), cited by both parties here, the court said "no error is committed by the mere fact of calling a witness who will claim the privilege." And citing *Namet* v. *United States,* the court said that case "makes it clear that the forbidden conduct is the 'conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege.'" In addition, the court said any unfavorable inference would have to add "critical weight" to the state's case in order to have a reversible effect. "Critical weight" was defined as "decisive weight — the evidentiary inference that tips the scales of justice from innocence to guilt."

Applying the above cases to the case at bar, we find no reversible error.

In the first place, we cannot say the prosecutor was guilty of misconduct. It does not appear that the witness Hickman was called to the stand merely to get him to claim, before the jury, his privilege to questions not pertinent to the issues or not admissible under the rules of evidence. As the trial court noted, the first witness, Roy Dancey, testified that

Hickman was one of the three men who burst in the recreation center and that he stood by the door while appellant did the shooting. There was no attempt and no need to try to build a case out of inferences arising from the use of the testimonial privilege against self-incrimination.

In the second place, whether we are considering prosecutorial misconduct or the denial of the constitutional right of confrontation, the inferences from Hickman's refusal to testify would have to add "critical weight" to the state's case. At most, any inference here would only bolster Dancey's testimony. All the elements of the offense charged were already in evidence and none needed to be supplied by an inference from Hickman's refusal to testify.

In closing argument, the prosecuting attorney suggested that Hickman (whom the jury knew was in prison) refused to testify because he was afraid to serve his sentence in the same prison as appellant. In closing argument, defense counsel claimed that Hickman's refusal to testify hurt their contention that Sims was not present at the recreation center at the time of the shooting.

After the jury retired, counsel for appellant made this motion:

> On the record again, your Honor, I'd like to object in terms of — and move for a mistrial — in terms of his comments and statements about Lynn Hickman being convicted for the same offense and bringing that up again in his closing. I think that was totally improper and prejudicial.

The motion certainly came too late to make any difference. In his opening statement the prosecutor told the jury that Hickman had been convicted for his participation in this case. He also specifically told the jury that "he's serving his sentence." No objection was made to either statement. Then when Hickman was on the stand he admitted he had been convicted in connection with this incident. Again there was no objection. Under this state of the record, in addition to all we have already said, no

reversible error could possibly result from the court's failure to grant a mistrial for "bringing that up again in his closing." And finally, the trial court gave the jury the standard instruction that closing arguments of counsel are not evidence and any argument, statement, or remark having no basis in the evidence should be disregarded.

The judgment is affirmed.

Judy K. MARKHAM *v.* K-MART CORPORATION

CA 81-399 630 S.W. 2d 550

Court of Appeals of Arkansas
Opinion delivered March 31, 1982

*Blevins, Pierce & Stanley,* by: *James W. Stanley, Jr.,* for appellant.

*Wright, Lindsey & Jennings,* for appellee.

LAWSON CLONINGER, Judge. Appellant, Judy K. Markham, received a compensable back injury while employed by appellee, K-Mart Corporation, a self-insured employer, on July 10, 1979. Appellant was paid medical benefits, temporary total disability benefits for two weeks, and permanent partial disability benefits based upon a rating of 5% of the body as a whole.

After a hearing held on November 17, 1980, an administrative law judge found that appellant was entitled to neither additional medical expenses nor additional temporary total disability benefits, because "Claimant has failed to comply with the provisions of § 11 and Rule 21 of the Arkansas Workers' Compensation Law and is, therefore, precluded from a change in physicians and any periods of temporary total disability to run commensurate with such change."

At the time of the injury, § 11 of the Workers' Compensation Act, Ark. Stat. Ann. § 81-1311 (Supp. 1979) provided, in part:

> The Commission may order a change of physicians at the expense of the employer when, in its discretion, such change is deemed necessary or desirable. Upon notice of injury, the injured employee shall be furnished a copy of Commission Rule 21 and a copy of Section 11 of the Workers' Compensation Act. Subsequently, if the injured employee desires to change physicians pursuant to the rules, notice to this effect must be given to the employer.

Commission Rule 21 provides, in part:

> A claimant . . . may obtain a change in treating physicians to a physician of the claimant's choice, the cost of such treatment to be borne by the employer or the employer's insurance carrier provided (1) the claimant's healing period shall not have ended; (2) the claimant is not seeking to change physicians from one

> of his own choice, previously selected by the claimant; (3) the physician to whom claimant wishes to change is qualified . . . ; (4) the claimant files with the Commission a petition for a change in physicians . . . ; (5) no unresolved issue exists over whether claimant is legally entitled to medical care at the expense of respondents.

On appeal to the Full Commission, Commissioner Tatum adopted the finding and ruling of the administrative law judge. Commissioner Rotenberry would not require appellee to pay for appellant's treatment by the unauthorized physician, but would not deny appellant's claim for additional temporary total disability benefits solely because the claim for medical expenses is being denied. Commissioner Rotenberry did find, however, that appellant had failed to prove by a preponderance of the evidence that the additional periods of temporary total disability were causally related to the compensable injury of July 10, 1979. Commissioner Clark dissented, holding that appellant was entitled to both additional medical expenses and temporary total disability benefits. Appellant now brings this appeal.

We find that the Commission erred as a matter of law in finding that appellant was entitled to neither additional medical expenses nor additional temporary total disability benefits because of claimant's failure to comply with the provisions of Rule 21 of the Arkansas Workers' Compensation Laws and Rules of the Commission. Since the commissioners did not agree on whether claimant proved by a preponderance of the evidence that she was entitled to additional periods of temporary total disability and to additional medical expenses, this case must be remanded to the Commission on that point. This issue of fact was not actually decided by the Commission, but rather was treated as a question of law and must be sent back to the Commission for a decision. See *Houston Contracting Company* v. *Young*, 267 Ark. 322, 590 S.W. 2d 653 (1979). Furthermore, the reports of an unauthorized doctor should be considered in determining the extent of disability of the claimant. See Larson, *Workmen's Compensation Law*, § 61.12 (j) (1981). See also *Lee* v. *Industrial Commission*, 592 Pac. 2d 785 (Ariz.

App. 1979); *Garland* v. *Anaconda Company,* 581 Pac. 2d 431 (Mont. 1978).

Appellant's other points for reversal are without merit. Appellant argues that her failure to comply with Rule 21 of the Workers' Compensation Commission's rules and regulations should be excused, since appellee failed to furnish a copy of the Commission's Rule 21 to appellant pursuant to Ark. Stat. Ann. § 81-1311. Suffice it to say that this point was not raised at the hearing before the Commission and cannot be raised for the first time on appeal. *Ashcraft* v. *Quimby,* 2 Ark. App. 332, 621 S.W. 2d 230 (1981).

Appellant further argues that the change of physician was reasonable and necessary under the circumstances and should have been authorized by the Commission. As was stated above, the Commission found that appellant did not comply with Rule 21 and therefore was not entitled to a change of physician. This court has recognized Commission Rule 21 in an earlier case and has upheld the Commission's enforcement and interpretation of its own rules. *Williams* v. *Arkansas Oak Flooring Company,* 267 Ark. 810, 590 S.W. 2d 328 (Ark. App. 1979).

This case is reversed and remanded to the Commission on the issue of whether claimant has failed to prove her case by a preponderance of the evidence regarding additional temporary total disability benefits and additional medical expenses. It is affirmed in all other respects.

# INTERNATIONAL PAPER COMPANY *v.* Gary L. PLUNKETT

CA 81-373 630 S.W. 2d 552

Court of Appeals of Arkansas
Opinion delivered March 31, 1982

*Bridges, Young, Matthews, Holmes & Drake,* for appellant.

*Dean A. Garrett,* for appellee.

DONALD A. CORBIN, Judge. The appellee, Gary L. Plunkett, was injured while employed by the appellant, International Paper Company, on February 9, 1980. Appellee reported to the mill's first aid station and was given first aid treatment and returned to work. Appellee was given additional first aid treatment over the next several days. During this time, he asked to see a physician on several different occasions. On February 12, 1980, he was referred to Dr. P. B. Simpson, a neurologist in Pine Bluff. He was treated by this doctor and released on February 29 with no limitations or permanent physical impairment rating. Ap-

pellee attempted work for a short period of time but continued to complain of pain. He was then referred to Dr. Robert R. Gullett, an orthopedic surgeon in Pine Bluff, on March 7, 1980. Dr. Gullett treated appellee for a few days and returned appellee to light duty work for two weeks and advised that at the end of this two week period, the appellee could resume full and normal activities. On March 5, 1980, appellee forwarded a written request to the Commission requesting authority to see a chiropractor. On March 12, 1980, he forwarded a second letter to the Commission amending his March 5 letter to request permission to be seen by Dr. Wilbur M. Giles, a neurosurgeon in Little Rock. Appellant responded with a letter to the Commission protesting the change because the appellee had been seen and treated at the expense of the appellant by two different physicians in Pine Bluff. On March 21, 1980, appellee was seen by Dr. Giles. Dr. Giles' initial report stated that he felt appellee had sustained a lumbosacral strain and mild cervical strain. He recommended that the appellee remain off work until May 1, at which time, appellee should be able to return to work. Appellee returned to Dr. Giles on April 30, complaining of low back pain, hip pain and occasional leg pain. Dr. Giles hospitalized appellee for more extensive therapy and a more detailed re-evaluation. He was also seen by a psychiatrist who felt that appellee was suffering from considerable difficulty with psychogenic overlay secondary to the back injury. Dr. Giles released the appellee from the hospital on May 22, 1980.

Appellee then saw Dr. Lester on May 23, 1980, who referred him to Dr. Jim J. Moore, a neurosurgeon in Little Rock. Dr. Moore evaluated appellee, hospitalized him, and ran numerous tests. The last report from Dr. Moore indicated that in his opinion the appellee sustained a musculoligamentis sprain and strain of his lower back with a probable cerebral concussion. Dr. Moore treated the appellee from June 22, 1980 through August 4, 1980. The appellee never filed a petition for change of physician pursuant to the requirements of Rule 21 for permission to see either Drs. Lester or Moore.

The Administrative Law Judge held that appellee was

temporarily and totally disabled from January 9 to February 4, 1980, and to a date yet to be determined. The Administrative Law Judge also ruled that the appellant should be liable for the medical treatments rendered by Dr. Wilbur Giles, Dr. Joe K. Lester and Dr. Jim J. Moore. By a two to one decision, with one concurring opinion and one dissent, the full Commission affirmed the decision of the Administrative Law Judge and adopted his findings of fact. The majority opinion concluded that: "Failure of appellant to provide prompt medical care and treatment by a physician may have prevented the underlying cause of the serious issues faced in this appeal from being discovered."

The Chairman of the Commission concurred in the majority opinion and stated the following:

> To me, perhaps the key factor in my resolution of this controversy in favor of the appellee is the appellant's three to four day delay in sending the appellee to a doctor following his injury despite his request to be seen by a doctor. While the appellee may very well have committed several violations of Commission Rule 21 in going to the various physicians he saw following his conditional release by Dr. Robert Gullett, I think that the appellant's initial reluctance to allow appellee to see a doctor operates in the nature of an estoppel to prevent appellant from asserting the defense of non-compliance with Rule 21.
>
> We reverse and remand.

