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PUROLATOR COURIER and Liberty Mutual Insurance Company *v.* Billy Darrell CHANCEY and Second Injury Fund

CA 92-81 841 S.W.2d 159

Court of Appeals of Arkansas
Division II
Opinion delivered November 4, 1992

Friday, Eldredge & Clark, by: *J. Michael Pickens*, for appellant.

Terry Pence, for appellee.

JOHN E. JENNINGS, Judge. In this workers' compensation case Purolator Courier, the employer, appeals from an order of the Commission holding that Billy Darrell Chancey was entitled to additional temporary total disability benefits; that Chancey sustained permanent partial disability of sixty percent to the body as a whole; and that the Second Injury Fund had no liability on the claim and was dismissed. Appellant argues that the "Commission erred in finding that Chancey's poliomyelitis or encephalitis constituted a 'latent condition' thereby relieving the Second Injury Fund of Liability." We disagree and affirm.

While working for appellant as a truck driver on January 2, 1985, Chancey slipped and fell from the running board of his van and hurt his back. At the time Chancey was thirty-nine years old. He saw a Dr. McDaniel, who referred him to Dr. Kaplan, a neurosurgeon. After a week of hospitalization and tests, Dr. Kaplan's diagnosis was lumbar strain and radiculitis. Chancey continued to experience back pain, for which he took Darvocet and other pain medication. After six months of conservative treatment, Chancey was referred to the Baptist Pain Clinic in Memphis, Tennessee, where he stayed as an in-patient for six weeks under the care of Dr. William C. North. After discharge in September 1985, he continued to return for regular visits and continued taking pain medication. Follow-up notes by Dr. North indicate that Chancey continued to experience pain and weakness.

Dr. Kaplan's discharge summary dated January 24, 1985, noted that

> [Chancey] may have had polio when he was eleven years old. . . . [h]e awakened and was very ill one morning. He stated that the could move only his left upper extremity. His left upper extremity has been larger than his right and his left lower extremity has been larger than his right lower extremity since he had this central nervous inflammation

> when he was eleven years old.
>
> . . . .
>
> Old history of central nervous infection, probably polio when eleven years old.

After a follow-up visit on April 5, 1985, Dr. Kaplan sent a letter to Dr. McDaniel dated April 8, 1985, noting that

> [Chancey] had mild spasticity and atrophy of his right extremities, mildly impaired alternate motion rate on the right, and questionable weakness of his right extremities — all probably related to childhood central nervous system disease.

A "Physical Therapy Initial Evaluation — Pain Unit" document dated August 12, 1985, shows that "Pt. states he has recently been told he had polio as a child." Dr. North's discharge summary dated September 23, 1985, states:

> Preadmission Diagnosis:
>
> 1. Low back pain
> 2. Psychological factors contributing to low back pain.
>
> Discharge Diagnosis:
>
> 1. Clinical myofascitis of the lumbar muscles.
>
> Secondary Diagnosis:
>
> 1. Psychological factors affecting medical illness.
> 2. Post-poliomyelitis.
>
> . . . .
>
> Past Medical History:
>
> He had polio in his childhood. There is a minimal residual rightsided weakness.

A pain center office note dated July 23, 1986, by Dr. Martin Fodiman states, "The patient's chief problem is myofascitis of the lumbar muscles and post poliomyelitis syndrome, also psychological factors effecting his medical illness." In a letter dated August

7, 1986, Dr. North stated:

> Mr. Chancey is unique in that his injury coincided with the natural course of old poliomyelitis where there is gradual deterioration of muscle strength. In the absence of some precipitating cause which results in a significant period of time in which muscles are not used, this deterioration is generally so gradual that it is not recognized as being a factor in the aging process.
>
> It is our impression that Mr. Chancey was inactive for so long that to rehabilitate his muscles, which is always a very slow process, required a long period of time. As a result of the exercise program Mr. Chancey has a muscle imbalance which is marked and accentuates his disability. He has made considerable progress in dealing with this issue. He appears to us to be extremely well motivated, much better than many of our patients. However, it will be at least two or three years before Mr. Chancey will have learned to function within the limitations imposed by his poliomyelitis deficits and the effects of the injury.

Notes from an examination by Dr. Dillard Denson dated June 21, 1988, recount Chancey's history of his childhood illness as well as the results of the examination. Those notes show, "IMPRESSION: 1. Polioencephalitis; 2. Possible poliomyelitis; 3. Post-polio syndrome."

A letter from Dr. Stevenson Flanigan dated August 9, 1988, states:

> I believe [Chancey] has been a victim of a polio-myeloencephalitis that was likely the disorder with which he was afflicted as a youngster. The pain and limitations identified with the pain are likely an aggravation of the condition with which he was functionally affected until the time of his accident. Apart from the restricted range of movements associated with contractors and possibly a mild degree of spasticity, there is no objective indication of an alteration in his functional capacity that could be attributed to the accident.

During continued treatment by Dr. North, Chancey underwent a vocational assessment with favorable results and was recom-

mended for vocational rehabilitation. After a return visit on June 17, 1987, Chancey was given a prescription for Xanax, which he took while continuing with other medication for pain. A progress note dated March 23, 1988, indicates that the pain clinic had done all they could for him. A letter from Dr. North dated June 15, 1988, stated:

> I should like to briefly summarize Mr. Chancey's situation. He carries a diagnosis of:
>
> (1) Chronic lumbar myofascitis secondary to injury
>
> (2) Right lower extremity in back weakness secondary to encephalitis
>
> (3) Psychological factors affecting medical illness
>
> All three of these diagnoses are interrelated and perhaps causally related. The low back injury which he sustained is not an unusual injury. However, the effects of it and the response to therapy were not as dramatic as would probably have occurred had he not had the residual weakness to begin with. Finally, the combination of the latent neuromuscular problem coupled with the failure to respond effectively to therapy has led him to a situation of anxiety and depression that is related to his inability to perform his usual tasks.
>
> We feel that he has probably received maximum medical benefit from our therapy. Evaluation of his physical findings which include atrophy of the muscles of the right lower leg, limitation of motion of the right knee and ankle, and pain associated with the changes in the knee and spine joints, give him an impairment of 50% of the right lower extremity which translates into 20% impairment of the whole person. He will need continuing supervision of an exercise program to maintain his muscle strength. He also will need some medication. It is my understanding that he has moved from the Memphis area to Little Rock.
>
> Could you set him up with a local physician for maintenance care? Enclosed is a copy of medication record. Please give Mr. Chancey a call when this has been arranged.

> I am sorry that we cannot do more for Mr. Chancey but I do not believe that there is anything further that can be done to improve his function apart from being able to find a job that will fit within his limitations of motions and strength and to let him improve his earnings and therefore his outlook on life.

In the August 9, 1988, letter Dr. Flanigan noted that one of Chancey's major problems was habitual use of Motrin, Darvocet N, Xanax, and Halcion, and recommended professional help in withdrawal from those drugs. Chancey was successfully treated at the VA for his substance dependency in April 1989.

At the hearing, Chancey testified that when he was about eleven years old he woke up one morning unable to move anything except his left arm. He was examined at a hospital and released. After a few weeks of chiropractic treatment he got better and was able to walk. He saw another doctor regarding a cyst on his neck. He was hospitalized for thirty-one days while tests were run. It was two months before he could return to school. After two more months in a special physical education class he seemed to have fully recovered and was taken out of the special class. For the remainder of his junior high and high school career he was active in athletics, participating on the track team and playing basketball and baseball. After graduation he joined the Air Force as a supply clerk and served overseas in Vietnam. Upon discharge from the Air Force, he returned to Tulsa, Oklahoma, and took a delivery job. He worked numerous other jobs for the next fifteen years or so, many involving delivery and supply-type duties. He began working for Purolator in 1980, where he was employed at the time of his 1985 injury. He testified that he never again suffered any physical problems related to his period of childhood illness.

Arkansas Code Annotated section 11-9-525(a)(3) (1987) provides:

> It is intended that latent conditions which are not known to the employee or employer not be considered previous disabilities or impairments which would give rise to a claim against the Second Injury Fund.

Based on Chancey's testimony, the deposition of Dr. North,

and the other medical evidence, the Commission found that Chancey suffered from a neurological disorder which was latent until it was accelerated by his work-related injury. The Commission said:

> In the present case, as discussed above, we find that the evidence clearly establishes that the claimant's neurological condition was latent. As discussed, the claimant was aware of the size differences, the infrequent weakness, and possibly the slight limp. However, he felt that these were residuals of the childhood incident. There is no evidence that the claimant had any knowledge, or should have had any knowledge, that he suffered from any condition which would result in the progressive deterioration of his muscles. Likewise, there is no evidence that the employer was aware of any such condition. Moreover, we find that the claimant's current disabled condition is the result of the muscle deterioration and weakness attributable to the inactivity produced by the work-related injury. Consequently, we find that the pre-existing condition resulting in the claimant's disability condition was latent and unknown to either the employer or the claimant.

"Latent condition" is not defined by statute. The phrase "latent injury" has ordinarily arisen in workers' compensation cases in the context of the statute of limitations. *See, e.g., Arkansas Louisiana Gas Co.* v. *Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983); *Woodard* v. *ITT Higbie Mfg. Co.*, 271 Ark. 498, 609 S.W.2d 115 (Ark. App. 1980). The word "latent" applies to that which is present without showing itself. *Sanderson & Porter* v. *Crow*, 214 Ark. 416, 216 S.W.2d 796(1949). Latent means hidden, concealed, or dormant. *McDaniel* v. *Hilyard Drilling Co.*, 233 Ark. 142, 343 S.W.2d 416 (1961). An injury is latent until its substantial character becomes known or until the employee knows or should reasonably be expected to be aware of the full extent and nature of his injury. *Arkansas Louisiana Gas Co.* v. *Grooms, supra.* The question whether an injury is latent is one of fact, subject to the substantial evidence standard on review. *See Woodard* v. *ITT Higbie Mfg. Co., supra; McDaniel* v. *Hilyard Drilling Co., supra.* When reviewing a finding of fact made by the Commission, we must affirm if the Commission's

decision is supported by substantial evidence. *Welch's Laundry & Cleaners* v. *Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *College Club Dairy* v. *Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988).

In the case at bar the fact that there were visible signs of the claimant's underlying disorder does not preclude a finding that the condition which disabled him was latent at the time of the injury. Until the injury, the claimant was able to perform normally, to play high school sports, to serve in the Air Force, and to perform manual labor. The evidence supports a finding that, at the time of the injury, the full extent and nature of his childhood illness and its effect were not known to him or to his employer. *See* Ark. Code. Ann. § 11-9-525(a)(3); *Arkansas Louisiana Gas Co.* v. *Grooms, supra.*

Affirmed.

DANIELSON and MAYFIELD, JJ., agree.

John E. McDERMOTT, et al. *v.* GREAT PLAINS EQUIPMENT LEASING CORPORATION

CA 92-23 839 S.W.2d 547

Court of Appeals of Arkansas
Division I
Opinion delivered November 4, 1992

Tiner & McGill, by: *Dan McGill*, for appellants.

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

ELIZABETH W. DANIELSON, Judge. Grain Systems Credit Company, a partnership, was awarded a summary judgment in a United States District Court in Illinois against the appellants, John E. McDermott and Ila A. McDermott, for $63,915.51, plus attorneys' fees and costs for breach of a grain bin lease. The judgment was issued on April 23, 1990, and on July 9, 1990, Grain Systems gave notice to appellants that they had filed the foreign judgment in Poinsett County Circuit Court. On August 30, 1990, appellants responded to the notice of filing of the foreign judgment and asked for dismissal of the action on the basis that Grain Systems was a general partnership doing business in Illinois, and that under Arkansas law, a general partnership does

not have entity status and cannot maintain an action in its own name. Subsequently, the trial court granted an oral motion for substitution of all of Grain System's rights, title and interest in the foreign judgment to Great Plains Equipment Leasing Corporation. Appellants filed a motion to vacate the order of substitution as well as a response to the motion for summary judgment. The trial court denied the motion to vacate and granted appellee's motion for summary judgment. On appeal, the appellants contend that the court erred in denying their motion to vacate and erred in granting summary judgment in favor of the appellee. We find no error and affirm.

Appellants first argue that the trial court erred in failing to grant their motion to vacate the order for substitution and, further, that they were not given notice of the request for substitution. Rule 25 of the Arkansas Rules of Civil Procedure governs the substitution of parties. Where the substitution is based on a transfer of interest as it is in this case, subparagraph (c) of Rule 25 provides as follows:

> In the case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of this motion shall be made as provided in subdivision (a) of this rule.

The pertinent part of subdivision (a) governing notice sets out "substitution may be ordered without notice or upon notice as the court may require." Based on Rule 25, the trial court did not err by granting appellee's motion to be substituted for Grain Systems as the party in interest nor did the court abuse its discretion by not requiring notice to appellants of the requested substitution.

Appellants next argue that the court erred in granting appellee's motion for summary judgment. There is no showing in the record that appellants ever challenged the standing of the partnership to file suit in Illinois or contended that the judgment there was improperly entered. The Uniform Enforcement of Foreign Judgments Act, Ark. Code Ann. § 16-66-602—619 (1987), requires only that a foreign judgment be regular on its face and duly authenticated to be subject to registration. *Strick Lease, Inc.* v. *Juels*, 30 Ark. App. 15, 780

S.W.2d 594 (1989). The judgment which appellee seeks to register was found by the trial court to be regular on its face as well as properly authenticated. Based on the record, it was not error for the trial court to have granted appellee's motion for summary judgment.

The primary purpose of the Uniform Act is to provide a summary judgment procedure in which a party in whose favor a judgment has been rendered may enforce that judgment promptly in any jurisdiction where the judgment debtor can be found, thereby enabling the judgment creditor to obtain relief in an expeditious manner. *Dolin* v. *Dolin*, 9 Ark. App. 329, 659 S.W.2d 954 (1983). The court in which the judgment is registered treats and enforces the judgment exactly as it would a judgment rendered by that court. *Holley* v. *Holley*, 264 Ark. 35, 568 S.W.2d 487 (1978).

Under the full faith and credit clause of the United States Constitution, art. IV, §1, a foreign judgment is conclusive on collateral attack, except for defenses of fraud in the procurement or want of jurisdiction in the rendering court, as a domestic judgment would be. *Strick Lease*, 30 Ark. App. 15. These judgments are presumed valid and the burden of proving them invalid is on the party attacking the foreign judgment. *Dolin*, 9 Ark. App. 329. The only defenses available to appellants are fraud in the procurement of the foreign judgment or lack of jurisdiction by the rendering court, neither of which were properly raised.

Affirmed.

JENNINGS and ROGERS, JJ., agree.

Charles D. WALKER *v.* DIRECTOR, Employment Security Department

E 92-47 840 S.W.2d 200

Court of Appeals of Arkansas
Division II
Opinion delivered November 4, 1992

Charles D. Walker, pro se.

Allan Pruitt, for appellee.

MELVIN MAYFIELD, Judge. This is an appeal from a decision of the Arkansas Board of Review that denied appellant's claim for extended unemployment benefits. The appellant is not represented by an attorney, and neither party has filed a brief. Nevertheless, we have given this matter careful attention and issue this opinion in an attempt to bring a degree of clarity to a somewhat complex situation.

In the first quarter of 1991, the appellant filed a claim for regular unemployment compensation benefits. His claim was denied by the Arkansas Employment Security Division on a finding that appellant was discharged from his last work for misconduct in connection with the work. That decision was appealed to the Appeal Tribunal which held appellant was discharged for misconduct under the provisions of Ark. Code Ann. § 11-10-514 (Supp. 1991) and that he was disqualified for benefits "for eight (8) weeks of unemployment, as defined in Ark. Code Ann. § 11-10-512." This decision was affirmed by the Board of Review, and there was no appeal from that decision.

Under the provisions of Ark. Code Ann. § 10-10-512(b) (1987), a week of disqualification "shall be satisfied" by either a week of unemployment or by a week of employment during which the employee has "earnings in an amount equal to his weekly benefit amount." At the hearing on the claim filed in the case now before us, held on January 6, 1992, it was established that the appellant had satisfied the eight-week disqualification and then filed a new claim. That claim was for regular benefits, and appellant was paid those benefits until they were exhausted. After that, appellant was still unable to find work; therefore, he filed a claim for extended benefits.

Extended benefits are governed by Ark. Code Ann. §§ 11-10-534 thru 544 (1987 & Supp. 1991). A provision of these extended benefits sections, which has been in effect for several years, Ark. Code Ann. § 11-10-543(h) (1987), provides as follows:

> An individual shall not be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period if the individual has been disqualified for regular benefits under this law because he voluntarily left work, was discharged for misconduct, or refused an offer of suitable work unless the disqualification imposed for such reasons was satisfied with employment.

We have had an occasion to deal with this provision before. *See Dozier* v. *Everett, Director*, 9 Ark. App. 247, 657 S.W.2d 567 (1983). The provision at that time was compiled as Ark. Stat. Ann. § 81-1124(k)(8) (Supp. 1983), and we clearly pointed out that our statutes provided that one who is disqualified

by misconduct (with certain enumerated exceptions) from receiving *regular* benefits for a certain period may satisfy the disqualification by work for the required period or, if unable to find work, by forfeiting the benefits for that period to which the individual would otherwise be entitled. But, we said, under Ark. Stat. Ann. § 81-1124(k)(8) (now Ark. Code Ann. § 11-10-543(h)), such a worker can satisfy the penalty disqualification for *extended* benefits only by *employment* for the required period and amount.

Therefore, the decision of the Board of Review was correct in the case now before us. However, because the appellant has filed a pro se response to the appellee's answer to appellant's notice of appeal in which the appellant asks how Arkansas can hold he is not eligible for "emergency benefits" to which the "Federal Government" says he is eligible, we explain the matter in more detail.

In 76 Am. Jur. 2d, *Unemployment Compensation* § 1 (1992), it is said that "state-imposed unemployment insurance . . . exists pursuant to a federal-state scheme of unemployment insurance legislation represented by the Federal Unemployment Tax Act and the complimentary state statutes enacted pursuant to the inducement of the Federal Act." The discussion in Am. Jur. points out that apart from the "minimum standards" prescribed by the Act it "leaves to state discretion the rules governing the administration of unemployment compensation programs." *See id.* § 4 at 748. It is also explained that while the terms and conditions of the Federal Unemployment Tax Act require federal approval of state statutes as a condition of participation "the Act leaves to every state full liberty to accept or reject, and to withdraw at any time after acceptance and to have returned the state's unexpended share of the federal unemployment trust fund." *Id.* § 23 at 767. Thus, it is said "the Act is not void as involving coercion of the states." *Id.*

The Federal Unemployment Tax Act can be found in 26 U.S.C. §§ 3301 thru 3311 (1988). *See also* 26 U.S.C.A. §§ 3301 thru 3311 (West 1989 & Supp. 1992). Section 3304(a)(11) provides that "extended compensation shall be payable as provided by the Federal-State Extended Unemployment Compensation Act of 1970." The 1970 Act is Title II of Pub. L. No. 91-373, 84 Stat. 708 (1970). Section 202(a) of that Act was amended by

Title X of the Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2599 (1980), to provide:

> (4) No provision of State law which terminates a disqualification for voluntarily leaving employment, being discharged for misconduct, or refusing suitable employment shall apply for purposes of determining eligibility for extended compensation unless such termination is based upon employment subsequent to the date of such disqualification.

Pub. L. 96-499, § 1024, 94 Stat. 2599 (1980) at 2659.

The extended benefits sought by the appellant in this case are apparently made available by Title I of the Emergency Unemployment Compensation Act of 1991, Pub. L. No. 102-164, 105 Stat. 1049 (1991), which provides that a State may enter into an agreement with the Secretary of Labor of the United States under which the State may make payments of emergency unemployment compensation to individuals who have exhausted their rights to regular compensation under State law. That Act, however, specifically provides that "the terms and conditions of the State law which apply to claims for extended compensation and to the payment thereof shall apply to claims for emergency unemployment compensation and the payment thereof, except where inconsistent with the provisions of this Act. . . ." *Id.* Section 101 (d)(2). We find nothing in that Act which is inconsistent with the provisions for extended benefits in the Arkansas Employment Security Law.

Thus, under the federal-state scheme of unemployment insurance legislation, the provision in our state law requiring an individual who has been disqualified for regular unemployment benefits (as was the appellant in this case) to satisfy that disqualification with employment in order to become eligible for extended benefits is not only authorized, but is encouraged, by the law of the federal government. It is, however, the law of Arkansas which prevents the appellant in this case from being eligible for the extended unemployment benefits which he is seeking.

Affirmed.

COOPER and ROGERS, JJ., agree.

Randall D. MARTINDILL *v.* STATE of Arkansas

CA CR 92-135 839 S.W.2d 545

Court of Appeals of Arkansas
Division I
Opinion delivered November 4, 1992

Paul Petty & Robert Meurer, for appellant.

Winston Bryant, Att'y Gen., by: *Brad Newman*, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. The appellant, Randall D. Martindill, was arrested for driving while intoxicated by David Newman, an auxiliary police officer for the City of McRae. The arrest occurred when Newman stopped appellant's vehicle after twice observing it cross the center line of the roadway. During the stop, Newman concluded that appellant was intoxicated, and he transported appellant to the police station in Beebe where there

was a breathalyzer machine. At the station, Newman issued appellant citations for driving while intoxicated and driving left of center. Appellant refused to submit to a blood-alcohol test, and the operator of the breathalyzer machine also cited appellant for violating the implied consent law. This appeal follows appellant's convictions on all charges at a bench trial held in the Circuit Court of White County.

For reversal, appellant contends that at the time of his arrest the auxiliary officer was not acting under the direct supervision of a designated, on-duty law enforcement officer as is required under the provisions found in Ark. Code Ann. § 12-9-301 (1987) and § 12-9-303 (1987). Consequently, he asserts that he was not legally arrested or validly charged with the offenses of driving while intoxicated and left of center, and argues that the trial court erred in denying his motions to dismiss and to suppress the evidence arising from the arrest. Because we do not accept appellant's proposition that the auxiliary officer was not properly supervised, we affirm.

Arkansas Code Annotated § 12-9-303 (1987) provides as follows:

> (a) An auxiliary law enforcement officer shall have the authority of a police officer as set forth by the statutes of this state when the auxiliary law enforcement officer is performing an assigned duty and is under the direct supervision of a full-time certified law enforcement officer.
>
> (b) When not performing an assigned duty and when not working under the direct supervision of a full-time certified law enforcement officer, an auxiliary law enforcement officer shall have no authority other than that of a private citizen.