Appellant contends the Commission erred in retroactively approving a change of physicians first to Dr. Giles and later to Drs. Lester and Moore. Appellant also argues there is no substantial evidence to support a finding of temporary and total disability after May 22, 1980.

The pertinent statutory section is Ark. Stat. Ann. § 81-1311 (Supp. 1979)[1] which provides in part:

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[1]This statute was amended by the Legislature through Act 290 of 1981.

> The Commission may order a change of physicians at the expense of the employer when, in its discretion, such change is deemed necessary or desirable. Upon notice of injury, the injured employee shall be furnished a copy of Commission Rule 21 and a copy of Section 11 of the Workers' Compensation Act. Subsequently, if the injured employee desires to change physicians pursuant to the rules, notice to this effect must be given to the employer. Any unauthorized medical expense incurred after receiving a copy of Rule 21 and a copy of Section 11 of the Workers' Compensation Act shall not be the responsibility of the employer unless the employee gives the employer prior notice of intent to change physicians pursuant to the rules and eventually obtains an order from the commission approving the change.

Rule 21 of the Rules of the Arkansas Workers' Compensation Commission provides:

> The employer and/or insurance carrier has the right and duty in the first instance to provide prompt medical care to injured employees through physicians and hospitals of the respondent's choice. A claimant, subsequently, may obtain a change in treating physicians to a physician of the claimant's choice, the cost of such treatment to be borne by the employer or employer's insurance carrier, provided (1) the claimant's healing period shall not have ended; (2) the claimant is not seeking to change physicians from one of his own choice, previously selected by the claimant; (3) the physician to whom the claimant wishes to change is qualified in a particular field of medicine needed for claimant's particular difficulty; (4) the claimant files with the commission a petition for a change of physicians, gives the name of the physician to whom he wishes to change and asserts that the physician to which he wishes to change is competent to treat his particular ailment; (5) no unresolved issue exists over whether claimant is legally entitled to medical care at the expense of respondents.

An employer might be estopped, under certain circumstances, from invoking Rule 21, however, we do not believe this to be a proper case for estoppel. Under the facts presented to this court, the appellee admittedly received copies of both Rule 21 and Section 11 of the Compensation Act on February 15, 1980. Further, appellee was obviously aware of the appropriate procedure required by Rule 21 because on not just one occasion, but twice, appellee directed letters to the Commission requesting first, care and treatment by a chiropractor and one week later, care and treatment by Dr. Giles, a neurosurgeon. Dr. Giles was a physician of the appellee's choice. The record reflects that the appellee has been seen and treated by as many as nine different physicians: Dr. P. B. Simpson, Jr., a neurosurgeon in Pine Bluff; Dr. Robert R. Gullett, an orthopedic surgeon in Pine Bluff; Dr. E. Frank Reed, an orthopedic surgeon in Pine Bluff; Dr. Fabar Carter, a general practitioner in Sheridan; Dr. Wilbur M. Giles, a neurosurgeon in Little Rock; Dr. Joe K. Lester, an orthopedic surgeon in North Little Rock; Dr. Jim J. Moore, a neurosurgeon in Little Rock; Dr. Jim Sims, a psychiatrist at the Baptist Medical Center; and Dr. Mallard or Ballard, a diagnostician in Little Rock. No reports or statements were offered from Dr. Carter, Dr. Reed, Dr. Sims or the diagnostician.

While the Commission has discretion in allowing a change in physician, the Commission clearly abused its discretion in the instant case. We would allow Dr. Giles to be paid and the appellee to be paid temporary total disability to May 22, 1980, the date he was released from the Baptist Medical Center by Dr. Wilbur M. Giles.

Additionally, we find no substantial evidence to indicate that the appellee is, or was, temporarily and totally disabled after May 22, 1980. None of the medical reports in the record indicate that appellee was unable to work after May 22, 1980.

We reverse and remand with directions to the Commission to enter an order in accordance with this decision.

Reversed and remanded.

Thomas R. FOSTER and Frances J. FOSTER
*v.* Leon WHITLOW

CA 81-277 630 S.W. 2d 559

Court of Appeals of Arkansas
Opinion delivered March 31, 1982

*Charles R. White,* for appellants.

*Gibbs & Hickam, P.A.,* by: *Gary R. Gibbs* and *D. Scott Hickam,* for appellee.

TOM GLAZE, Judge. The decisive issue in this appeal concerns whether the trial court erred by proceeding to trial of this cause before appellants' twenty days expired within which they had to respond to a counterclaim filed by appellee. The facts underlying this legal issue are not disputed.

On April 21, 1981, appellants filed a specific performance suit against appellee, alleging he should be directed to deliver a warranty deed to property sold to appellants pursuant to an oral contract of sale. On April 28, 1981, appellee filed an answer, denying such a sale and requesting the court to order appellants to vacate the premises since they had no legal or equitable interest in the property. The parties agreed to an early trial setting on April 30, 1981, but the trial judge became ill. The court rescheduled the date of trial to May 11, 1981.

After receiving notice of the new May 11 trial date, appellants promptly moved for a continuance, stating they would be out of state on vacation. The court denied appellants' motion. Appellants failed to appear in court on May 11, but their counsel did, renewing appellants' motion for continuance. The court again denied the motion, and after its ruling appellants' counsel moved to nonsuit their case. This request was granted.

Since appellants' complaint was nonsuited, this left pending only appellee's answer which also contained a prayer requesting the court to order appellants to be removed from the property. The court treated this answer, and the relief requested, as a counterclaim for ejectment or unlawful detainer. Appellants' counsel moved to transfer this remaining cause of action to circuit court, contending that appellee's ejectment or unlawful detainer action was cognizable solely in circuit court. The court denied this motion, and counsel for appellants again requested a continuance, this time contending he wanted his twenty days within which to respond to appellee's counterclaim. This motion was denied. The court proceeded to trial on the merits of the counterclaim which resulted in its decision, finding no enforceable contract of sale between the parties

and ordering appellants to deliver possession of the disputed property to appellee.

We believe the court erred in not permitting appellants twenty days in which to file their answer to appellee's counterclaim as provided by Rule 12 of the Arkansas Rules of Civil Procedure. The counterclaim was not filed until April 28, 1981, and although the record is not clear when appellants were served, the trial on the counterclaim occurred on May 11, 1981, or twenty days after appellants filed their complaint and only thirteen days after appellee's counterclaim was filed. Appellants admittedly agreed to an earlier trial date, *i.e.*, April 30, but this trial never took place. Perhaps, if it had, the parties could have formally joined issues and proceeded to trial even though time had not run for the filing of all pleadings, and particularly appellants' answer to appellee's counterclaim. Instead, the case was reset by the court to the May 11 date, but this later setting was never agreed to by appellants.

We have held that whether a motion for continuance should be granted is addressed to the discretion of the trial judge and his decision will not be overturned unless that discretion is manifestly abused. *Johnson* v. *Coleman*, 4 Ark. App. 58, 627 S.W. 2d 565 (1982). Moreover, we also pointed out in *Johnson* that an attorney's trial schedule conflicts and convenience must be subject to the convenience of the trial court in setting its trial or hearing docket. However, this does not mean that a trial court can set a trial date in a plenary proceeding, which would effectively cause a reduction in a party's time to file an answer. See *The Corner, Inc.* v. *State of Arkansas*, 257 Ark. 525, 518 S.W. 2d 506 (1975).

In *Corner*, the prosecuting attorney filed an action to have the court dissolve The Corner Corporation as a public nuisance. Three days later, the trial court proceeded to hear the cause over the corporation's objections that it was entitled to twenty days to file an answer. On appeal, the Supreme Court agreed with the corporation's contentions, stating:

> It was a plenary proceeding in which the State asked that the corporation be permanently and finally dissolved, presumably at a financial loss to its members. In such a proceeding, as in any other lawsuit, the statute allows the defendant 20 days in which to file an answer or other pleading. Ark. Stat. Ann. § 27-1135 (Repl. 1966). The cases uniformly hold that the courts cannot reduce the time allowed by the legislature for the filing of an answer.

In accordance with *Corner,* we conclude appellants are entitled to twenty days within which to respond to appellee's counterclaim. Appellants never waived this right although they may well have chosen to do so if the April 30 trial had been held. Appellants had filed no answer prior to the May 11 trial nor did the pleading filed by appellee indicate an answer was necessary. The pleading filed by appellee was styled "Answer," and it was not until the May 11 trial that it was decided the relief contained in the answer would be treated as a counterclaim. After the parties and the court reached this decision, the trial court, under the circumstances of this case, should have allowed appellants twenty days to answer.

We must briefly address another issue raised by appellants on whether appellee's cause of action should have been transferred to circuit court. Apparently, the parties and the court concluded that appellee stated sufficient facts in his answer to sustain an ejectment action. Our courts have held that in an action of ejectment the right of possession is a question triable at law. *Lockridge* v. *Johnson,* 108 Ark. 147, 157 S.W. 405 (1913), and *Brooks* v. *McGill,* 250 Ark. 534, 465 S.W. 2d 902 (1971). Appellee contends, however, that since appellants invoked the assistance of equity, they cannot now object to that jurisdiction unless the subject matter of the litigation is wholly without equitable cognizance. To this effect see *Spikes* v. *Hibbard,* 225 Ark. 939, 286 S.W. 2d 477 (1956), and *Arkansas State Highway Commission* v. *Rice,* 259 Ark. 190, 532 S.W. 2d 727 (1976).

Appellants' voluntary nonsuit of their specific performance action would not, of itself, affect the court's

jurisdiction as to appellee's counterclaim. See *Naylor* v. *Goza, Judge,* 232 Ark. 515, 338 S.W. 2d 923 (1960). We agree with appellee that it was appellants who initially selected equity as an appropriate forum. Therefore, we cannot accept appellants' position now that they are entitled to lift this cause from the court they asserted was the only one with sufficient jurisdiction to afford complete relief. Certainly, if appellee had objected to the court's jurisdiction due to his ejectment action, our decision, on the facts of this case, would be otherwise. However, both parties here sought equity jurisdiction to resolve their respective actions, and we know of no reason why the court cannot, under the "clean up doctrine," retain jurisdiction of appellee's cause so as to afford the parties whatever relief may be required. See *Arkansas State Highway Commission* v. *Rice, supra,* at 192-194.

We hold that the trial court correctly decided to retain jurisdiction of the cause, but we reverse and remand this case for a new trial since it erred in not allowing appellants their twenty days to file an answer.

Reversed and remanded.

MAYFIELD, C.J., and CRACRAFT and CORBIN, JJ., concur.

MELVIN MAYFIELD, Chief Judge, concurring. As the majority opinion sets out, on the morning of trial the appellants renewed their previous motion for continuance and when it was denied took a nonsuit on their complaint. The chancellor then treated a prayer in appellee's answer, requesting that the court remove appellants from the property, as a counterclaim for ejectment. Appellants then moved to transfer this remaining cause of action to circuit court and when that motion was overruled they again moved for a continuance asking for twenty days to respond to the counterclaim.