According to Ark. Code Ann. § 12-9-301(8) (1987), "direct supervision" means having a designated on-duty, full-time certified law enforcement officer responsible for the direction, conduct, and performance of the auxiliary law enforcement officer when that auxiliary law enforcement officer is working an assigned duty. The statute further provides that direct supervision does not mean that the full-time law enforcement officer must be in the physical presence of the auxiliary law enforcement

officer when the auxiliary officer is working an assigned duty. It is the appellant's contention in this appeal that there was no "direct supervision" when the arrest occurred because the supervising officer was not "on-duty" based on evidence that the supervisor was at home and had turned down the volume of his police radio.

As disclosed by the record in this case, Officer Newman stopped appellant's vehicle at roughly 2:30 a.m. on August 5, 1990. Some five minutes before initiating the stop, Newman had been in contact with Marshall Mark Bishop, who was the officer designated as Newman's supervisor. Bishop informed Newman that he was going home and he instructed Newman to make one last patrol through town before Newman retired for the evening. Bishop further advised Newman to call him at his residence if any problems were encountered. Newman stopped appellant's vehicle during this last sweep through town. Newman phoned Bishop immediately upon his arrival at the Beebe police station and he informed Bishop about what had transpired. Bishop told Newman to have the breathalyzer test administered and to call him back when the results were obtained. Newman then informed appellant of the law concerning implied consent and advised appellant of his rights with respect to taking the test. When appellant refused the test, Newman contacted Bishop who directed Newman to issue citations for driving left of center and driving while intoxicated.

Our courts have had occasion to address questions concerning auxiliary police officers in the context of Ark. Code Ann. §§ 12-9-301 and 12-9-303. First, in *Brewer* v. *State*, 286 Ark. 1, 688 S.W.2d 736 (1985), the supreme court ruled that unsupervised auxiliary officers did not have the authority to arrest the defendant or validly charge him with the offense of DWI, second offense. The court observed that unsupervised auxiliary officers only had the authority to act as private citizens, who are authorized to make an arrest if it is believed that a felony had been committed, but not a misdemeanor offense such as DWI, second offense. As the auxiliary officers' citation was the only charging instrument, the supreme court dismissed the case since the unsupervised officers had no authority to issue the citation. Later, in *McAfee* v. *State*, 290 Ark. 446, 720 S.W.2d 307 (1986), the court held that the supervisor's physical presence was not required to validate an arrest by the auxiliary officer. There, the

court was also of the opinion that it would be an unreasonable interpretation of the statue to require the auxiliary officer to speak to his supervisor before proceeding with an arrest. Next, in *Turnbull* v. *State*, 22 Ark. App. 18, 731 S.W.2d 794 (1987), we rejected the contention that radio contact between the auxiliary officer and his supervisor did not provide direct supervision, noting that the physical presence of the supervisor was not required.

Here, we think the record amply demonstrates that the auxiliary officer was acting under the direct supervision of his supervisor to the extent required under the statutes. Both Newman and Bishop were aware of each other's whereabouts at the time of the arrest. Newman was specifically instructed to make one more patrol through the area and was directed to contact Bishop should anything occur. Newman complied with this directive when he phoned Bishop from the police station. Moreover, Newman received further instructions from Bishop as to how he should proceed in handling the situation. Notwithstanding appellant's argument that Bishop was not "on-duty" because he was at home, the record supports the view that Bishop, in fact, maintained his role as Newman's supervisor. Therefore, we find no merit in appellant's argument that direct supervision was lacking.

Affirmed.

JENNINGS and DANIELSON, JJ., agree.

Alizia PHILLIPS *v.* STATE of Arkansas

CA CR 91-321 840 S.W.2d 808

Court of Appeals of Arkansas
En Banc
Opinion delivered November 4, 1992

William R. Simpson, Jr., Public Defender and *Jerry J. Sallings*, Chief Deputy Public Defender, by: *Bret Qualls*, Deputy Public Defender.

Winston Bryant, Att'y Gen., by: *Clementine Infante*, Asst. Att'y Gen., for appellee.

JUDITH ROGERS, Judge. This is an appeal from a decision revoking Alzia Phillips' probation and sentencing him to six years in the Arkansas Department of Correction. On appeal, appellant contends that the trial court erred in revoking his probation in violation of his due process right to notice of the basis for his revocation. We disagree and affirm.

On February 12, 1988, appellant was found guilty of possession of a controlled substance, cocaine, and was placed on probation for six years, ordered to pay a $500 fine and to comply with written probation conditions. On October 30, 1989, the prosecuting attorney filed a petition for revocation alleging that

the appellant had violated the terms of his probationary sentence on or about October 18, 1989, by committing the crimes of misdemeanor theft of property and disorderly conduct. Appellant admitted the violation and the court extended his probation to March 8, 1994. The prosecutor subsequently filed a petition for revocation on November 21, 1990. The prosecutor claimed that the appellant had violated the terms of his probation alleging that he had committed the offense of delivery of a controlled substance on October 30, 1990, and had failed to keep supervision fees current.

The charge of delivery of a controlled substance was dismissed after a bench trial held on August 20, 1991. The revocation hearing was held immediately following the dismissal. During the trial, Officer Larry Paul Garrison testified that he purchased three rocks of what was purported to be cocaine from appellant. There was also evidence introduced showing that the serial number on a twenty dollar bill found in appellant's possession matched the number Officer Garrison had copied from the money used in the transaction. Appellant interposed an objection to the introduction of the three rocks that Garrison purchased on chain of custody grounds. The court overruled the objection and admitted the three rocks, along with a fourth rock that was found in the same evidence baggy. Garrison surmised that this fourth rock was found on appellant's person in the search incident to his arrest. There was testimony given by the chemist from the crime lab identifying the rocks purchased by Garrison as aspirin, while the fourth rock showed a positive analysis for cocaine. Under these circumstances, the court on its own motion dismissed the charge of delivery of a controlled substance as the evidence revealed that the rocks purchased by Garrison were aspirin. Based on the evidence offered at trial, the court, however, found that appellant had violated the terms of his probation by delivering a counterfeit substance, and revoked appellant's probation.

Appellant claims he was not provided adequate notice of the charge against him because the state's petition alleged a charge of delivery of a controlled substance, not delivery of a counterfeit substance. Probation revocation, like parole revocation, is not a stage of a criminal prosecution, even though it does result in the loss of liberty. Consequently, a person on probation is

not entitled to the full panoply of rights afforded a defendant in a criminal prosecution. *Lawrence* v. *State*, 39 Ark. App. 39, 839 S.W.2d 10 (1992). Fundamental fairness, with an opportunity to be heard, is all that a probationer is entitled to demand. *Lockett* v. *State*, 271 Ark. 860, 611 S.W.2d 500 (1981); *Fitzgerald* v. *State*, 7 Ark. App. 246, 647 S.W.2d 480 (1983). The notice required for revocation of suspension or probation is provided for in Ark. Code Ann. § 5-4-310(3) (1987), which requires that the defendant be given prior notice of the time and place of the preliminary hearing, the purpose of the hearing, and the conditions of suspension or probation he is alleged to have violated.

In support of his argument, appellant cites *Robinson* v. *State*, 14 Ark. App. 38, 684 S.W.2d 824 (1985). In *Robinson*, the appellant was charged with robbery and theft by receiving. Robinson was acquitted of all charges. His revocation hearing followed the trial and the court revoked his suspended sentence finding that there was evidence he had committed third degree battery. Our court reversed, finding inadequate notice because, under the circumstances, the appellant had not had the opportunity to present a defense for the offense of third degree battery. Our court noted, that without due notice by the state of its basis for seeking to revoke suspension of sentence, a defendant is left to speculate upon what charges might emanate from the state's evidence on the day of the revocation hearing.

This case, however, is distinguishable from *Robinson*. In *Robinson*, we relied heavily upon the fact that the record revealed that Robinson was not afforded the opportunity to defend against the charge of third degree battery. In the instant case, however, appellant made no claim of surprise, nor did he seek a continuance or indicate the necessity of altering his defense to meet the circumstances. Appellant merely asserted that he was not accorded notice of the charge against him for revocation. When error is alleged, prejudice must be shown because we do not reverse for harmless error. *Bonds* v. *State*, 298 Ark. 630, 770 S.W.2d 136 (1989); *Phillips* v. *State*, 25 Ark. App. 102, 752 S.W.2d 301 (1988). It is the appellant's burden to demonstrate prejudicial error, not merely to allege it. *Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986). In our view, appellant has demonstrated no prejudice resulting from his probation being revoked based on evidence that he delivered a counterfeit substance, as

opposed to a controlled substance. Unlike the situation in *Robinson*, we cannot say that appellant was denied an opportunity to be heard, or that fundamental fairness was lacking.

Also, the offenses in this situation contain essentially the same elements to be proven. Arkansas Code Annotated § 5-64-401(a) (1987) states, in part,that it is unlawful for any person to deliver a controlled substance; while Ark. Code Ann. § 5-64-401(b) (1987) states, in part, that it is unlawful for any person to deliver a counterfeit substance. The similarity between each offense supports the conclusion that appellant was accorded adequate notice. We think a finding of delivery of a counterfeit substance naturally flows from an allegation of delivery of a controlled substance, when the substance actually delivered is shown to have been a counterfeit substance. Consequently, we do not find that appellant's right to due process was offended.

Affirmed.

COOPER and MAYFIELD, JJ., dissent.

JAMES R. COOPER, Judge, dissenting. I dissent because I disagree with the majority's conclusion that the appellant was provided adequate notice of the charge against him. The appellant, charged with and acquitted of delivery of a controlled substance, was immediately after trial found to have violated the conditions of his probation by committing a different offense, delivery of a counterfeit substance. This set of circumstances is precisely analogous to those presented in the case of *Robinson* v. *State*, 14 Ark. App. 38, 684 S.W.2d 824 (1985), where the appellant was charged with robbery and theft by receiving, acquitted, and revoked for committing a different offense, third degree battery.

The majority attempts to distinguish *Robinson, supra*, on the ground that the circumstances of that case resulted in greater prejudice to the defendant. I cannot agree. First, it should be noted that the appellant in *Robinson, supra*, admitted in open court that he hit the victim; all that was at issue in that case was the appellant's asserted defense of justification. Certainly the appellant in the present case, who admitted no wrongdoing, was equally prejudiced.

Although the majority cites the similarity between the

offenses of delivery of a controlled substance and delivery of a counterfeit substance as a factor lessening the prejudicial impact of the State's failure to provide adequate notice on the basis for revocation, I submit that this similarity resulted in confusion of the issues and placed the appellant on the horns of a dilemma. Charged with delivery of a controlled substance, the appellant sought to establish that no controlled substance was delivered, and that the substance involved was merely aspirin. Having successfully raised sufficient doubt concerning the nature of the substance to win an acquittal, the appellant's probation was revoked for selling aspirin.

Certainly, selling aspirin may be a crime under certain circumstances, but whereas the thrust of a prosecution for delivery of a controlled substance is the nature of the substance, the emphasis in a prosecution for delivery of counterfeit substance is the accused's representations or misrepresentations concerning the nature of the substance, and other evidence bearing on the accused's intent to deceive. *See* Ark. Code Ann. § 5-64-101(e) (Supp. 1991). I submit that it is fundamentally unfair for the State to permit a defendant to prepare his case on the principal charge on the basis of the nature of the substance alleged to have been sold, prevail on that issue, and then revoke his probation for a different offense involving proof of a substantially different character based on the proof adduced by the defendant in his trial on the principal charge. As the Court noted in *Robinson, supra*:

> [A] defendant cannot properly prepare for the hearing without knowing in advance what charges of misconduct are to be investigated as a basis for the proposed revocation of the probation.

Robinson, supra, quoting Hawkins v. *State*, 251 Ark. 955, 475 S.W.2d 887 (1972).

I respectfully dissent.

MAYFIELD, J., joins in this dissent.

Joseph Houston WALDRIP, Jr. and Welma Waldrip *v.* Randy L. DAVIS

CA 92-466 842 S.W.2d 49

Court of Appeals of Arkansas
Division I
Opinion delivered November 12, 1992

Gary Vinson, for appellant.

Jeffrey E. Hance, for appellee.

JUDITH ROGERS, Judge. This is a step-parent adoption case. Welma Waldrip, appellant, and Randy L. Davis, appellee, were divorced in late 1987. In the divorce, Welma was awarded custody of their two sons, and appellee was ordered to pay $200 a month in child support. Welma married appellant, Joseph Houston Waldrip, Jr., in August of 1988. In September of 1991, a petition was filed for adoption of the boys by Mr. Waldrip. In this petition, appellants alleged that appellee's consent to the adoption was unnecessary because he had failed significantly and without justifiable cause to provide for the support of the children.

The hearing was held on December 16, 1991. At the

conclusion of the hearing, the probate judge made the dual findings that appellants had not shown by clear and convincing evidence that appellee had failed to support the children, and that the adoption was not in the best interests of the children. In this appeal, appellants argue that the trial court erred in finding that they had not met their burden of proving that appellee had failed to support the children. For reasons discussed herein, we dismiss the appeal.

Arkansas Code Annotated § 9-9-207(a)(2) (1987) provides that:

> (a) Consent to adoption is not required of:
>
> (2) A parent of a child in the custody of another, if the parent for a period of at least one (1) year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree.

However, the mere fact that a parent has forfeited his right to have his consent to an adoption required does not mean that the adoption must be granted. The court must further find from clear and convincing evidence that the adoption is in the best interest of the child. *Manuel* v. *McCorkle*, 24 Ark. App. 92, 749 S.W.2d 341 (1988).

It is the appellants' sole contention on appeal that appellee's consent to the adoption was unnecessary because for a period of one year he failed significantly and without justifiable cause to support the children, and that the probate court's finding to the contrary was clearly erroneous. Appellants do not challenge, however, the court's finding that the adoption was not in the children's best interest, and they openly recognize that by not contesting that ruling any determination upon review of the court's alternate finding concerning appellee's purported failure of support will not alter the ultimate decision of the probate court in this case, the denial of the petition for adoption. Nevertheless, appellants urge us to reach the merits of their argument by contending that our decision might have an impact on a future claim for back child support or might affect a future adoption proceeding. We cannot accept appellants' invitation to address their argument.

As a general rule, no appeal lies from findings of fact, conclusions of law, or "mere rulings." *Holsum Shipley Baking Co.* v. *Terwilliger*, 36 Ark. App. 221, 819 S.W.2d 303 (1991). To make a determination on this issue in this situation would be tantamount to issuing an advisory opinion, which courts are prohibited from doing. *See Kunz* v. *Jarnigan*, 25 Ark. App. 221, 756 S.W.2d 913 (1988). Moreover, it is our duty to decide actual controversies. *Killiam* v. *Texas Oil & Gas Corp.*, 303 Ark. 547, 798 S.W.2d 419 (1990). Since the resolution of appellants' issue would have no effect on the instant case and since we do not issue advisory opinions, we dismiss the appeal. *See Beatty* v. *Clinton*, 299 Ark. 547, 772 S.W.2d 619 (1989); *Huckaby* v. *Cargill, Inc.*, 20 Ark. App. 164, 725 S.W.2d 856 (1987).

Dismissed.

JENNINGS and DANIELSON, JJ., agree.

Ivy LINCOLN and Arkansas Power & Light Company *v.* ARKANSAS PUBLIC SERVICE COMMISSION

CA 91-489 842 S.W.2d 51

Court of Appeals of Arkansas
En Banc
Opinion delivered November 18, 1992
[Rehearing denied December 16, 1992.]

[redacted]

[redacted]

[redacted]

Ivy Lincoln, for appellant.

Mitchell, Williams, Selig, Gates & Woodyard, by: *Edward B. Dillon, Jr.*, for appellant AP&L.

Paul J. Ward, for appellee Arkansas Public Service Commission.

Chisenhall, Nestrud & Julian, P.A., by: *Lawrence E. Chisenhall, Jr.*; and *James N. Atkins*, for appellee Oklahoma Gas & Electric.

MELVIN MAYFIELD, Judge. The sole issue involved in this appeal is whether the Arkansas Public Service Commission erred in dismissing appellant Ivy Lincoln's complaint after it found that it was without jurisdiction to grant Lincoln the relief he is seeking. Appellant Ivy Lincoln and appellant Arkansas Power & Light Company (AP&L) separately petitioned for rehearing, contending that Lincoln's petition was within the Commission's jurisdiction. Both petitions were denied, and their separate appeals from those denials have been consolidated in this appeal.

On July 3, 1991, Ivy Lincoln filed a complaint with the Arkansas Public Service Commission, naming as defendants AP&L and "all other public utilities and electric cooperative corporations furnishing electric service in the state of Arkansas." Lincoln requested that the Commission order AP&L and the other defendants to cease their maintenance of exclusive service territories by offering service without regard to any electric service territory boundaries. Lincoln acknowledged that maintenance of exclusive service territories was required by Ark. Code Ann. § 23-18-101 (1987), which provides:

> Notwithstanding any provisions of law or the terms of any certificate of convenience and necessity, franchise, permit, license, or other authority granted to a public utility or electric cooperative corporation by the state or a municipality, no public utility or electric cooperative corporation shall furnish, or offer to furnish, electric service at retail and not for resale in any area allocated by the Arkansas Public Service Commission to another electric cooperative corporation or public utility.

Lincoln argued, however, that this statute should be declared unconstitutional because it creates monopolies, which are disallowed by the Arkansas Constitution.

Lincoln asserted that he has a public right to freedom from state-imposed restrictions on electric service offerings pursuant to Ark. Code Ann. § 23-3-114(a)(1) (1987), which provides that "[a]s to rates or services, no public utility shall make or grant any unreasonable preference or advantage to any corporation or person or subject any corporation or person to any unreasonable prejudice or disadvantage." The defendants' refusal to offer electric service to prospective customers outside their allocated territories, Lincoln argued, creates an unreasonable disadvantage and unfair prejudice to the consumer. Lincoln's complaint requested:

> (1) that the APSC convene a hearing and hear oral argument within 60 days after the filing of this complaint;
>
> (2) that the APSC find A.C.A. Sec. 23-18-101 unconstitutional under ARK. CONST. art. II, Secs. 19 and 29;
>
> (3) that the APSC enter an order which abolishes exclusive electric service territories and which frees AP&L, et al, to offer electric service without regard to whether a potential customer is located within the service territory previously allocated to AP&L, et al; and
>
> (4) all other appropriate relief.

Because Lincoln's complaint questioned the constitutionality of a state statute, defendant and appellee Ozarks Electrical Cooperative Corporation ("OECC") denied that the Commis-

sion had jurisdiction of Lincoln's cause of action. OECC and the other defendants also denied that Lincoln's complaint stated a cause of action and prayed that his complaint be dismissed.

An extensive answer was filed by appellant AP&L, which denied all of the allegations of law and fact upon which Lincoln's complaint was based. AP&L asserted that Lincoln had misinterpreted the word "monopoly" as it is used in the Arkansas Constitution and that the Commission's policies do not result in a "monopoly" within the meaning of the Constitution.

In October 1991, the Commission entered Order No. 1, which dismissed Lincoln's complaint for lack of jurisdiction. The Commission determined that Lincoln's complaint sought an order declaring § 23-18-101 void and unconstitutional, which exceeds the Commission's authority. The Commission stated:

> Complainant asserts that the exclusive service territories created pursuant to this provision are "monopolies" prohibited by the Constitution of the State of Arkansas and that such service territories should be eliminated immediately. It is alleged in the Complaint that if these service territories were eliminated, that Complainant would have available competitive electric utility service at competitive rates. Complainant asserts that pursuant to the Commission's quasi-judicial authority under Ark. Code Ann. § 23-3-119, the Commission "is required, as well as empowered, to decide the constitutionality of utility and co-op practices in light of Complainant's asserted right to a competitive market for electric service.
>
> . . . .
>
> Complainant invokes the Commission's jurisdiction as primary pursuant to Ark. Code Ann.§ 23-3-119(d) which provides:
>
> > (d) The commission shall then have the authority, upon timely notice, to conduct investigations and public hearings, to mandate monetary refunds and billing credits, or to order appropriate prospective relief as authorized or required by law, rule, regulation, or order. The jurisdiction of the commission in

> such disputes is primary and shall be exhausted before a court of law or equity may assume jurisdiction. However, the commission shall not have the authority to order payment of damages or to adjudicate disputes in which the right asserted is a private right found in the common law of contracts, torts, or property.

It is the specific intent of this section to authorize the Commission to adjudicate individual disputes between consumers and the public utilities serving those consumers. In addition to the Commission's quasi-legislative authority, the General Assembly extended the Commission's quasi-judicial authority to adjudicate complaints arising from the public utility statutes, rules and regulations and orders of the Commission. Ark. Code Ann. § 23-3-119(f).

Were the relief requested of a different nature, the Commission might agree that our jurisdiction over this Complaint is primary. However, the relief which Complainant seeks is to have the Commission declare a statute invalid and this relief exceeds the Commission's authority. The Public Service Commission is a creature of the legislature which acts within the powers conferred upon it by legislative act. *Southwestern Bell Telephone Company* v. *Arkansas Public Service Commission*, 267 Ark. 550, 593 SW2d 434 (1980). As a "creature of the legislature", the Commission's power and authority is confined to that which the legislature confers upon it. The Commission is empowered, in some instances, to interpret the public utility statutes of the state but the General Assembly has not conferred upon the Commission the authority to overrule the General Assembly and act as a super legislature of three. It is not within the jurisdiction of this Commission to declare a properly enacted statute to be invalid and to declare that the Commission will hereinafter ignore the provisions of that statute.

The relief which Complainant seeks can only be obtained through legislative action repealing or amending Ark. Code Ann. § 23-18-101 or through a court with the authority to declare the statute unconstitutional. Therefore, the Commission finds that the Complaint filed in this

Docket on July 3, 1991, should be and hereby is dismissed for lack of jurisdiction.[1]

In response to Order No. 1, Lincoln and AP&L separately petitioned for rehearing. Lincoln contended Ark. Code Ann. § 23-2-423(c)(4) (1991) requires that the Commission first determine whether an order or decision of the Commission violates any laws of the Arkansas Constitution or the Constitution of the United States and, after that determination is made, the Commission's decision is then appealable to the courts.

Although it urged that Lincoln's request for rehearing be denied, AP&L also requested rehearing of Commission Order No. 1. AP&L contended that the Commission's order erroneously focused on the constitutionality of § 23-18-101 in finding it did not have jurisdiction to hear Lincoln's complaint. AP&L argued that, because the major thrust of Lincoln's complaint is an attack on the allocation of electric service areas, which is exclusively within the Commission's jurisdiction, the Commission should have rendered a decision on this issue and then addressed the issue of the constitutionality of § 23-18-101 as incidental to its basic regulatory jurisdiction.

The Commission in Order No. 2 held that neither Lincoln's nor AP&L's arguments were persuasive and denied their petitions. Both parties now appeal the Commission's denial of jurisdiction. We find no error and affirm.