I agree with the majority that the trial court should have allowed appellants time to respond to appellee's counterclaim but I also think their motion to transfer to circuit court should have been granted.

When the complaint was nonsuited the only cause of action left was one for ejectment by a party holding legal title against a party in possession. In this situation *Brooks* v. *McGill,* 250 Ark. 534, 465 S.W. 2d 902 (1971) cited by appellants, very clearly holds that a party claiming under a legal title has a full and complete remedy at law against a party in possession and that chancery has no jurisdiction. A case cited in *Brooks* explains the matter this way:

> This court has held that equity jurisdiction to quiet title, independent of statute, can only be invoked by a plaintiff in possession holding the legal title. The reason is that, where the title is a purely legal one, and some one else is in possession, the remedy at law is plain, adequate and complete, and an action by ejectment cannot be maintained under the guise of a suit to quiet title. In such cases the party in possession has a constitutional right to a trial by jury. *Pearman* v. *Pearman,* 144 Ark. 528, 222 S.W. 1064; *Gibbs* v. *Bates,* 150 Ark. 344, 234 S.W. 175; and *Simmons* v. *Turner,* 171 Ark. 96, 283 S.W. 47.

*Jackson* v. *Frazier,* 175 Ark. 421, 424, 299 S.W. 738 (1927).

This has been the rule in Arkansas for more than one hundred years. In *Lawrence* v. *Zimpleman,* 37 Ark. 643 (1881), the court said:

> To obtain the relief sought, the plaintiff must be in possession when he brings suit, unless his title be an equitable one. A Court of Chancery is not the appropriate forum to try a purely legal title. The defendant, if he is in actual possession, is entitled to a trial by jury, unless there are peculiar circumstances bringing his case under some one of the recognized heads of equity jurisdiction.

And in *Ralston* v. *Powers,* 269 Ark. 63, 598 S.W. 2d 410 (1980), the court said:

> The equity jurisdiction to quiet title, independent of statute, can only be invoked by a plaintiff in possession,

> unless his title be merely an equitable one. The reason is that where the power is purely a legal one, and some one else is in possession, the remedy at law is plain, adequate and complete, and an action of ejectment cannot be maintained under the guise of a bill in chancery. In such case the adverse party has a constitutional right to a trial by jury.

*Ralston* goes on to say, "However, this jurisdictional requirement may be satisfied by a defendant in possession, even though the plaintiff is not, if the defendant affirmatively raises issues clearly cognizable in equity." The case of *Gibbs* v. *Bates,* 150 Ark. 344, 234 S.W. 175 (1921) cited by appellants, holds the same thing but the complaint was dismissed because neither it nor the answer set up a matter cognizable in equity. In regard to the answer, the court said:

> It is true that the defendant filed an answer setting up title in herself by adverse possession, but she did this by way of defense to the plaintiff's action, and did not ask affirmative relief for herself.

In the case of *Ark. State Hwy. Commission* v. *Rice,* 259 Ark. 190, 532 S.W. 2d 727 (1976) relied upon by the majority, the court cited a case where the defendant landowners had moved to transfer an eminent domain case from circuit to chancery alleging "a complete remedy cannot be obtained in law." The motion was granted and in chancery the defendant's motion to transfer back to law was denied. On appeal, the Supreme Court said, "It is our view that equity was definitely selected as an appropriate forum and the appellants are not now entitled to lift the cause from the court they asserted to be the only one with sufficient jurisdiction to afford complete relief."

As a matter of fact, *Rice* actually held that a chancery court judgment granting the appellant immediate possession of property sought by eminent domain was subject to collateral attack because the court lacked jurisdiction. In addition to the uncertainty cast by that case, the situation in the instant case, in my judgment, is not at all like the case quoted from in *Rice.* Here, the appellants, as they had the

right to do, have nonsuited the complaint they filed for specific performance. The only cause of action left is not cognizable in equity. We are today holding that this case should be remanded for a new trial. Surely it would not be wrong to order this matter transferred to law where appellants can have a trial by jury which the Supreme Court of this state has so long recognized is their constitutional right.

CRACRAFT and CORBIN, JJ., join in this concurrence.

Jerry Dale LLEWELLYN *v.* STATE of Arkansas

CA CR 81-151 630 S.W. 2d 555

Court of Appeals of Arkansas
Opinion delivered March 31, 1982

*William H. Craig* and *John H. Adametz, Jr.*, for appellant.

*Steve Clark*, Atty. Gen., by: *William C. Mann, III*, Asst. Atty. Gen., for appellee.

TOM GLAZE, Judge. Appellant urges two points for reversal of a jury verdict finding him guilty of possession of marijuana with intent to deliver. He contends: (1) It was error to permit a chemist to testify about the findings of another chemist who received and tested the suspected contraband in issue;[1] and (2) The evidence is not sufficient to support the verdict.

At trial, the State offered the testimony of the drug laboratory supervisor, a superior of the chemist who actually received and tested the substance. The supervisor testified about the regular practices and procedures used by other chemists in the laboratory. He admitted, however, that he was not present when the substance in this case was delivered to the Crime Laboratory. Nor did he have any personal knowledge of the receipt or testing of the substance. Appellant contends the supervisor's testimony was inadmissible hearsay and should have been excluded pursuant to Rule 803 (8) of the Uniform Rules of Evidence. We agree.

Rule 803 (8) in pertinent part provides:

> . . . The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; *(iii) factual findings offered by the government in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident;* and (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness. [Emphasis supplied.]

The record clearly reflects that the supervisor testified concerning factual findings of another chemist, whose findings were a direct result of the investigation of criminal

[1]Based on this testimony, the substance identified as marijuana was admitted into evidence. Appellant's argument also challenges the introduction of the substance.

charges filed against appellant. Indeed, these findings were offered by the State at his trial on these charges. We have no doubts that this testimony was excludable under Rule 803 (8) (iii) and (iv).

We find no Arkansas case which specifically construes or applies Rule 803 (8) (iii) and (iv) to a fact situation such as we have here.[2] However, the Court in *United States* v. *Oates,* 560 F. 2d 45 (2nd Cir. 1977), considered the comparable Federal Rule of Evidence when it decided a case which posed facts strikingly similar to those before us.

In *Oates,* the defendant was charged with possession of heroin with intent to distribute. At trial, the Government did not call the chemist who analyzed the substance. Rather, it relied upon the "business records exception" of Rule 803 (6) and introduced the chemist's reports and worksheets through the testimony of another Government chemist, who had no personal knowledge about the analysis in question. In an extensive, well-reasoned opinion, the appellate court held the chemist's reports were hearsay and were ineligible to qualify for any exception to the hearsay rule. Specifically, the Court characterized the chemist's reports and worksheets as "factual findings resulting from an investigation made pursuant to authority granted by law," and, in doing so, it held the documents inadmissible under Rule 803 (8) (B) of the Federal Rules of Evidence. The appellate court also rejected the Government's contention that Rule 803 (24) was authority for the admissibility of such documents, an argument the State urges in the case at bar as well.

We believe the Court in *Oates* was correct in its construction and application of Rule 803 (8) (B) as well as its consideration of the other Federal Rules dealing with hearsay exception. Our study of Arkansas' Rule 803 (8)

[2]Our courts on two occasions have considered Rule 803 (8) insofar as it excludes reports of the police or other law enforcement personnel. In both instances, the reports were held inadmissible hearsay. See *Wallin* v. *Insurance Company of North America,* 268 Ark. 847, 596 S.W. 2d 716 (Ark. App. 1980), and *Poole* v. *State,* 262 Ark. 4, 552 S.W. 2d 647 (1977) (Supreme Court excluded testimony of State investigators who were not sufficiently familiar with records about which they testified).

reveals that we have adopted a much more detailed and restrictive version of the comparable Federal Rule. In view of these added restrictive provisions to Arkansas' Rule 803 (8), particularly items (iii) and (iv), we are compelled to hold the trial court erred in admitting the supervisor's testimony concerning the factual findings contained in another chemist's report.

In reaching our decision, we also find no merit in the State's argument that the supervisor's testimony was admissible under Rule 803 (24) of the Arkansas Uniform Rules of Evidence. As we previously noted, this contention was rejected by the court in *United States* v. *Oates, supra,* and we do so here. We are unable to accept the argument that the supervisor's testimony is entitled to any additional guarantees of trustworthiness, especially in view of the undisputed fact that he has no personal knowledge of the drug tests which were relevant and necessary to the presentation of the State's case against appellant. Regardless of how trustworthy the supervisor may be in relating general procedures in their handling such matters, the appellant is still denied his right to confront and cross-examine the witness who had personal knowledge of the drug tests conducted in this case.

The State next argues that even though the supervisor's testimony may be inadmissible, the other evidence presented by the State at trial was sufficient to establish that the substance involved was marijuana. Thus, disregarding the testimony pertaining to the drug tests and the chemist's findings, the State contends there is substantial evidence to support the verdict. At the same time, appellant contends the State's evidence is not sufficient to support the verdict.

On appellate reivew, when a challenge is made to the sufficiency of the evidence, it is only necessary to ascertain the evidence which is most favorable to the State. If there is any substantial evidence to support the verdict, we affirm. *Hughes* v. *State,* 3 Ark. App. 275, 625 S.W. 2d 547 (1981), and *Lunon* v. *State,* 264 Ark. 188, 569 S.W. 2d 663 (1978). Substantial evidence must be forceful enough to compel a conclusion one way or the other beyond suspicion or

conjecture. *Jones* v. *State,* 269 Ark. 119, 598 S.W. 2d 748 (1980).

From the record we find the State's confidential informant and a law enforcement officer negotiated a sale and purchase of marijuana with a man named Johnny Miller. Although appellant did not personally participate in the discussion or negotiation of the proposed sale, he appeared but remained in Miller's van while Miller departed the van to discuss this drug deal with the informant and officer. The officer agreed to buy twenty pounds of marijuana from Miller, and Miller agreed to deliver it in his van. At the prearranged time and place of delivery of the marijuana, Miller met with the officer and informant. He got out of the van and then advised the officer that he could purchase fourteen pounds of marijuana for $2,500. The officer agreed to the price and quantity. Then Miller advised the officer he needed help to load the marijuana, and apparently the informant agreed to assist. Miller and the informant got in the van and left. The appellant was not seen in the van at this time.

Approximately ten minutes later, Miller reappeared driving his van, and the officer observed the appellant in the front passenger seat. Miller got out of his van carrying a paper sack to the officer and then told the officer, "There's fourteen of them." The officer opened the bag and saw a green vegetable material which appeared to be marijuana. The officer then stated he wanted to see the rest of it and Miller informed him it was in the van. The officer testified that when he opened the doors to the van, he detected a strong odor of what he thought was marijuana. The officer also saw a third person in the van who was in the possession of a Remington model 1100 shotgun. After the officer viewed other bags of marijuana in the van, he signaled to other police officers who were monitoring the sale. After shots were fired and a skirmish ensued, the appellant, Miller, and the third person in the van were arrested. The officer who was involved in the sale then proceeded to package fourteen bags containing the vegetable material he identified as marijuana. He testified he placed the bags in a large sack and

personally took them to the Arkansas State Crime Lab for analysis.