■ It is well established that courts, and not administrative agencies, are the final arbiters of agency authority. *West Helena Sav. & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 417 F. Supp. 220, 223 (E.D. Ark. 1976), *aff'd*, 553 F.2d 1175 (8th Cir. 1977). The courts have recognized that administrative agencies, because of their specialization, experience, and greater flexibility of procedure, are better equipped than courts to analyze legal issues

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[1] The Commission also held in Order No. 1 that, in *Southwestern Elec. Power Co.* v. *Carroll Elec. Coop. Corp.*, 261 Ark. 919, 554 S.W.2d 308 (1977), and *Great Lakes Carbon Corp.* v. *Arkansas Pub. Serv. Comm'n.*, 31 Ark. App. 54, 788 S.W.2d 243 (1990), the validity of § 23-18-101 had been upheld by the Arkansas courts. We note, however, that these cases dealt with the interpretation and application of § 23-18-101 and that the constitutionality of § 23-18-101 was not challenged. Therefore, we do not find them dispositive of Lincoln's complaint.

dealing with their agencies, and this accounts for the limited scope of review of administrative action and the reluctance of a court to substitute its judgment for that of the agency. *Clinton* v. *Bonds*, 306 Ark. 554, 557, 816 S.W.2d 169, 171 (1991).

In denying Lincoln's rehearing petition, the Commission stated that, although the General Assembly has given the Commission broad authority to carry out its rules and regulations, it must conform its policies to that legislation and the Commission has no authority to invalidate an act of the General Assembly. While the Commission acknowledged that it has the authority to rule on the constitutionality of a statute if it is germane and incidental to an ultimate legislative act, it concluded that the relief requested by Lincoln's complaint was purely judicial and not incidental to the Commission's legislative authority.

For his appeal, Lincoln contends that the Commission has the statutory authority to adjudicate his complaint and order electric utilities and cooperatives to stop their practice of offering service only to those customers who are located within their territorial boundaries. Lincoln acknowledges that past Commission policy and the utilities' refusals to compete arise from Ark. Code Ann. § 23-18-101 (1987), which the Commission is charged by law to administer, but argues that the Commission erred in concluding that it did not have the judicial authority to hold this statute unconstitutional. In support of his argument, Lincoln relies on Ark. Code Ann. § 23-3-119(a)(2) and (d) (1987), which provides:

> (2) Any consumer or prospective consumer of any utility service may complain to the commission with respect to the service, furnishing of service, or any discrimination with respect to any service or rates.
>
> . . . .
>
> (d) . . . .The jurisdiction of the commission in such disputes is primary and shall be exhausted before a court of law or equity may assume jurisdiction. However, the commission shall not have the authority to order payment of damages or to adjudicate disputes in which the right asserted is a private right found in the common law of

contracts, torts, or property.

Lincoln also relies on Ark. Code Ann. § 23-2-304(a), which enumerates certain powers of the Commission that include:

> (1) Find and fix just, reasonable, and sufficient rates . . . ;
>
> (2) Determine the reasonable, safe, adequate, sufficient service to be observed, furnished, enforced, or employed by any public utility and to fix this service by its order, rule, or regulation;
>
> (3) Ascertain and fix adequate and reasonable standards, classifications, regulations, practices, and services to be furnished . . .

Lincoln asserts that § 23-3-119 gives the Commission subject matter jurisdiction over all consumer complaints. He argues that the Commission's conclusion that determination of his complaint would be an unconstitutional violation of the separation of powers is contrary to the intent of the General Assembly as expressed in § 23-3-119(f)(1) through (3):

> (f)(1) It is the specific intent of the General Assembly in enacting the 1985 amendment to this section to vest in the Arkansas Public Service Commission the authority to adjudicate individual disputes between consumers and the public utilities which serve them when those disputes involve public rights which the commission is charged by law to administer.
>
> (2) Public rights which the commission may adjudicate are those arising from the public utility statutes enacted by the General Assembly and the lawful rules, regulations, and orders entered by the commission in the execution of the statutes. The commission's jurisdiction to adjudicate public rights does not and cannot, however, extend to disputes in which the right asserted is a private right found in the common law of contracts, torts, or property.
>
> (3) The commission's quasi-judicial jurisdiction to adjudicate public rights and claims in individual cases is in addition to the commission's traditional legislative authority to act generally and prospectively in the interest of the

public. The quasi-judicial commission authority recognized in this action is a legitimate function and does not, in the judgment of the General Assembly, constitute an unlawful delegation of judicial authority under either the Arkansas Constitution or the United States Constitution.

We disagree with Lincoln's argument that § 23-3-119 gives the Commission jurisdiction to adjudicate all consumer complaints involving a "public right." The public rights that § 23-3-119(f) charges the Commission to administer are those rights "arising from the public utility statutes enacted by the General Assembly and the lawful rules, regulations, and orders entered by the commission in the execution of the statutes." The "public right" Lincoln is seeking to have enforced in the case at bar is competitive electric service. Assuming without deciding that he is entitled to such a right, it is not one that arises from either the "utility statutes enacted by the General Assembly" or the "lawful rules," "regulations," or "orders entered by the Commission." The Commission correctly found that Lincoln's complaint was outside the scope of § 23-3-119.

Nor do we agree with Lincoln's argument that the supreme court's holding in *Ozarks Electric Cooperative Corporation* v. *Harrelson*, 301 Ark. 123, 782 S.W.2d 570 (1990), expands the Commission's jurisdiction under § 23-3-119. In that case, the appellant discovered the appellees' electric meter was defective and billed them for reconstructive charges pursuant to Commission General Service Rule 10C(3)(a). After the appellees refused to pay the charges, the appellant disconnected their service. The appellees filed an action in circuit court seeking to have their service restored. The appellees' action was later transferred to chancery court, which retained jurisdiction on the basis of equitable principles that the appellees owed for estimated usage only. On appeal, the supreme court held that jurisdiction of the appellees' complaint was properly with the Arkansas Public Service Commission. The supreme court noted that § 23-3-119(d) gives the Commission the authority to conduct investigations and public hearings and to mandate monetary refunds, billing credits, or order appropriate prospective relief as authorized or required by law and that jurisdiction of the Commission in such disputes is primary and shall be exhausted before a court of law or equity may assume jurisdiction. The supreme court then

noted that the powers of the Commission include the authority to:

> Ascertain and fix adequate and reasonable standards for the measurement of quantity, quality, pressure, initial voltage, or other conditions pertaining to the supply of all products, commodities, or services furnished or rendered by any and all public utilities; prescribe reasonable regulations for the examination and testing of such production, commodity, or service, and for the measurement thereof, establish or approve reasonable rules, regulations, specification, and standards to secure the accuracy of all meters or appliances for measurement; and provide for the examination and testing of any and all appliances used for the measurement of any product, commodity, or service of any public utility. [Ark. Code Ann. § 23-2-304(a)(3) (1987).]

301 Ark. at 126, 782 S.W.2d at 572. The supreme court concluded that the issue of whether the appellant properly billed the appellees for reconstructive service involved a specific regulation of the Commission and, therefore, fell within the primary jurisdiction of the Commission.

The rights at issue in *Ozark Electric Cooperative Corporation* v. *Harrelson, supra*, dealt with a specific regulation of the Commission. We agree with the Commission's conclusion that the supreme court's holding there cannot be expanded under the fact situation here to give the Commission jurisdiction to declare a statute enacted by the General Assembly unconstitutional. Although the Commission has been given quasi-judicial jurisdiction to adjudicate public rights and claims in individual cases in addition to its traditional legislative authority, that jurisdiction is not so broad as to allow the Commission to make a purely judicial determination and invalidate a statute which the Commission is charged to enforce. The Commission is a creature of the legislature and its duties are primarily legislative and administrative; it is not a judicial body. *Southwestern Elec. Power Co.* v. *Coxsey*, 257 Ark. 534, 536, 518 S.W.2d 485, 487 (1975). When the final act in a given case before the Commission is legislative, the Commission is empowered to determine legal questions which are incidental and necessary to the final legislative act. *Id.* at 536-37, 518 S.W.2d at 487. Here, however, the relief Lincoln seeks is the abolishment of exclusive service

territories which are mandated by § 23-18-101. Lincoln can obtain this relief only by having the General Assembly repeal § 23-18-101 or by having the statute declared invalid, which calls for a judicial determination.

AP&L agrees with the Commission's holding that § 23-3-119 does not extend the Commission's jurisdiction to allow it to declare § 23-18-101 unconstitutional. Nevertheless, AP&L maintains that the primary focus of Lincoln's complaint is not about the constitutionality of § 23-18-101, but instead his request that the Commission reverse its more than fifty-year-old regulatory policy of area allocation and abolish exclusive service territories. AP&L argues that, although § 23-18-101 now requires exclusive service territories for electric service providers, these territories existed prior to its enactment. Therefore, even if § 23-18-101 is found unconstitutional, Lincoln would not necessarily be entitled to competing electric service, because the Commission could still find the exclusive service areas are in the public's best interest. AP&L argues that the issue of whether § 23-18-101 is constitutional need not even be addressed if the Commission finds that its area allocation policies do not violate the Constitution. AP&L concludes that the only sensible course for the Commission to follow in resolving appellant's complaint is to first determine whether the Commission's area allocation policies are prohibited by the Constitution; then, if it concludes that its policies are not constitutional, it should determine the incidental issue of whether § 23-18-101 is constitutional.

The Commission has authority to address constitutional questions which are germane and incidental to a final act over which the Commission's jurisdiction is primary. *See General Tel. Co.* v. *Lowe*, 263 Ark. 727, 730, 569 S.W.2d 71, 73 (1978). Orderly procedure and administrative efficiency demand that the regulatory body be vested with authority to make preliminary determination of legal questions which are incidental and necessary to the ultimate legislative act. *Southwestern Gas & Elec. Co.* v. *City of Hatfield*, 219 Ark. 515, 522, 243 S.W.2d 378, 382 (1951).

We agree with the Commission's finding that the constitutionality of § 23-18-101 is not incidental to Lincoln's complaint. It is undisputed that, in order for appellant Lincoln to

obtain abolishment of exclusive service territories, § 23-18-101, which now mandates such territories, must be declared unconstitutional. While the Commission may have found prior to the enactment of § 23-18-101 that exclusive service territories were in the public's best interest, that determination is no longer relevant because, under § 23-18-101, these exclusive service territories are required. When the General Assembly enacts a statute affecting the powers, duties, or jurisdiction of the Commission, the Commission must conform its policies and regulations to that legislation. *See Southwestern Bell Tel. Co.* v. *Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 557, 593 S.W.2d 434, 440 (1980).

In the present case, the challenge is not to a specific area allocation order of the Commission but to a statute enacted by the General Assembly which requires such allocation. Notwithstanding the fact that exclusive service areas existed prior to the enactment of this statute, they exist now pursuant to this statute, and Lincoln cannot obtain the relief he is seeking without this statute being repealed or declared unconstitutional. Lincoln challenges the statute on the ground that it violates the anti-monopoly provision of the Arkansas Constitution. Whether this argument contains any merit remains to be decided; however, this question clearly should be decided by the courts, and the Commission correctly denied jurisdiction to decide this issue.

Where an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy should be pursued; however, where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right. *Public Utils. Comm'n of Calif.* v. *United States*, 355 U.S. 534, 539-40 (1957).

> In general, administrative officers and agencies may not determine constitutional questions. Accordingly, they have no power or authority to consider or question the constitutionality of an act of the legislature, such as their own enabling legislation, and may not declare unconstitutional the statutes which they are empowered to administer or enforce.

73 C.J.S. *Public Administrative Law & Procedure*, § 65 (1983).

For his second issue, Lincoln argues that the Commission, in denying it had the authority to adjudicate his complaint, violated his right to a certain and complete remedy in the laws. Lincoln asserts that "[a] prospective complainant should be able to read the statutes and determine whether the PSC has jurisdiction." He cites no authority for this proposition but concludes that, because the Commission arbitrarily and capriciously dismissed his complaint, he has been denied a remedy. We disagree. If Lincoln believes that he is being unjustly denied competing electric service because of the existence of § 23-18-101, he can challenge the constitutionality of this statute in a declaratory judgment action.

Affirmed.

COOPER and ROGERS, JJ., concur.

Jeffrey Lynn CASH *v.* STATE of Arkansas

CACR 92-46 842 S.W.2d 440

Court of Appeals of Arkansas
Division I
Opinion delivered November 18, 1992

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

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

JUDITH ROGERS, Judge. Jeffery Lynn Cash, appellant, appeals his convictions of robbery and theft of property for which he was sentenced to concurrent terms of five and three years, respectively. As his sole point for reversal, appellant contends that he was denied the right to a speedy trial. We disagree, and affirm.

Appellant was charged by a single information with the offenses of aggravated robbery and theft of property (counts 2 & 3), and the offenses of robbery and theft of property (counts 1 & 4). The court's docket reflects that all charges were set for trial on February 6, 1991. On January 18, 1991, appellant moved to sever these offenses, and at an omnibus hearing held on January 22, 1991, the court granted appellant's motion to sever. Appellant was tried on counts 2 and 3 on the date originally scheduled for trial, February 6. As reflected by a docket entry made on January

22, counts 1 and 4, which are the subject of this appeal, as well as another charge pending against appellant, were bound over for trial on May 21, 1991. On May 21, the state elected to try appellant on the other pending charge, and appellant was not tried on counts 1 and 4 until September 16, 1991.

The parties agree that the speedy trial period began to run on August 31, 1990, the date of appellant's arrest. *See* Ark. R. Crim. P. 28.2(a). Pursuant to Ark. R. Crim. P. 28.1(c), the state had until August 31, 1991, or twelve months from the day of arrest to bring appellant to trial, excluding only such periods of necessary delay as provided in Ark. R. Crim. P. 28.3. Since appellant's trial took place on September 16, 1991, it was held seventeen days beyond the speedy trial period. Once it has been shown that a trial is to be held after the speedy trial period has expired, the State has the burden of showing that any delay was the result of appellant's conduct or that it was otherwise legally justified. *Reed* v. *State*, 35 Ark. App. 161, 814 S.W.2d 560 (1991). The State urges that there are several excluded periods justifying the delay. However, we need only discuss one such period as we have determined that the time between January 22, 1991, and May 21, 1991, is excluded based on the supreme court's decision in *Lewis* v. *State*, 307 Ark. 260, 819 S.W.2d 689 (1991). This period alone is sufficient to bring appellant's trial within the speedy trial limitation.

In *Lewis* v. *State*, *supra*, the defendant was charged with four counts of delivery of a controlled substance and all counts were set for trial on the same date, June 18, 1990. Lewis, like the appellant here, successfully obtained a severance just prior to trial and was tried on one count on the original trial date. Before his second trial, Lewis filed a motion to dismiss asserting the lack of a speedy trial. In affirming the trial court's denial of the motion, the supreme court held that the period from the time the motion to sever was granted until the date the second trial was initially scheduled was excluded for speedy trial purposes. In discussing Lewis's arguments, the court said:

> Be that as it may, it is obvious the remaining counts could not be tried on June 18 as scheduled, and a delay in the trial attributable to the defendant constitutes 'good cause' as provided in Ark. R. Crim. P. 23.3(h). The state was

> prepared to try the appellant on June 18, well within the time for speedy trial and it was the appellant's motion to sever, filed on the eve of trial, that occasioned the delay. We have held a number of times that when the defendant is scheduled for trial within the time for speedy trial and the trial is postponed because of the defendant, that is 'good cause' to exclude the time attributable to the delay.

Id. at 262-63, 819 S.W.2d at 691. Although appellant argues otherwise, we discern no material distinction between *Lewis* and the case at bar. Appellant was scheduled for trial on all counts on February 6 and, due to the motion to sever granted on January 22, the remaining counts were bound over for trial on May 21. Even though appellant was not tried on that date, that period of delay was nevertheless directly attributable to appellant's motion to sever. Rule 28.3(h) provides that periods of delay for good cause are excluded in computing the time for trial. As did the court in *Lewis*, we hold that the postponement prompted by appellant's motion to sever, from January 22 to May 21, is excluded under the speedy trial rules.

Appellant also argues that the trial court failed to comply with Ark. R. Crim. P. 28.3(i), which provides in part that "all excluded periods shall be set forth by the court in a written order or docket entry." The court's docket entry of January 22, 1991, states, "Cts. 2 & 3 of this case to be tried - 5-21-91 set for trial of other counts or 90-2258." Although appellant does not specify the reason he deems this notation deficient, he cites our decision in *Reed* v. *State*, 35 Ark. App. 161, 814 S.W.2d 560 (1991). There, we observed:

> Although not expressly stated in the rule [Ark. R. Crim. P. 28.3(i)], the supreme court has said that 'a court should enter written orders or make docket notations *at the time continuances are granted to detail the reasons for the continuances* and to specify, to a date certain, the time covered by such excluded periods.' *Hicks* v. *State*, 305 Ark. 393, 397, 808 S.W.2d 248, 351 (1991) (emphasis in original); *see also McConaughy* v. *State*, 301 Ark. 446, 784 S.W.2d 768 (1990). The court has also said that this language must be adhered to in order to provide any impetus behind Rule 28.3. *Hicks* v. *State*, *supra*.

Id. at 166, 814 S.W.2d at 562. In this case, the docket entry speaks to the motion to sever; the notation was made contemporaneously to the granting of the motion; and, it specifies the date upon which the trial was rescheduled. Consequently, we find compliance with the rule.

Affirmed.

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

Lana A. ELKINS *v.* Mark JAMES

CA 92-154 842 S.W.2d 58

Court of Appeals of Arkansas
Division I
Opinion delivered November 18, 1992

Ronald W. Metcalf, for appellant.

Stephen M. Sharum and *William J. Kropp III*, for appellee.

JUDITH ROGERS, Judge. At issue in this appeal is whether the chancellor was correct in applying the substantive law of Arkansas in modifying a Missouri divorce decree as it pertains to the age of majority and the payment of child support. Appellant contends that the chancellor's decision to apply Arkansas law deprived the Missouri decree of full faith and credit. We agree with the chancellor's ruling and affirm.

Appellant, Lana A. Elkins, and appellee, Mark James, were divorced in 1979 pursuant to a Jackson County, Missouri, decree. Custody of their two minor children was awarded to appellant, and appellee was ordered to make monthly child support payments in the sum of $200 per child through the clerk's office of Jackson County. In 1980, appellant and the children moved to Arkansas; appellee moved to Oklahoma in 1982.

In October of 1985, appellant registered the Missouri divorce decree with the Sebastian County Chancery Court and

sought an increase in child support. On December 17, 1985, the chancellor modified the decree in accordance with the parties' agreement to increase support payments to $300 a month per child. The court retained the provision that the payments would continue to be paid through the clerk's office in Jackson County, Missouri.

In July of 1989, the Sebastian County Chancery Court again modified the decree by approving an agreement of the parties regarding the payment of medical expenses. The order recited that appellee would be solely responsible for all future extraordinary medical, hospital, dental and orthopedic treatment for the minor children. The order further provided that child support payments would be abated during the time that the children actually spent with their father pursuant to the visitation schedule. The amount of child support was not increased at that time.

The instant litigation began on June 4, 1991, when appellee petitioned the chancery court seeking the termination of child support for the parties' older son, who had reached the age of eighteen. In his petition, appellee agreed to continue paying support for the remaining child and offered to increase payments on behalf of that child from $300 to $500 per month. Appellant responded that appellee should not be relieved of the duty to support the older son because Missouri law required the payment of child support to continue for children in college until the age of twenty-one. The statutory provision referred to provides in part: "If when a child reaches the age of eighteen, he is enrolled in and attending a secondary school program of instruction, the parental support obligation shall continue until the child completes such program or reaches age twenty-one, whichever occurs first." Mo. Ann. Stat. § 452.340.5 (Vernon 1986). Appellant also requested an increase in support for both children.

The chancellor found that appellant had twice invoked the jurisdiction of the Arkansas court when she registered the Missouri divorce decree in October of 1985 and when she called upon the court to have appellee provide payment of medical expenses for the two children, a matter which had not been addressed in the original Missouri decree. The chancellor thus held that Arkansas law applied and terminated support for the elder son.

Appellant contends on appeal that, as a matter of full faith and credit, the court should have applied the substantive law of Missouri concerning the termination of child support. The Full Faith and Credit Clause is found at art. IV, § 1 of the United States Constitution. Its purpose is to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered. *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943). In keeping with this principle, it has been held that a divorce decree as to past due installments of alimony or child support is within the protection of the full faith and credit clause and may not be modified as long as the courts in the state which rendered the decree have no discretion to modify such accrued installments. *Sistare* v. *Sistare*, 218 U.S. 1 (1910). However, future installments under a sister state's decree may be modified as long as such installments are subject to modification in the state rendering the decree. *New York ex re. Halvey* v. *Halvey*, 330 U.S. 610 (1947).

The Revised Uniform Reciprocal Enforcement of Support Act, codified at Ark. Code Ann. §§ 9-14-301—334 (Repl. 1991), at section 9-14-340(a) provides:

> Upon registration the registered foreign support order shall be treated in the same manner as a support order issued by a court of this state. It has the same effect and is subject to the same procedures, defenses, and proceedings for the reopening, vacating, or staying as a support order of this state and may be enforced and satisfied in like manner.

Appellant agrees that Arkansas courts can treat the Missouri support order in the same manner as a support order issued in this state, as far as it involves obtaining jurisdiction of the parties and having the power to modify the order. However, appellant contends that any modifications made in Arkansas must be controlled by the law of Missouri.

Although Arkansas courts have not directly addressed the precise issue raised here, other jurisdictions have done so and their decisions provide guidance in this case. In *Elkind* v. *Byck*, 439 P.2d 316 (Cal. 1968), the court was also confronted with the situation where neither of the parties remained residents of the

rendering state. The parties were divorced in Georgia, where the decree incorporated an agreement for the husband to establish a trust in the amount of $11,500 from which monthly child support payments would be made. This support provision was not subject to modification. Eight years later, the mother initiated proceedings to obtain further support under URESA in New York, where she and the child had moved, and the case was transmitted to California where the father had become a resident. The father defended the petition on the ground that the California court could not impose, consistent with the full faith and credit clause, any support obligation in excess of his duty under the Georgia decree. The father relied on the decision in *Yarborough* v. *Yarborough*, 290 U.S. 202 (1933), where the United States Supreme Court reversed a decision from the Supreme Court of South Carolina and held that the courts of South Carolina were precluded by full faith and credit from modifying a Georgia child support decree which was not modifiable under Georgia law. The court in *Elkind*, however, held that California law applied. In rejecting the father's contention, the court reasoned that *Yarborough* was not controlling because the decision was founded upon the continuing presence of the obligor in the rendering state and because the Court had specifically reserved the question of whether a different result would obtain if the obligor no longer resided in the rendering state. *See also e.g. Rollins* v. *Rollins*, 602 A.2d 1121 (D.C. 1992). The *Elkind* court further observed that Georgia had not adopted the URESA provisions at the time *Yarborough* was decided, and expressed the view that with the adoption of the reciprocal support legislation "the federal system now espouses the principle that no state may freeze the obligations flowing from the continuing relationship of parent and child." 439 P.2d at 320.