We find the foregoing evidence is sufficient to establish the elements of unlawful possession of a controlled substance with the intent to deliver. These elements may be established by circumstantial as well as direct evidence. *Cary* v. *State,* 259 Ark. 510, 534 S.W. 2d 230 (1976). Moreover, neither exclusive nor physical possession is necessary to sustain a charge if the place where the offending substance is found is under the dominion and control of the accused. In so holding, the court in *Cary,* quoting from *People* v. *Williams,* 95 Cal. Rptr. 530, 485 P. 2d 1146 (1971), said:

> *** Constructive possession occurs when the accused maintains control or a right to control the contraband; *possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another.* [Emphasis supplied and citation omitted.]

In sum, appellant was present at the time the sale was negotiated and when the substance was delivered. Immediately before Miller delivered the substance, he told the officer he needed help in loading the marijuana. When the substance was delivered, the officer said that Miller gave him a bag with green vegetable material which appeared to be marijuana. The officer then opened Miller's van, detected a strong odor of what he thought to be marijuana and later packaged fourteen bags of the vegetable material. Even though appellant was present during all these events, he claims the evidence is insufficient to show he was not an active participant in the offense charged. We simply cannot agree.

We see little difference in the facts here to distinguish this case from *Hartman* v. *State,* 258 Ark. 1018, 530 S.W. 2d 366 (1975). In *Hartman,* the defendant never talked to the police officers, drove either of the cars involved or transferred the marijuana from one car to the other. The evidence

showed the defendant was present on two occasions when a codefendant participated in the drug deal with the officers. This was held sufficient evidence from which the trial court, the trier of facts, could reasonably infer that the defendant was an active participant in the alleged offense.

The evidence, both direct and circumstantial, also establishes appellant and Miller were in the van which contained the contraband, and it was reasonable for the jury to infer they had joint dominion and control of the marijuana. There is no doubt that the officer was competent to testify to his aural and visual identification of the green vegetable material which was confiscated. See *Milburn* v. *State,* 262 Ark. 267, 555 S.W. 2d 946 (1977), and *Moser* v. *State,* 262 Ark. 329, 557 S.W. 2d 385 (1977). Moreover, Miller, only ten minutes before he returned with the green vegetable material in his van, told the officer that he needed help to load the marijuana. This statement and others made by Miller in the course of the transaction were admissible as being statements of a co-conspirator. See *Foxworth* v. *State,* 263 Ark. 549, 566 S.W. 2d 151 (1978). We believe the evidence was more than sufficient to support the jury's verdict.

Although we conclude there was sufficient, competent evidence to sustain the verdict, we can only speculate as to whether the inadmissible evidence introduced through the chemist influenced the jury's decision. For instance, whether the officer's identification of the vegetable material as marijuana was bolstered by the chemist's testimony, we cannot say with any degree of confidence. The rule is that error in the trial is presumed to be prejudicial unless it is affirmatively shown otherwise. Here, we cannot conscientiously say that the chemist's testimony had no prejudicial effect upon the jury's consideration of the case. Consistent with our decision in *Vowell* v. *State,* 4 Ark. App. 175, 628 S.W. 2d 599 (1982), we reverse and remand this cause for a new trial.

Reversed and remanded.

CLONINGER, J., would affirm.

Gerald Dean McCLUSKEY and Evelyn McCLUSKEY
*v.* Joyce KERLEN

CA 82-124 631 S.W. 2d 18

Court of Appeals of Arkansas
Opinion delivered April 2, 1982

*David M. Clark,* for appellants.

*J. T. Skinner,* for appellee.

PER CURIAM. On August 31, 1981, the Probate Court of

Jackson County entered a decree in which the appellants adopted a minor child, Gerald David McCluskey, who had been delivered to them at birth by the appellee, Joyce Kerlen, his natural mother. On March 9, 1982, the court entered an order setting aside the decree of adoption and awarding custody of the minor to the appellee. On that same day the appellants filed a motion in the probate court praying an order staying the execution of the custodial order pending a determination on appeal. There is no order in the record indicating that motion has been acted on by the trial court. On March 15, 1982, this case was docketed in the Court of Appeals. On March 25, 1982, the appellants filed with this court an application for an order staying the custodial order of the probate court pending the outcome of their appeal.

In *Goodin* v. *Goodin,* 240 Ark. 541, 400 S.W. 2d 665 (1966) the Supreme Court declared that a trial court has a right to fix custody during the pendency of an appeal and that there is no absolute right to a supersedeas in child custody cases. We do not depart from that declaration. However, once an appeal has been docketed in this court our jurisdiction attaches and we may, in a proper case, direct that the order of the trial court be stayed pending a final determination on appeal. Rule 8, Arkansas Rules of Appellate Procedure. The better practice in such cases is that the motion to stay the order changing custody pending an appeal should be first addressed to the trial court. If that stay is denied, the trial court should state his reasons for denial in order that on a subsequent motion to stay the order made to the appellate court, due weight may be given to the trial court's determination.

In this case, although a motion to stay the custodial order was filed in the trial court, it was not acted on by that court and no reasons for a denial thereof are therefore before us. The record discloses that the appellants have cared for this child since birth, are fit and proper persons and there is no indication of imminent danger to the child should this stay be granted. The record also reflects that the natural mother has never seen the child nor provided for its care. In these peculiar circumstances we conclude that where custody of a minor infant is to be removed from those with

whom he has lived all of his life and there is no indication that imminent danger to the child's welfare would result, a stay order ought to be entered maintaining the status quo in order that the parental rights to review can be preserved without unnecessary emotional cost to the child.

The clerk of this court is therefore directed to issue a stay order pursuant to Rule 8 (b), Arkansas Rules of Appellate Procedure, upon the filing with her of a bond in the amount of $5,000 conditioned as provided in Rule 8 (b), and further conditioned that the appellants will not remove the child from the State of Arkansas during the pendency of this appeal and that they will indemnify and hold the appellee harmless from any and all consequences of their failure to perform the orders of the court as finally determined on this appeal.

CORBIN and GLAZE, JJ., concur.

MAYFIELD, C.J., dissents.

TOM GLAZE, Judge, concurring. I concur in the result reached by the majority court. Pursuant to Rule 8 of the Rules of the Supreme Court and Court of Appeals, there is no question that once an appeal has been docketed in our court, we may stay a trial court's order pending a final determination on appeal. In custody cases, our appellate courts have been reluctant to stay chancery proceedings. See *Goodin* v. *Goodin,* 240 Ark. 541, 400 S.W. 2d 665 (1966). We most often defer to the chancellor's superior position to decide parents' custodial rights to children since the trial judge can weigh credibility and the demeanor of the witnesses. Importantly, the court retains continuing jurisdiction in these chancery actions so where substantial changes in circumstances exist, the trial judge may change his custodial order if he determines it is in the best interest of the children. This simply is not true in adoption proceedings.

In adoption proceedings, the probate court is requested to establish a legal relationship between the adopting parents and the child or children to be adopted. Possessory

custodial rights awarded by a probate court are only incidental to the establishment of parental rights under our Revised Uniform Adoption Code. Additionally, the legal rights of the natural parents are terminated at the same time. Once a final decree is entered, the court does not retain continuing jurisdiction to modify possessory custodial rights when changes of circumstances occur in the future. To emphasize the obvious, there is a marked difference in custody and adoption proceedings.

Since adoption proceedings have a finality that is not characteristic of custody actions, I believe this factor alone is sufficient to view this appeal in a different manner than if we were considering an appeal from a custody order. Moreover, the underlying difference in the nature of the two actions also dictates that we review this cause from a different perspective. For instance, the normal set of facts in custody actions involve a dispute between natural or adoptive parents who have had contact with their child. Here, however, appellants are the only parents this minor child has ever known, but appellants were never related to the child except by virtue of the lower court's decree of adoption. This infant child was delivered to appellants at the time of birth, and the natural mother, appellee, has not seen him since that time. In my opinion, these facts alone warrant a stay of the lower court's order pending this appeal. Suffice it to say, that the trial court, in its decision to set aside its prior decree of adoption in favor of appellants, made no findings that the best interests of the minor child dictated the child be placed with appellee. The only basis for setting aside the adoption decree was the court's finding that appellee did not give a "knowing consent" to the adoption. After a review of the record before us, I agree with the majority that maintaining the status quo in this cause will minimize the emotional trauma this infant will face during the pendency of this adoption proceeding on appeal. Obviously, it is in the best interest of this baby to change hands between the warring parties as few times as possible.

This matter has been somewhat complicated by the fact that during oral argument before this court the parties' attorneys noted that the trial court presently has scheduled a

hearing for April 5, 1982, to determine whether appellants are in contempt of the trial court's order and to consider their application to that court for a stay of the court's order. Although the record is silent on the subject, it was suggested by counsel that appellants may be in hiding until our court decides whether to stay the lower court's order. Of course, when this appeal was docketed, our court obtained jurisdiction to grant appellants' motion for a stay. Nevertheless, the contempt proceeding is apparently still scheduled.

One of my colleagues dissents from this court's decision to stay the court's order and in a written opinion, he contends that our court should reinvest jurisdiction with the trial court. This would, I suppose, permit that court to consider the appellants' stay motion. At the same time, he believes we should also direct the trial court to defer any contempt hearing for a period of fifteen days after that court enters its order on the application for stay. I strongly disagree that such a procedure should be followed.

First, counsel for both parties indicated during oral argument that the trial judge had already summarily denied the granting of applicants' motion for a stay. It would be a useless act for us to defer this matter to the trial court for this purpose, nor do I think it is otherwise required by law. Secondly, I do not believe that we have any legal authority to prohibit a trial court from conducting a contempt hearing under the circumstances of this case. Whether appellants have violated a court order is a matter which must be addressed by the trial court, and we are in no position to interfere with that proceeding. The only issue we have before us at this time is whether the prior court's order setting aside its adoption decree should be stayed. If a contempt hearing is held and the trial court affirmatively disposes of the contempt issue, either or both of the parties may then choose to appeal that decision. But until then, this court has no jurisdictional authority to intervene in the trial court's hearing concerning an issue which has not yet been reached or decided by the lower court.

The dissenting opinion also voices a concern that the appellants and the minor child could end up in jail. Under

the present state of this case, I find it most difficult to believe this can occur. Since we have stayed the lower court's order, civil contempt is no longer an issue. On the other hand, if appellants are found in criminal contempt of the court's order, they have a right to appeal and post a supersedeas bond pending that appeal. I do not believe we should anticipate or pre-judge what may occur at any future hearing to be held by the trial court. Regardless of what occurs, the parties have available remedies which they may pursue to alleviate incarceration pending appellate review of any decision rendered at a contempt proceeding.

The manner in which the majority proposes to handle this cause on appeal protects the interests of the appellants and appellee and at the same time recognizes the best interests of the eleven month old baby boy. Under the procedure proposed by this court, the parties may raise and argue each issue as it arises. We may then consider each legal question posed and decide the relative rights of the parties in a calm and deliberate manner.

I am authorized to state that Judge CORBIN joins in this concurring opinion.

MELVIN MAYFIELD, Chief Judge, dissenting. On March 25, 1982, the above named appellants filed a motion in this court asking that a judgment of the Probate Court of Jackson County be stayed pending the decision of the merits of the appeal in this matter.

On March 31, 1982, a hearing was had on that motion and the matter was argued by the attorneys on both sides.

Today this court has granted the appellants' motion. I do not agree to this action of the court because (1) the motion should first be passed upon by the trial court, (2) the action of this court can have an unhappy practical effect, and (3) the action of this court will compound the problem that exists in this matter.

This case involves the adoption and custody of an eleven-month-old baby boy. The child's natural mother

executed a consent to adoption on the day the child was born and the appellants have had custody of the child since that day. Appellants filed a petition for adoption and obtained a temporary decree on August 31, 1981, but on October 28, 1981, the natural mother filed a motion to withdraw her consent. On March 8, 1982, the probate court heard the mother's petition to withdraw consent and held that it was not knowingly executed. The court's order also awarded immediate custody and control of the child to its mother. This order was filed of record on March 8, 1982, and on the same day a motion was filed by the appellants asking that the probate court stay the enforcement of its order pending the decision of the merits of the case on appeal.

No order has been filed in this court reflecting a decision by the probate court on the motion for stay filed in that court. It is alleged by the appellants that the probate court "summarily" denied the application for stay. At the hearing before this court the attorney for the natural mother filed a response in which it was alleged that the probate court has set a hearing for next Monday, April 5, 1982, to determine whether or not appellants are in civil contempt of that court and to consider their application to that court for a stay of its judgment.

In my view, this court should today enter an order directing the Probate Court of Jackson County to have a hearing on the appellants' application to that court for a stay of its judgment and in order to eliminate any doubt of the authority of that court to have the hearing, our order should specifically invest that court with such authority. Our order should also direct the probate court to set out its findings of fact and conclusions of law in its order and should direct the probate court to defer any contempt hearing for a period of 15 days after that court enters its order on the application for stay so that either party may have an opportunity to ask us to review the court's order on the stay before any contempt hearing.

If this procedure is followed, we can pass upon the propriety of the probate court's action. We need to have that court's findings before us before we decide whether or not its

judgment should be stayed. As matters now stand, this court is granting a stay without benefit of the findings of the trial court which heard this matter and which may know more about it than we do.

Secondly, by granting a stay of the probate court's judgment with regard to custody of the child without also staying that court's contempt hearing, the practical effect may be that the court will put the adoptive parents in jail for not obeying an order that should have been stayed and, by this court's authorization to those parents to continue in custody of that child, it logically follows that the child could be placed in jail with his adoptive parents.

In the third place, the procedure I suggest is, in my view, the procedure that should have been followed to begin with and without requiring it to be done in this way, we are tacitly approving the reoccurrence of this same situation in similar matters in the future.

Shirley PRICE *v.* DIRECTOR OF LABOR

E 81-242 631 S.W. 2d 22

Court of Appeals of Arkansas
Opinion delivered April 7, 1982

Appellant, *pro se.*

*Thelma Lorenzo,* for appellee.

MELVIN MAYFIELD, Chief Judge. This is an appeal from the denial of unemployment benefits. The denial was based on Section 4 (c) of the Employment Security Law, Ark. Stat. Ann. § 81-1105 (c) (Repl. 1976), which provides that an unemployed claimant must be available for suitable work in order to be eligible for benefits. Specifically, it was found that claimant had unduly restricted her availability for work by the amount of her wage demand. We affirm.

The claimant lives near Conway, Arkansas. She has been working for the Internal Revenue Service in Little Rock on a "call as needed" basis since September of 1977. She is generally called to work in the fall and works through the tax season. She has done no other work during the last three years except to work occasionally for the Census Bureau or to do substitute teaching.

Her pay at IRS is about $6.80 per hour and if she were employed on a full-time basis that would amount to $15,000.00 per year. In past years she has worked as an executive secretary and has done personnel, accounting, and general office work. She has tried to find full-time work in the Conway area and wants $12,000.00 per year.

This is claimant's second appeal to this court. The last appeal was from the denial of benefits for the period from September 5, 1980, to November 10, 1980. That claim was also denied because the Board of Review found claimant unduly restricted her availability by the amount of her wage demand. We reversed that decision and allowed benefits. *Price* v. *Everett,* 2 Ark. App. 98 (1981). That opinion points out that the best full-time job opportunity claimant had

during the period off work was at a 50% reduction in pay. The opinion says:

> If the claimant could have found employment to which her training and experience entitles her, with appropriate salary, she should have been granted a reasonable opportunity to make that quest. . . . As the period of unemployment continues, a job offer at a salary lower than the claimant earned previously may become suitable, even though the lower salary may not have been suitable at the time the claimant first became unemployed. Thus, after a period of fruitless searching for a job, it may then be reasonable for the Board to expect the claimant to moderate her salary expectation.

After the period of unemployment involved in that case ended on November 10, 1980, the claimant worked until April 17, 1981, when she was again laid off. She filed for benefits on April 24 and the period involved in this claim is from that date to the date of the Appeal Tribunal's hearing on June 2, 1981.

The claimant testified she expected it would be September before she would be called back by IRS. She said they had recently called her about a temporary job at less pay but she was not interested because she wanted something permanent. She probably could have gotten a job in the Conway area at $7,000.00 per year but said, "I can work half a year in Little Rock and make $7,000.00 so it would be stupid to take a job for $7,000.00 working 12 months out of a year. . . . " She also said the IRS needed full-time employees but there was a freeze on hiring and they had not had a full-time job open in two years.

An Employment Security Division specialist in the Conway office testified that most of the clerical jobs in that area would average $8,200.00 to $9,000.00 per year and most of the starting jobs in general factory production work would be between $9,000.00 and $10,500.00. He said "occasionally when we do get listings for personnal assistance and so on like that, those salary ranges would usually be in the neighborhood of $12,000.00."

The first appeal was concerned with a period prior to November 10, 1980, and we thought claimant should not be denied benefits because of her salary requirement for the work she had been seeking. But we made it clear that "after a period of fruitless searching" she reasonably could be expected "to moderate her salary expectation." In April of 1981, she again became unemployed and again had to be available for suitable work in order to be eligible for unemployment benefits. The record is clear, however, that her salary requirement was not moderated.

The issue presented is one of fact and under the law it is our duty to affirm the decision of the Board of Review if it is supported by substantial evidence. Based upon the evidence in this case and upon our decisions in the similar cases of *Eubanks* v. *Daniels,* 267 Ark. 888, 591 S.W. 2d 673 (Ark. App. 1980), *Sanders* v. *Daniels,* 269 Ark. 672, 599 S.W. 2d 770 (Ark. App. 1980), and *Wacaster* v. *Daniels,* 270 Ark. 190, 603 S.W. 2d 907 (Ark. App. 1980), we affirm.

Sue PROSSER *v.* William F. EVERETT, Director of Labor, and ROSEBURG PUBLIC SCHOOLS

E 81-364 631 S.W. 2d 24

Court of Appeals of Arkansas
Opinion delivered April 7, 1982

Appellant, *pro se.*

*Thelma Lorenzo,* for appellee.

JAMES R. COOPER, Judge. The appellant was a school teacher in the Fort Smith Public Schools. During the 1980-81 school year, the appellant moved to Oregon to accompany her spouse to a new residence. She obtained employment there as a substitute teacher and finished the school year in that capacity. At the end of that school year, she moved from Roseburg, Oregon to Antioch, California, again to accompany her spouse. The record indicates that she has actively sought work as a school teacher in California, but that at the time of this hearing, she was still unemployed.

The Board of Review decided that appellant had "a reasonable assurance of performing services in the second academic year or term", and held that she was ineligible under Ark. Stat. Ann. § 81-1105 (g) (Supp. 1981). That section of the Act provides:

> (1) With respect to service performed in an instructional, research, or principal administrative capacity for an educational institution, benefits shall not be paid based on such services for any week of unemployment commencing during the period between two [2] succesive academic years, or terms, or, during a similar period between two [2] regular but not successive terms, or during a period of paid sabbatical leave provided for in the individual's contract, to any individual if such individual performs such services in the first of such academic years or terms and if there is a contract or a *reasonable assurance* that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms, and (2) With respect to services performed in any other capacity for an educational institution (other than an institution of higher education as defined in subsection 2 (t) [§ 81-1103 (t)], benefits shall not be paid on the basis of such services to any individual for any week which commences during a period between two [2] successive academic years or terms if such individual performs such services in the first of such academic

> years or terms and there is a *reasonable assurance* that such individual will perform such services in the second of such academic years or terms, and (3) With respect to any services described in paragraph (1) or (2), compensation payable on the basis of such services shall not be payable to any individual for any week which commences during an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation or holiday recess, and there is a *reasonable assurance* that such individual will perform such services in the period immediately following such vacation period or holiday recess. [Emphasis added].

The evidence shows that appellant had worked in an educational institution during the 1980-81 school year, and that she was seeking employment in California as a school teacher. It does not show that she had a contract to teach in the next school year, or that she had a promise of such a contract.

Thus, the only basis on which she could be disqualified was the Board's finding that she had a "reasonable assurance" of teaching school in the next school year. There is no evidence whatsoever to support such a finding. The most that can be said is that appellant was seeking such employment, and hoped to obtain it.

Employment Security Division, Regulation No. 24, provides:

> That "reasonable assurance" means a written, verbal or implied agreement.[1]

The facts of this case clearly show that, under the Director's definition of "reasonable assurance", appellant was entitled to benefits. There is no evidence which shows that the appellant had a "written, verbal or implied agreement" to teach school in the 1981-82 school year.

[1]Regulation No. 24 was adopted January 1, 1978, and amended October 1, 1981.

We hold that, on these facts, appellant had no "reasonable assurance" that she would perform the services of a school teacher in the 1981-82 school year, and that she is eligible for benefits. The decision of the Board of Review is reversed, and the case remanded for the entry of an order allowing appellant all the benefits to which she is entitled under the Act and this opinion.

Reversed and remanded.

Michael STUART *v.* William F. EVERETT, Director of Labor and STERLING STORES

E 81-220 631 S.W. 2d 25

Court of Appeals of Arkansas
Opinion delivered April 7, 1982

*Sandra A. DeBoer* and *Katherine D. Ehrenberg,* Central Ark. Legal Services, for appellant.

*Gary W. Williams,* for appellees.

DONALD A. CORBIN, Judge. In this unemployment compensation case the Board of Review held that appellant, Michael Stuart, was disqualified from receiving benefits

because he had voluntarily and without good cause connected with the work left his last work. We reverse.