A similar result was reached by the Missouri Court of Appeals in *Thompson* v. *Thompson*, 645 S.W.2d 79 (Mo. Ct. App. 1982). At issue in that case was the power of the Missouri court to modify a Kansas divorce decree so as to change the age of majority from eighteen, as provided under Kansas law, to twenty-one, in accordance with Missouri law. At the time modification was sought, both parties resided in Missouri. The court recognized the competing policies of full faith and credit clause in protecting the sovereignty of Kansas, as opposed to the policy of

Missouri with respect to the protection of domiciled minors in the area of parental support. In ruling that the Missouri court had the authority to order the husband's child support obligation continued past the age of eighteen, the court reasoned:

> A support decree governs a continuing relationship - that of the child and his parent. It is impossible for a rendering state to take into account another state's interest that may arise in the future. In the case at hand husband, wife, and children were domiciliaries of Kansas at the time the support decree was entered. But by the time the modification of that decree, which is the subject of this appeal, was sought, *all* parties had moved to Missouri. Missouri is responsible for the welfare of the Thompson children, and Missouri continues a father's support obligation until his child reaches the age of twenty-one. Mr. Thompson, the husband, became subject to Missouri law upon establishing a domicile in this state. Missouri need not accede to the judgment of a sister state concerning a continuing matter that has become a purely internal affair of Missouri.
>
> . . . .
>
> In weighing the interests of Kansas under the policy reasons for full faith and credit and the interests of Missouri in the maintenance and support of minor children domiciled in Missouri, the balance must be struck on the side of Missouri.

Id. at 87, 88 (citations omitted). *Cf. Davis* v. *Sullivan*, 762 S.W.2d 495 (Mo. Ct. App. 1988) (holding that the full faith and credit clause precluded modification of a foreign state's decree with regard to the age of majority where the obligor remained a resident of the rendering state).

In *In re the Marriage of McCabe*, 819 P.2d 1116 (Colo. Ct. App. 1991), the court held that the full faith and credit impact to be given a decree from one state to another depends not only on whether that decree is modifiable but also on the present domicile of the parties. The parties there had divorced in California, where the age of majority was eighteen. Subsequent to the divorce, the wife and child moved to Virginia while the husband moved to Colorado. The wife petitioned a Colorado court for an increase in

child support and also asked that support be continued until the child reached the age of twenty-one, the age of majority in Colorado. In ruling that Colorado could modify the foreign support decree and apply its age of majority, the court stated:

> Thus, for two primary reasons, we conclude here that the full faith and credit clause does not restrict Colorado from applying its majority age to a subsequent child support action where a decree from another state with a different majority age is involved.
>
> First, the absence of the parties from the rendering state, particularly the obligor and the child, diminishes the rendering state's interest in enforcing the decree in other states. Second, although the action here was not brought as a URESA action, the rendering state has, by adopting URESA laws, evidenced a general willingness to permit the laws of the obligor state to be applicable to further nonmodifiable child support payments.
>
> We therefore conclude that, because none of the parties to the initial decree still reside in California and since California has adopted URESA, the full faith and credit clause does not preclude the application of Colorado law in this instance.

Id. at 1120.

The case of *Finney* v. *Eagly*, 568 So. 2d 816 (Ala. Civ. App. 1990), contains facts closely resembling those found in this case. The parties obtained a divorce in Utah, after which the wife and children moved to Alabama and the husband moved to Montana. The husband later brought an action in an Alabama court seeking joint custody, or specific visitation in the alternative. The wife requested an increase in child support. In its ruling, the trial court determined that the age of majority was controlled by the law of Utah, which provided for the termination of support at age eighteen. On appeal from that ruling, the Alabama court was persuaded by the Missouri Court of Appeals' analysis in *Thompson* v. *Thompson*, *supra*, and reversed, holding that the issue was governed by Alabama law, which fixed the age of majority at age nineteen.

We note appellant's argument that the decision in *Holley* v.

Holley, 264 Ark. 35, 568 S.W.2d 487 (1978), is dispositive of the question presented here. There, in addressing the chancellor's remission of past due support under a foreign decree, the court, in *obiter dictum*, remarked in reference to full faith and credit that "[t]here is at least doubt about the power of the Arkansas court to reduce this foreign judgment under any circumstances in view of the Kansas law on this subject." The court went on to say that it was deciding the case under Arkansas law as the parties had not invoked Kansas law. It is clear that the court did not decide the issue raised here as the question was not squarely before it. Also, while the wife and children lived in Arkansas, it is not apparent from the opinion where the obligor resided and, as appellant recognizes, the decision antedates the enactment of URESA. Therefore, we do not agree that *Holley* is controlling.

Instead, from our review, the case law illustrates that the full faith and credit clause erects no barrier to the application of Arkansas law on this subject, particularly where the obligor has not remained a resident of the rendering state. In the present case, Arkansas and Missouri have both adopted the Uniform Reciprocal Enforcement of Support Act. Neither party questions the authority of an Arkansas Court to modify the Missouri decree and appellant has twice obtained affirmative relief from the court in this state. The parties here no longer have any ties to Missouri, except for the receipt by the clerk's office in Jackson County, Missouri, of appellee's monthly child support payments. Appellee has lived in Oklahoma since 1982 and appellant and their two sons have lived in Arkansas since 1980. We find that, after more than a decade, Arkansas has acquired an interest in the welfare of these children such that the issue of their support has become an internal affair of this state. Based on these considerations, we hold that the law of Arkansas is applicable, under the facts of this case, to the issue of their continuing support. Under Arkansas law, absent special circumstances which are not present here, there is no legal obligation on the part of a parent to contribute to the maintenance and support of his or her children after they reach the age of eighteen. *See Mitchell* v. *Mitchell*, 2 Ark. App. 75, 78-79, 616 S.W.2d 753, 754-55 (1981). The chancellor was correct in modifying the decree and terminating child support for the child who had reached the age of eighteen.

Affirmed.

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

Greg HENDRIX *v.* STATE of Arkansas

CA CR 92-22 842 S.W.2d 443

Court of Appeals
En Banc
Opinion delivered November 25, 1992

S. Reid Harrod, Jr., for appellant.

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

GEORGE K. CRACRAFT, Chief Judge. Greg Hendrix appeals from his conviction of delivery of a controlled substance (cocaine), for which he was sentenced to a term of ten years in the Arkansas Department of Correction and fined $10,000.00. We find sufficient merit in two points raised to warrant reversal for a new trial.

Officer Ed Gilbert testified that in September 1990, while working undercover, he purchased a substance from appellant for $100.00. It was not denied that the substance was cocaine. Appellant testified in his own behalf, denying that he was the person from whom the officer made the purchase.

On direct examination, appellant was asked by his attorney if he had ever used drugs. Appellant responded that over two years ago he had tried cocaine on one or two occasions but had not used it at any time after that. He denied either using or dealing in drugs, asserting that he had tried to keep other people from becoming involved with drugs because "it's burning our commu-

nity down" and because people who use or deal in drugs "los[e] everything."

After appellant testified, the State announced in chambers that it intended to call Officer Ricky Newton to testify that, approximately four months before appellant's arrest on the charge for which he was being tried, Newton had found appellant in possession of cocaine, arrested him, and obtained an Arkansas State Crime Laboratory report that would corroborate the officer's opinion that the substance was cocaine. Appellant made a continuing objection to evidence of the incident on grounds that it was not proper impeachment evidence, that introduction of the laboratory report denied him the right of confrontation, and that the officer lacked the required qualifications to state an opinion as to the classification of the substance taken from appellant on that occasion. Appellant makes these same arguments on appeal.

We first address the issue of impeachment. On direct examination, appellant not only denied participating in the crime for which he was being tried, but also made the sweeping assertion that he had not used or dealt in narcotics and had used his best efforts to prevent others from doing so. When he made these assertions on direct examination, he opened the door for impeachment by contradiction and the State was entitled to introduce competent evidence that he had been untruthful and attempted to mislead the jury by his direct examination. *Garst* v. *Cullum*, 291 Ark. 512, 726 S.W.2d 271 (1987); *Hill* v. *State*, 33 Ark. App. 135, 803 S.W.2d 935 (1991); *see McFadden* v. *State*, 290 Ark. 177, 717 S.W.2d 812 (1986). Since the Arkansas Rules of Evidence do not provide a rule for impeachment by contradiction, we must look to the common law. While a witness cannot be impeached by extrinsic evidence on collateral matters brought out on cross-examination, the limitation does not apply to answers given on direct examination. It is now established that when a witness testifies on direct examination that he has not committed collateral acts of misconduct, that testimony may be contradicted by extrinsic evidence. *Garst* v. *Cullum*, *supra*; *Hill* v. *State*, *supra*. Under this rule, it would not be error for the court to allow competent evidence to establish that appellant's assertion that he had not used or dealt in drugs and had used his best efforts to prevent others from using them was untrue.

We agree with appellant, however, that on the facts of this case the actual evidence introduced was not admissible. Officer Newton testified that he stopped appellant in May 1990 for a traffic violation and found him in possession of a plastic bag containing a substance that the officer sent to the State Crime Laboratory for analysis. Over appellant's objection, the officer was permitted to state that in his opinion the substance in the bag was cocaine. Also over appellant's objection, the State was allowed to introduce into evidence a copy of the crime laboratory report purported to have been made of that substance. We agree with appellant that it was prejudicial error to allow the crime laboratory report into evidence over his objection that it denied him the right to confront and cross-examine his accusers.

Arkansas Code Annotated § 12-12-313(d) (Supp. 1991) states as follows:

> (d)(1) All records and reports of evidence analysis of the State Crime Laboratory shall be received as competent evidence as to the facts in any court or other proceeding when duly attested to by the employee who performed the analysis.
>
> (2) The defendant shall give at least ten (10) days notice prior to the proceedings that he requests the presence of the employee of the State Crime Laboratory who performed the analysis for the purposes of cross-examination.
>
> (3) Nothing in this subsection shall be construed to abrogate the defendant's right to cross-examination.

The purpose of this statute is to remove these reports from exclusion under the hearsay rule and make them admissible when certain requirements designed to establish their trustworthiness have been met. *Nard* v. *State*, 304 Ark. 159, 801 S.W.2d 634 (1990). However, we cannot agree that the statute, when applied to the facts of this case, also dispensed with appellant's right to assert his rights of cross-examination and confrontation. These rights are designed to protect the accused against adverse testimony from whatever source it might come and guarantee the right to see a witness face-to-face. The primary purpose of this guarantee is to preserve the right of cross-examination. It also is

designed to require the personal appearance of the witness to enable the factfinder to observe his deportment and to have the advantage of subjective moral effect on the witness produced by his presence before the court in which the accused is on trial. *See Hoover* v. *State*, 262 Ark. 856, 562 S.W.2d 55 (1978).