Appellant had been employed at Biomedics Laboratory for six years prior to his termination on March 3, 1981. He was office manager at Biomedics and his annual salary was $11,700 at the time his employment terminated. He applied for unemployment benefits on March 6, 1981. The record reflects that appellant was not given any information regarding his rights and duties under the Arkansas unemployment compensation law at that time. On March 13, 1981, ten days after his employment terminated at Biomedics, appellant obtained employment with the Sterling Stores warehouse as a laborer earning $3.75 per hour. This job basically involved manual labor. Although the record is not entirely clear, it appears that appellant first saw a slide presentation setting forth his rights to benefits on March 19th and received a benefits pamphlet on April 28, 1981. On April 7, 1981, he terminated his employment with Sterling Stores. Appellant renewed his initial claim for unemployment compensation benefits and, on May 1, he was informed that his request was denied because of disqualification under Section 5 (a) of the Arkansas Employment Security Act, Ark. Stat. Ann. § 81-1106 (a) (Supp. 1979). The Appeal Tribunal and the Board of Review affirmed the agency's decision.

Section 5 (a) of the Arkansas Employment Security Law provides that an individual shall be disqualified for benefits "if he voluntarily and without good cause connected with the work, left his last work." Section 5 (c) (1) [Ark. Stat. Ann. § 81-1106 (c) (1) (Repl. 1976)] provides as follows:

> In determining whether or not any work is suitable for an individual and in determining the existence of good cause for voluntarily leaving his work under subsection (a) of this section, there shall be considered among other factors, and in addition to those enumerated in paragraph (2) of this subsection, the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, the length of his unemployment, his pros-

> pects for obtaining work in his customary occupation, the distance of available work from his residence and prospects for obtaining local work.

The appellant contends that he should not be penalized by disqualification from benefits for attempting work which was not suitable to his abilities and background.

Appellant stated at the hearing that he had taken the job as a laborer because he was "unemployed and needed a job". The thrust of appellant's testimony at the hearing was to the effect that he had immediate financial burdens to meet and he did not realize that he would have a reasonable amount of time to look for work commensurate with his skills and prior experience. Appellant indicated that he quit his employment with Sterling Stores after three and one-half weeks because "the job was more than I could handle, I had never done work of that sort before."

In *Oxford* v. *Daniels,* 2 Ark. App. 200, 618 S.W. 2d 171 (Ark. App. 1981), this court stated as follows:

> The appellant should not be penalized because he made a mistake and accepted a job for which he was unsuited. It is evident that he accepted the job in good faith, hoping that he could handle it . . . .

This court in *Oxford* v. *Daniels, supra,* cited with approval the New Jersey case of *Wojcik* v. *Board of Review,* 58 N.J. 341, 277 A. 2d 529 (1971). In *Wojcik* v. *Board of Review, supra,* the court stated:

> It is clear that one need only apply for and accept suitable work. . . . It is equally clear that in the present case Wojcik could have refused the work at Union Carbide as not being "suitable." It involved a substantial reduction from his "prior earnings" and was totally inconsistent with his "prior training" and "experience." . . . The question is whether a person who takes work he is not required to take should suffer the loss of unemployment benefits when he is unable to cope with that work. We do not believe he should. . . .

> We do not believe a person should be penalized for so laudable an effort. . . . It is well known that today many highly trained persons are unable to find work in their own fields because of economic factors beyond their control. If they are to work at all, many must experiment in new areas which are not "suitable" under the statute. They should be given a reasonable time to measure their ability to cope with their new work, and to reapply for benefits if they cannot.

We concur in the reasoning in *Wojcik* v. *Board of Review, supra,* and this case is reversed and remanded for the Board of Review to award benefits to appellant.

Reversed and remanded.

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

MELVIN MAYFIELD, Chief Judge, dissenting. My disagreement with the majority is with the facts involved in this case, not with the law.

The majority opinion says that claimant quit his job because it was more than he could handle. The claimant's testimony in that regard was that the work caused him to have headaches but his doctor did not tell him that his headaches were job related and his doctor did not advise him to quit.

The duties of the job were in evidence and the issue presented was a question of fact for the board, not us, to decide. In *Harris* v. *Daniels,* 263 Ark. 897, 567 S.W. 2d 954 (1978), the Arkansas Supreme Court said:

> Even though there is evidence upon which the Board of Review might have reached a different result, the scope of judicial review is limited to a determination whether the board could reasonably reach its results upon the evidence before it and a reviewing court is not privileged to substitute its findings for those of the board even though the court might reach a different conclu-

sion if it had made the original determination upon the same evidence considered by the board.

I would affirm the decision of the Board of Review.

CRACRAFT, J., joins in this opinion.

William B. MORRISON and Denise MORRISON
*v.* FIREMEN'S INSURANCE CO. OF NEWARK,
NEW JERSEY

CA 81-269 631 S.W. 2d 310

Court of Appeals of Arkansas
Opinion delivered April 14, 1982

*Faulkner, Goza & Rollins,* by: *V. Benton Rollins,* for appellants.

*Laser, Sharp & Huckabay,* for appellee.

JAMES R. COOPER, Judge. Appellants were the owners of a residence in Camden, Arkansas, which residence was insured against various perils under a policy issued by appellee. Appellants filed a claim for damages allegedly caused by a hailstorm. Appellee denied the claim, and appellants filed suit, seeking to recover their damages, plus penalty and attorney's fees. The jury returned a verdict in favor of appellee, and appellants have appealed to this Court, alleging that the trial court erred in allowing the admission of certain photographs into evidence.

The photographs complained of were admitted during the testimony of a witness for appellee, an insurance adjuster. He testified that he had found no hail damage to appellants' roof, and he attempted to explain what he looked for when he tried to determine if a roof had been damaged by hail. Photographs of a similar roof were offered in evidence, and the witness testified that the pictures showed the type of damage he was testifying about.

The trial court ruled that the pictures were admissible. He instructed the jury that they were admissible only for the purpose of " . . . aiding you in understanding this witness' testimony as to his opinion and his explanation as to what he looked for in hail damage and what he found in this particular roof at Fort Smith and that this is the kind of thing that he views as hail damage, . . . " The trial court further instructed the jury that it should keep in mind that the pictures did not depict the appellants' roof, and that the conditions under which the damage occurred might be different.

Appellants argue that these photographs created a false impression in the mind of the jury, or that it could have created the impression that unless the appellants' roof resembled the roof in the pictures, it could not have been damaged by hail. They argue that the trial court erred in

allowing the photographs into evidence, since the appellee failed to show that the two roofs were similar and that the two hailstorms were similar.

Had the trial court admitted the photographs into evidence for the purpose of comparing the damage done to appellants' roof with that shown in the photographs, then we might very well agree with appellants. *See, Houston General Ins.* v. *Arkansas Louisiana Gas,* 267 Ark. 544, 592 S.W. 2d 445 (1980). However, that is not the question in this case. The trial court limited the purpose for which the jury could use the photographs, and, therefore, the issue before us is whether the trial court abused his discretion in admitting the photographs for the limited purpose of assisting the jury in understanding the adjuster's testimony.

Generally, all relevant evidence is admissible. Uniform Rules of Evidence, Rule 402, Ark. Stat. Ann. § 28-1001 (Repl. 1979). However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of confusion of the issues or misleading the jury. Uniform Rules of Evidence, Rule 403, Ark. Stat. Ann. § 28-1001 (Repl. 1979). An appellate court will not reverse a trial court's ruling on relevancy, unless it finds an abuse of discretion. *Hamblin* v. *State,* 268 Ark. 497, 597 S.W. 2d 589 (1980).

The photographs were explanatory or illustrative of relevant testimony in the case, so as to be of potential help to the jury in understanding the oral testimony of appellee's witness. Therefore, the trial court was correct in admitting the photographs for that limited purpose. *See,* 3 J. Wigmore, Evidence § 790-792 (Chadbourn rev. 1970).

Affirmed.

GLAZE, J., not participating.

MAYFIELD, C.J., concurs.

WALT BENNETT FORD, INC. *v.* Everlener DYER

CA 81-325 631 S.W. 2d 312

Court of Appeals of Arkansas
Opinion delivered April 14, 1982

*Gill, Skokos, Simpson, Buford & Owen,* by: *William L. Owen,* for appellant.

*Judson C. Kidd,* for appellee.

JAMES R. COOPER, Judge. This is an action for breach of contract. On May 23, 1979, appellee purchased a used 1978 Ford automobile from appellant for the sum of $5,895.00. After trade-in allowance and a cash down payment, the balance due per the contract was $4,200.00. The retail purchase order and financing statement show that no taxes were included in the cash price. Appellee attempted to license the automobile some time later, and at that time discovered that the Arkansas sales tax had not been paid on the automobile. Appellee paid the sales tax in the amount of $212.80, and subsequently filed suit against appellant, alleging damages in the amount of $766.45. The appellee testified that the salesman, who negotiated the purchase with her and who was not available for trial, represented to

her both before and after her signing of the contract, that the sales tax on the automobile had been paid. Appellant objected to that testimony on the grounds that it violated the parol evidence rule. The court overruled that objection. On appeal, appellant argues that the trial court was in error in allowing testimony which violated the parol evidence rule. We agree.

The Uniform Commercial Code, Article 2, Sales, applies to transactions in goods. Ark. Stat. Ann. § 85-2-102 (Add. 1961). The definition of "goods" includes automobiles. Ark. Stat. Ann. § 85-2-105 (Add. 1961). The Uniform Commercial Code also contains a codification of the parol evidence rule. Ark. Stat. Ann. § 85-2-202 (Add. 1961); *Green Chevrolet Company* v. *Kemp,* 241 Ark. 62, 406 S.W. 2d 142 (1966).

The parol evidence rule requires, in the absence of fraud, duress, mutual mistake, or something of the kind, the exclusion of all prior or contemporaneous, oral or written evidence that would add to or vary the parties' integrated written contract, which is unambiguous. *City of Crossett* v. *Riles,* 261 Ark. 522, 549 S.W. 2d 800 (1977); *Farmers Cooperative Ass'n.* v. *Garrison,* 248 Ark. 948, 454 S.W. 2d 644 (1970); *Brown* v. *Aquilino,* 271 Ark. 273, 608 S.W. 2d 35 (Ark. App. 1980). The parol evidence rule is not a rule of evidence, but a rule of substantive law. *City of Crossett* v. *Riles, supra; Brown* v. *Aquilino, supra.*

In *Green Chevrolet Company* v. *Kemp, supra,* the Arkansas Supreme Court dealt with a case in which the buyer bought a used vehicle and financed the balance owed the seller. After he ceased making payments, the seller's assignee brought suit to recover for the balance due. The buyer cross-complained against the seller alleging breach of an express and implied warranty of all mechanical parts for one year. The trial court allowed the buyer and his wife to testify that the seller's agent had made oral guarantees of the mechanical parts of the vehicle for a period of one year. The written contracts provided that the buyer accepts the car "as is", and that the contract covers all conditions and agreements between the parties. The Arkansas Supreme Court

ruled that the trial court erred in admitting the testimony of the buyer and his wife with reference to representations made by the seller's agent. The Court held that their testimony contradicted the terms of the conditional sales contract, and that it was therefore a violation of the parol evidence rule.

In the case at bar, the retail purchase order contained the following language:

> The above comprises the entire agreement pertaining to this purchase and no other agreement of any kind, verbal understanding, representation, or promise whatsoever will be recognized.

That paragraph appears at the end of the retail purchase order, immediately above the signatures of appellee and appellant. The installment sales agreement also provides as follows:

> This contract constitutes the entire agreement between the parties and no modification hereof shall be valid in any event, and Buyer expressly waives the right to rely thereon, unless made in writing, signed by Seller.

We find the case at bar to be indistinguishable from *Kemp, supra,* and therefore we hold that the trial court erred in allowing the admission of parol evidence to vary the terms of the written contract.

Reversed and dismissed.

Ray Hugh NEAL *v.* STATE of Arkansas

CA CR 81-162 631 S.W. 2d 313

Court of Appeals of Arkansas
Opinion delivered April 14, 1982

*William R. Simpson, Jr.,* Public Defender, and *Howard Koopman,* Chief Deputy Public Defender, by: *Carolyn P. Baker,* Deputy Public Defender, for appellant.

*Steve Clark,* Atty. Gen., by: *Leslie M. Powell,* Asst. Atty. Gen., for appellee.

LAWSON CLONINGER, Judge. Appellant, Ray Hugh Neal, was convicted of two counts of aggravated robbery, and his only argument for reversal is that the trial court should not have admitted an in-court identification that followed lineup procedures violating appellant's constitutional right to the presence of counsel. His argument is without merit.

Viewing the testimony in the light most favorable to the State, as we must do on appeal, the evidence indicates that after appellant had been identified in a photo spread, he was taken to the Pulaski County Sheriff's Office and placed in a lineup with four others. His Miranda rights were read to him before he appeared in the lineup. He was also shown a form that advised him that he had a right to confer with an attorney prior to the lineup or to have an attorney present during the proceedings. Appellant stated that he did not need an attorney, and would stand in any lineup, but he refused to sign the form. Three victims of the two robberies observed the lineup and identified appellant as the perpetrator. The fairness of the lineup procedure is not questioned, except for the absence of counsel.

In *United States* v. *Wade,* 388 U.S. 218 (1967), the United States Supreme Court found that the sixth and fourteenth amendment right to counsel attaches at a post-indictment pre-trial lineup. The court considered this to be a critical stage of the criminal prosecution, and held that no in-court identifications are admissible in evidence in the absence of defendant's counsel at the lineup, unless the right was intelligently waived. In *Kirby* v. *Illinois,* 406 U.S. 682 (1972), the court refused to extend this exclusionary rule to an instance which occurred before the defendant was formally charged with a criminal offense. Appellant has cited no Arkansas authority for the extension of the rule announced in *Wade,* and we are not persuaded by his argument.

In *Sims* v. *State,* 258 Ark. 940, 530 S.W. 2d 182 (1975), the court held that an attorney appointed before the lineup was conducted should have been notified.

On a prior occasion, appellant in the instant case had been charged with the offense of burglary and Sandra Berry of the Pulaski County Public Defender's Office had been appointed to represent appellant on that charge. The burglary charge was still pending at the time appellant was arrested on the aggravated robbery charges. Appellant stated at trial that before the lineup was conducted, he requested an opportunity to consult with his attorney, Sandra Berry, and

appellant did call her after the lineup was conducted. Appellant contended that a lawyer-client relationship existed between Sandra Berry and appellant at the time the lineup was held, but the trial court pointed out that Sandra Berry had not been appointed to represent appellant on the aggravated robbery charge and that there was no lawyer-client relationship. We agree with the trial court.

An important aspect of this case is the credibility of the witnesses, and the trial court had the right to accept such portions of the testimony as it believed to be true and reject those it believed to be false. *Core* v. *State,* 265 Ark. 409, 578 S.W. 2d 581 (1979). Appellant testified that his request to make a phone call was denied, but a deputy sheriff said he was given an opportunity to call anyone he wished. Upon conflicting testimony the finding of the trial court was justified.

We find no error and we affirm.

David MARION *v.* STATE of Arkansas

CA CR 81-167 631 S.W. 2d 315

Court of Appeals of Arkansas
Opinion delivered April 14, 1982

*Wayne R. Williams,* for appellant.

*Steve Clark,* Atty. Gen., by: *Arnold M. Jochums,* Asst. Atty. Gen., for appellee.

DONALD L. CORBIN, Judge. On February 8, 1980, appellant, David Marion, was placed on five years' probation following a plea of guilty to a charge of burglary. Appellant's probation was revoked at a hearing held on March 4, 1981. He was then sentenced to two years imprisonment with an additional two years of probation to follow. He was paroled by the Arkansas Department of Correction on July 23, 1981. On October 6, 1981, at a second revocation hearing, appellant's probation was revoked and he was sentenced to two years in the Department of Correction. We reverse.

We agree with appellant that the Court could not impose a two-year probation on appellant in addition to the imprisonment imposed on March 4, 1981. Ark. Stat. Ann. § 41-1208 (6) (Repl. 1977) provides as follows:

> If the court revokes a suspension or probation, it

> may enter a judgment of conviction and may impose any sentence on defendant that might have been imposed originally for the offense of which he was found guilty, provided that any sentence to pay a fine or to imprisonment when combined with any previous fine or imprisonment imposed for the same offense shall not exceed the limits of sections 901 [§ 41-901] or 1101 [§ 41-1101], or if applicable, section 1001 [§ 41-1001].

Ark. Stat. Ann. § 41-803 (4) (Repl. 1977) provides in part:

> The court may sentence the defendant to a term of imprisonment and suspend imposition of sentence as to an additional term of imprisonment, but the court shall not sentence a defendant to imprisonment and place him on probation, except as authorized by section 1204 [§ 41-1204].

Ark. Stat. Ann. § 41-1204 provides for the placing of a defendant in a county or city jail with conditions of probation, and does not apply to a term of imprisonment at the Department of Correction. Therefore, Ark. Stat. Ann. § 41-1204 is not applicable in the instant case.

Since the court could not impose the two-year probation in addition to the imprisonment, this case is reversed.

# HENLEY'S WHOLESALE MEATS, INC. *v.* WALT BENNETT FORD, INC.

CA 81-241 631 S.W. 2d 316

Court of Appeals of Arkansas
Opinion delivered April 14, 1982

*Givens & Buzbee,* by: *J. R. Buzbee,* for appellant.

*Gill, Skokos, Simpson, Buford & Owen,* by: *William L. Owen,* for appellee.

TOM GLAZE, Judge. The primary question in this case is whether the trial judge, sitting without a jury, properly directed a verdict for the appellee at the conclusion of the appellant's case. Appellant, Henley's Wholesale Meats, Inc. (Henley), contends on appeal that it made a *prima facie* case of misrepresentation against Walt Bennett Ford, Inc. (Bennett), and Bennett, therefore, was required to present evidence to overcome Henley's case. Bennett counters this contention, arguing it was entitled to the directed verdict

because Henley never offered competent proof that a false material statement of fact was made or that Henley had relied on such a factual false statement.

Bennett requests that we review this cause on appeal in light of Rule 52 of the Arkansas Rules of Civil Procedure, *i.e.*, whether the trial court's findings were clearly against the preponderance of the evidence and failed to support the trial court's decision to direct a verdict. This, however, is not the correct test. The test is to take that view of the evidence that is most favorable to the party against whom the verdict is sought and to give it its highest probative value, taking into account all reasonable inferences deducible from it, and to grant the motion only if the evidence viewed in that light would be so substantial as to require that a jury verdict for the party be set aside. *Bradford* v. *Verkler,* 273 Ark. 317, 619 S.W. 2d 636 (1981). The applicable rule, stated in other terms, is that the duty of the trial court, sitting without a jury, when asked to give a "directed verdict" at the close of the plaintiff's case, is to consider whether the plaintiff's evidence, given its strongest probative force, presents a *prima facie* case. *McCollough* v. *Ogan,* 268 Ark. 881, 596 S.W. 2d 356 (Ark. App. 1980), and *Werbe* v. *Holt,* 217 Ark. 198, 229 SW. 2d 225 (1950). As was pointed out in *Minton* v. *McGowan,* 253 Ark. 945, 490 S.W. 2d 136 (1973), it is not proper for the court to weigh the facts at the time the plaintiff completes his case, and the motion should be denied if it is necessary to consider the weight of the testimony before determining whether the motion should be granted.

In applying the foregoing tests we must determine whether the proof, viewed in the light most favorable to the party against whom the verdict is directed, could have presented a question of fact for the jury had the case been tried to the jury. *Ralston Purina Company* v. *McCollum,* 271 Ark. 840, 611 S.W. 2d 201 (Ark. App. 1981).[1] We find, on the basis of the record before us, that a fact question was presented concerning certain representations made by a salesman for Bennett. A brief review of the facts is necessary.

[1]Also styled *Arkavalley Farms* v. *McCollum,* 271 Ark. 840.

Henley purchased two trucks from Bennett in 1978 to use in the delivery of frozen meat across the state. Henley had the advice and aid of its shop foreman in the purchase of the two vehicles in question. The shop foreman recommended a two speed rear axle. The salesman for Bennett recommended a one speed axle. Henley's corporate president testified at trial that the salesman was told the uses to which the two trucks would be put, and the salesman represented that the one speed rear axle would be adequate for highway use. An extended warranty was obtained and throughout the duration of the warranty a number of repairs were made on the trucks.

It is unnecessary to further detail the evidence, for our decision must rest upon a matter of procedure. It is enough to say that Henley's proof tended to show that the salesman for Bennett knew the use to which the trucks were to be put, and that the salesman's representation induced Henley to purchase trucks which were not fit for the purpose intended. A representative of Ford Motor Company testified the one speed axle trucks were not fit for the purpose for which Henley intended to use them.

Of course, Bennett contends that the proof does not show that the salesman's representation was deceitful or that Henley relied on such a statement. Moreover, Bennett argues that the salesman only presented an opinion rather than a statement of fact. We cannot agree.

As the court pointed out in *Fausett & Company, Inc.* v. *Bullard,* 217 Ark. 176, 229 S.W. 2d 490 (1950), the plaintiff in an action for misrepresentation does not have to prove a conscious and deliberate intention to deceive on the part of the defendant. The court stated the settled rule to be that representations are considered to be fraudulent if made by one who "either knows them to be false, or else, not knowing, asserts them to be true." The court in *Bullard* also restated the rule that the buyer may credit the statements of a seller who has peculiar knowledge of the subject matter of the sale.

In the instant case, Bennett's salesman was well in-

formed that Henley was under the impression that a two speed rear axle was necessary for the type deliveries Henley intended for the trucks to be used. The salesman insisted that the one speed rear axle was sufficient for this purpose. When we view this evidence most favorably towards Henley, we cannot say that the salesman did not possess a peculiar knowledge as to whether the trucks sold to Henley could possibly do the job for which they were intended. Moreover, from the evidence presented in Henley's case in chief, it certainly can be inferred that the trucks purchased by Henley were never intended for highway use and, in fact, they failed to do the job when they were used on the highway.

We also cannot accept Bennett's contention that the salesman's statement or representation was one of opinion rather than fact. As previously stated, Henley testified that he explained to the salesman that these trucks were going to be used on the highway and that Henley's shop foreman had told him that he should make sure that the trucks had two speeds. The salesman said that a two speed would be good for a gravel or dump truck or hauling logs, but that Henley did not carry that heavy a load. After Henley, his shop foreman and the salesman conferred, the salesman again recommended the trucks with a one speed axle. The subject matter discussed by these parties was specific and the salesman's representation was that the one axle trucks could do the job. This case is certainly distinguishable from *Miskimins* v. *City National Bank,* 248 Ark. 1194, 456 S.W. 2d 673 (1970).

Although we find that Henley did present a *prima facie* case, we do not hold that Henley was entitled to judgment in its favor. In other words, we do believe Henley is entitled to a trial on the merits and findings of fact even though it still may not win the lawsuit.

Henley raised two additional issues on appeal concerning revocation of acceptance and express and implied warranties. We do not reach those issues in this appeal since we reverse this matter on an issue of procedure. These two issues were never presented to the trial court, nor did the court have an opportunity to make any finding or ruling

regarding them. The parties will not be precluded from fully developing these issues upon the remand of this cause for further proceedings consistent with this opinion.

Reversed and remanded.

Cathy Irene MALONE *v.* Roger Wayne MALONE

CA 81-334 631 S.W. 2d 318

Court of Appeals of Arkansas
Opinion delivered April 14, 1982

*E. Winston McInnis,* for appellant.

*Malcolm R. Smith,* for appellee.

TOM GLAZE, Judge. This appeal involves a custody action. The appellant raises three issues: (1) The chancellor's finding that appellee should have custody of the parties' children is against the preponderance of the evidence; (2) The chancellor erred in not appointing a guardian *ad litem*; and (3) The chancellor erred in allowing into evidence the minor children's school report cards.

This dispute between the parties began in 1977. On March 23, 1977, a divorce decree was awarded appellant. The court additionally awarded her custody of the parties' three minor children. Subsequently, on July 16, 1979, the chancery court held that a change of circumstances had occurred since the rendition of the divorce decree, and it awarded custody of all three children to appellee, subject to reasonable visitation by appellant. On October 6, 1980, appellee filed a petition asking the court to order appellant to pay child support, and appellant counter-petitioned, alleging there had been a change of circumstances between the parties and requested that custody of the children be returned to her. On May 28, 1981, the chancellor ordered that the custody of the children remain in appellee and further ordered appellant to pay child support in the amount of $140 every two weeks.

On appeal, appellant argues that a review of the record in this case reveals that the evidence preponderates in her favor. Appellant argues that she is as fit to care for the children as appellee. Appellant's arguments might be well taken if we were reviewing an initial award of custody of the parties' children, but this is not the situation. Here, custody was initially awarded to appellant and subsequently changed to appellee. Thus, we are now concerned with whether circumstances have changed which would warrant custody of the children to be returned to appellant and whether the chancellor's determination to the contrary was clearly erroneous or clearly against the preponderance of the evidence. See *Watson* v. *Watson,* 271 Ark. 294, 608 S.W. 2d 44 (Ark. App. 1980).

Basically, appellant offers only three changes in circumstances since the trial court's last order on July 16, 1979,

*viz.*, (1) Her financial stability is better than appellee's; (2) A stressful relationship exists between the parties' oldest daughter, Kay, and appellee's present wife; and (3) Kay prefers to live with appellant. We cannot say the chancellor was clearly erroneous in finding these circumstances insufficient to warrant a change in custody.

It is true that appellee's income is less than the income earned by appellant. However, there is no evidence that the children's needs are not being provided for. We are aware of no cases where custody was changed merely because one parent had more resources or income. Obviously, appellant's ability to provide the children with more material items as well as additional activities is, in itself, not a factor entitling her to custody.

Regarding the other changes raised by appellant, we believe the chancellor was most reflective and thoughtful, not only in considering the problems which exist between Kay and her stepmother, but also in pondering Kay's stated preference to be returned to appellant. Before making a final decision, the chancellor interviewed Kay, an eleven year old, and he clearly weighed and considered Kay's expression of preference as he should have done. See *DeCroo* v. *DeCroo,* 266 Ark. 275, 583 S.W. 2d 80 (1979). Such preference, however, is not binding.

The evidence supports the conclusion that the stepmother recognized the problems between herself and Kay. The stepmother has sought counseling in a good faith effort to achieve a solution to these problems. Since the stepmother's marriage to appellee was of recent vintage, the chancellor obviously considered the fact that the relationship between Kay and her stepmother was new. In view of the conscientious efforts by the stepmother to establish a relationship with Kay, the chancellor did not believe Kay's welfare, at this time, would be jeopardized by leaving custody with her father. If the situation should change, the chancellor has made it evident that he would be receptive to such changes being brought to his attention. Since, however, less than one year has passed since the court awarded custody to appellee, we believe the chancellor's reluctance to

change custody at this time is understandable in light of all the evidence. The record reflects the children's physical, mental and spiritual needs are being met by appellee and his wife, and we simply are in no position to find the chancellor erred in his decision.

In so holding, we have considered appellant's argument that the chancellor erred in admitting into evidence the children's report cards. While it is true that these report cards contained hearsay, we find it unnecessary to make any ruling concerning the admissibility of the cards. After a careful review of the evidence and the findings of the chancellor, we hold that the court's order retaining custody in appellee is entirely correct even excluding the information contained on the report cards. See *Shaw* v. *Shaw,* 249 Ark. 835, 462 S.W. 2d 222 (1971).

In conclusion, appellant contends the chancellor abused his discretion in not appointing a guardian *ad litem.* While we cannot agree that the chancellor abused his discretion, we have recommended the appointment of guardians *ad litem* in custody cases. See *Kimmons* v. *Kimmons,* 1 Ark. App. 63, 613 S.W. 2d 110 (1981). Of course, guardians *ad litem* are not required by statutory law in custody actions, and under the facts presented in this case, we are unable to hold that the chancellor erred in not appointing one. Our holding on this point, however, should not be taken to mean that an *ad litem* appointment could not or should not be considered by the court at any future hearings scheduled in this cause.

Affirmed.

UNION MEDICAL CENTER et al *v.*
Barbara J. BRUMLEY

CA 81-434 631 S.W. 2d 618

Court of Appeals of Arkansas
Opinion delivered April 14, 1982

*David B. Simmons,* for appellants.

*Brown, Compton & Prewett, Ltd.,* by: *Floyd M. Thomas, Jr.,* for appellee.

TOM GLAZE, Judge. This Workers' Compensation case involves an employer's liability for the expense of a doctor who was consulted by the claimant after her healing period had ended.

The claimant was working as a nurse's aid at Union Medical Center on August 11, 1979, when she fell with a patient. She complained of back pain and was seen initially by Dr. George Warren and Dr. Carlton Newsome, her family doctors. When she continued to have problems, she asked a nurse at the hospital for the name of an orthopedic surgeon and Dr. Mac Smith was recommended. The claimant saw Dr. Smith and his associate, Dr. E. R. Hartman, from August 20, 1979, until sometime in January, 1980. Dr. Smith examined the claimant on October 23, 1979, and found her able to return to work at that time. In April, 1980, the claimant contacted the Public Employee Claims Division and it made an appointment for the claimant to be evaluated by Dr. Jerry Thomas. None of the doctors seen by the claimant indicated there was any evidence of permanent disability.

At the suggestion of her attorney, and without consulting respondents, she was examined by Dr. Jay M. Lipke on July 1, 1980. He diagnosed the claimant had an acute herniated nucleus pulposus. Dr. Lipke did not recommend hospitalization and surgery but instead elected to treat the claimant with conservative treatment.

The claimant requested that the treatment by Dr. Lipke be paid by the respondents, and the respondents, in turn, challenged her right to a change of physicians under the provisions of Workers' Compensation Rule 21 (1979),[1] which provides as follows:

> The employer and/or insurance carrier has the right and duty in the first instance to provide prompt medical care to injured employees through physicians and hospitals of the respondents' choice. A claimant, subsequently, may obtain a change in treating physicians to a physician of the claimant's choice, the costs of such treatment to be borne by the employer or the employer's insurance carrier, provided *(1) the claimant's healing period shall not have ended; (2) the claimant is not seeking to change physicians from one of his own choice, previously selected by the claimant;* (3) the physician to whom claimant wishes to change is qualified in the particular field of medicine needed for claimant's particular difficulties; (4) the claimant files with the Commission a petition for a change in physicians, gives the name of the physician to whom he wishes to change and asserts that the physician to whom he wishes to change is competent to treat his particular ailment; (5) no unresolved issue exists over whether claimant is legally entitled to medical care at the expense of respondents.
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> * * *

[Emphasis supplied.]

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[1]These portions of Rule 21 were repealed effective March 1, 1982, in view of the enactment of Act 290 of 1981, codified as Ark. Stat. Ann. § 81-1311.

On the foregoing facts, the Administrative Law Judge found that the claimant's healing period had ended on October 23, 1979, and that temporary disability benefits had been paid by the respondents. He also found the claimant was entitled to a change of physician to Dr. J. M. Lipke with such treatment to be at the expense of the respondents. In making such a finding of entitlement, the Administrative Law Judge relied on the case of *Caldwell* v. *Vestal,* 237 Ark. 142, 371 S.W. 2d 836 (1963). The Full Commission affirmed the decision of the Administrative Law Judge. However, *Caldwell* is distinguishable from the instant case, and the reliance on that case by the Administrative Law Judge and the Workers' Compensation Commission is misplaced.

The obvious difference between *Caldwell* and the instant case is that *Caldwell* did not involve a finding that the claimant there had reached the end of his healing period. Rule 21, as it read in 1979 and as it applies to the facts in this case, clearly provides that a claimant is entitled to a change in physicians only where the healing period has not ended.

Here, there is substantial evidence to support the Commission's finding, that claimant's healing period had ended. This being so, the right to a change of physicians is eliminated under the clear language of Rule 21. *Bradford* v. *Timex Corporation,* 270 Ark. 184, 604 S.W. 2d 572 (Ark. App. 1980). A review of the evidence in this cause reflects a report by Dr. Smith that he examined the claimant on October 23, 1979, that she was doing well and was able to return to work. Dr. Thomas, also an orthopedic surgeon, reported that there were no objective findings warranting further diagnostic studies. Altogether, the claimant was seen by three orthopedists and two family practitioners over a ten month period without a finding of incapacity. The following conclusions concerning the healing period were made by the Administrative Law Judge and approved by the Full Commission:

> None of the orthopedists who have examined or treated the claimant have stated that she is unable to work because of the injury since she was released by Dr. Smith on October 23, 1979. After observing the claim-

ant's demeanor as a witness, I was persuaded that she had failed to prove by a preponderance of the evidence that her pain symptomatology was sufficient to prevent her from returning to work.

The finding of fact that claimant's healing period ended negates and precludes a finding that the claimant was entitled to a change of physicians. Since there is substantial evidence to support the finding that the claimant's healing period ended October 23, 1979, the Commission was in error when it determined she was entitled to a change of physicians at the expense of the respondents after that date.

Reversed.

[redacted]

[redacted]

[redacted]