The State argues that appellant's failure to demand the presence of the crime laboratory analyst prior to trial constitutes a waiver of his right to demand that presence. We agree that even constitutional rights must be asserted in the manner specified by reasonable procedural requirements. *See Parham* v. *State*, 262 Ark. 241, 555 S.W.2d 943 (1977). However, the State's reliance on *Johnson* v. *State*, 303 Ark. 12, 792 S.W.2d 863 (1990), is misplaced. In *Johnson*, the appellant had knowledge that the crime laboratory report would be used at trial for more than ten days prior to the date of trial, and under those circumstances it was held that his failure to assert his right of confrontation in the time provided by statute constituted a waiver of that right.

The rule in *Johnson* necessarily contemplates that the accused knew or should have known of the State's intent to use the document prior to trial. In the event of such knowledge, he must follow the procedure set out in the statute. The statute, however, contains no procedure for the assertion of these rights when the existence and intended use of such a report first becomes known to the accused after the trial has commenced. Here, the State admits that it had no intention of using evidence of the stop made by Officer Newton until after appellant had testified. Nor was it disputed that appellant did not know of that intent until the third day of the trial. While the procedural rule requiring pretrial notice of demand for the right of cross-examination of a laboratory employee is generally a reasonable one, there can be no reasonable basis for enforcing such a rule where it is not possible for the accused to comply.

Nor do we find merit in the State's argument that, because appellant could have asked for a continuance to enable him to obtain the presence of the witness, his failure to do so constituted a waiver of the right to demand that presence. Because the statute does not contain a reasonable procedure for asserting the right of confrontation when that right arises after

the trial has begun, the assertion of that right when it does arise is all that is required of the accused and casts upon the State the burden of either producing the witness for cross-examination or requesting a continuance in order to produce him. In other words, in the absence of an applicable statute or rule, the burden of producing a prosecution witness for cross-examination does not rest upon the accused, but rather upon the State.

Appellant also argues that the trial court erred in allowing Officer Newton to state his opinion that the substance discovered in the earlier incident was cocaine. We agree.

When Officer Newton was called to testify he was asked to state his name, occupation, and if he had ever seen appellant before. He stated his name as "Trooper R.L. Newton." He was asked if he had ever seen appellant before and he stated that he had seen him on Tuesday the 15th of May, 1990, when he observed appellant operating a vehicle with an expired registration and stopped him. He was asked, "Did you recover a controlled substance in that vehicle or in the region near the vehicle?" Over appellant's continuing objection that there had not been a proper foundation laid, the officer was permitted to state his opinion that the substance was cocaine.

Rule 702 of the Arkansas Rules of Evidence provides as follows:

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

It is well settled that the determination of whether a witness possesses these qualifications sufficiently to qualify as an expert in the matter is within the sound discretion of the trial court, whose ruling this court will not disturb unless that discretion is abused. *Whaley* v. *State*, 11 Ark. App. 248, 669 S.W.2d 502 (1984).

We cannot conclude that the trial court exercised any discretion at all. No attempt was made to qualify this officer as having more experience with or understanding of controlled substances than that of the average juror. He simply stated that he was a police officer, without reference to the length of time he

had served as such or to any training or experience he may have had relative to controlled substances. Without a proper foundation, it was error to overrule appellant's objection.

It was argued in our conference that the objection to the officer's statement of opinion was not properly preserved for appeal and that his statement rendered the admission of the crime laboratory analyst's report harmless. While we do not agree that the point was not preserved, we conclude that even if it was not, the testimony did not render admission of the report harmless.

An accused's right of confrontation is guaranteed by both the state and federal constitutions. Although there are some federal constitutional errors that are harmless and do not require reversal, the rule for such a doctrine is necessarily a federal one. *Vann* v. *State*, 309 Ark. 303, 829 S.W.2d 415 (1992). In such cases, the test is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967); *Fahy* v. *Connecticut*, 375 U.S. 85 (1963); *Vann*, v. *State*, *supra*.

Here, the basis for the officer's opinion was not disclosed to the jury. As the extent of his knowledge, training, or experience regarding drugs was not made known, his testimony may have been given less weight by the jury than the positive assertion in the report of one who was purported to be a trained chemist. We must conclude, therefore, that there is a reasonable possibility that the admission of the chemist's report contributed to the conviction, and we cannot declare that its admission was harmless beyond a reasonable doubt.

Reversed and remanded.

COOPER, J., dissents.

JAMES R. COOPER, Judge, dissenting. I dissent from the reversal of this criminal conviction because the point on which the majority's decision turns has not been preserved for appeal. To preserve an error, the record must show that an appropriate objection was made in the trial court. *Beebe* v. *State*, 301 Ark. 430, 784 S.W.2d 765 (1990). An "appropriate" objection is one which is sufficiently clear, specific, and timely to give the trial

judge a fair opportunity to understand and consider the argument, and to correct the asserted error. *Lopez* v. *State*, 29 Ark. App. 145, 778 S.W.2d 641 (1989). In the case at bar, the appellant objected prior to the police officer's testimony and argued, in essence, that a police officer with only two years experience could not under any circumstances be qualified to state an opinion concerning whether a substance was or was not cocaine. This objection was overruled by the trial court, and properly so, because there had been no voir dire of the witness to establish his qualifications, or lack of them, at the time this objection was raised. Subsequently, during direct examination, the appellant made a general objection to lack of foundation, but he did not specify whether the objection was directed at the basis of the officer's knowledge of the events, or rather at the officer's qualifications to state an opinion concerning the nature of the substance or whether it was based on some other theory. In any event, the appellant did not ask to voir dire the witness, and the basis for his foundation objection is unclear. I submit that the appellant's objection was not sufficiently specific to apprise the trial court of the error complained of, and that the argument on appeal was therefore waived. *See Irwin* v. *State*, 28 Ark. App. 6, 771 S.W.2d 26 (1989).

Furthermore, the appellant's abstract shows that no ruling was obtained on his objection to the officer's qualifications to give opinion testimony:

> A. I recovered a controlled substance in the region near the vehicle. I did not retrieve the object that Mr. Hendrix threw. I did retrieve one package which contained one rock.
>
> Q. What did you retrieve?
>
> A. One (1) package which contained one (1) rock of—
>
> > *MR. COVIN*: Your Honor, I'm going to further object. There's been no indication what so ever that a search warrant was obtained and —
> >
> > *THE COURT*: No matter, that doesn't make any difference. What did you retrieve, Mr., ah, Officer Newton?

MR. NEWTON: Your Honor, I retrieved one (1) plastic package on the—

Mr. COVIN: May we ask where it came from before he—

THE COURT: You'll get a chance.

MR. NEWTON: On the west side of the vehicle, which contained 0.827 grams of cocaine base—

MR. COLVIN: Object to the—

THE COURT: I understand your objection.

MR. COLVIN: But, Your Honor, I object to the classification and, and, and, ah, characterization of this object that he's found as being cocaine.

THE COURT: Do you have what you found?

MR. NEWTON: Yes, sir. I've got the evidence and the results from the State Crime Lab with proof of certification—

MR. COLVIN: I don't, Your Honor, I object to reference to the—

THE COURT: You have the—

MR. NEWTON: Yes, sir.

THE COURT: Do you have the stuff there?

MR. NEWTON: Yes, sir.

THE COURT: All right. What's it look like?

MR. NEWTON: Based on my experience as a law enforcement officer, it'd be my opinion that it is rock cocaine.

THE COURT: All right. Is it in little crystals?

MR. NEWTON: Yes sir. It is. (Tr. 186)

THE COURT: Now, do you want to in—

MS. SAWYER: Your Honor, I'd like him to open it and identify it.

MR. COLVIN: I object to any further questioning concerning this, Your Honor, as lack of due process in obtaining this object out of the car.

THE COURT: I understand

It is the appellant's obligation to obtain a ruling on his objection in order to preserve the point for appeal. *Beebe* v. *State*, *supra*. As the abstract shows, the appellant failed to obtain the trial court's ruling with respect to the officer's basis for his opinion, and the officer was permitted to testify not only that the substance, in his opinion, was cocaine, but he also made reference to the results of the State Crime Lab report in his testimony. Although the appellant stated his objection to this reference, no ruling was obtained. I submit that, having allowed testimony regarding the results of the report to be placed before the jury in this manner, any error in the subsequent introduction of the report was rendered harmless.

Even had the appellant made a proper objection and obtained a ruling thereon, I would dissent from the majority's decision because the appellant clearly opened the door to the evidence by testifying that he had not used or dealt in drugs for two years, and that he had tried to keep other people from becoming involved in drugs. As the majority concedes, this testimony was subject to impeachment by extrinsic evidence. What should be emphasized, however, is that the extrinsic evidence of collateral acts of misconduct in the form of Officer Newton's testimony concerning the cocaine he found during the May 1990 traffic stop of the appellant was not admissible until after the appellant made his sweeping assertion of drug-prevention efforts on direct examination. Whether or not this evidence would be admissible depended entirely on the actions of the

appellant. Under these circumstances, the burden of moving for a continuance to obtain the presence of the laboratory technician should likewise have been on the appellant.

I respectfully dissent.

The ARKANSAS DEPARTMENT OF HUMAN SERVICES *v.* Quinton Wayne DEARMAN

CA 91-442 842 S.W.2d 449

Court of Appeals
En Banc
Opinion delivered November 25, 1992

Bruce P. Hurlbut, for appellant.

Robert J. Gladwin, for appellee.

MELVIN MAYFIELD. Judge. The Arkansas Department of Human Services (DHS) appeals from the order of the trial court which granted appellee Quinton Wayne Dearman's motion to dismiss its "Petition for Emergency Custody" on the basis of collateral estoppel.

Quinton Dearman and his wife (now Oleta Colleen Brooks) were divorced by a decree entered April 22, 1987. Custody of the parties' two girls, J.D., born November 5, 1980, and K.D., born August 30, 1984, was awarded to the father. On June 1, 1990, the

mother picked up the girls in accordance with a court order that increased her visitation rights to allow her a six weeks summer visitation, left the state with the children, and did not return until February 22, 1991, some seven months after her visitation period had ended. Upon returning to Arkansas, the mother took J.D. to the Washington County Office of DHS where the child was interviewed by Darby Snell, a DHS investigator, with regard to allegations of sexual abuse reportedly committed by the father. After interviewing J.D., Darby Snell told the mother not to return the children to their father.

On February 25, 1991, the father filed a motion for contempt of court against the mother for failing to return the children as ordered. The mother filed a counterclaim in which she alleged that the father had sexually abused J.D. and asked for change in custody or, in the alternative, for temporary custody pending the completion of an investigation of the matter.

At a hearing held March 21, 1991, on the father's petition for contempt and the mother's counterclaim, the court heard extensive testimony from the father, the mother, J.D., Darby Snell, and a deputy prosecuting attorney concerning the alleged sexual abuse issue. In an order entered April 2, 1991, the chancellor found the mother to be in contempt of court, ordered the children to be returned to their father, and dismissed the mother's counterclaim on the finding that it was not supported by the evidence.

On April 21, 1991, DHS filed a "Petition for Emergency Custody" in the Juvenile Division of Washington County Chancery Court alleging the children were dependent/neglected. The affidavit of Darby Snell, which was attached to the petition, stated that J.D. was "scared at home" because her father had been dressing K.D. each morning and J.D. "is very uncomfortable that her father may do to her sister as he has done to her." The affidavit alleges that J.D. said her father had intercourse with her "about one year ago." On April 22, 1991, the juvenile court entered an ex parte order for emergency custody on the finding that there was probable cause to believe J.D. and K.D. were dependent/neglected children and ordered them placed in the custody of DHS pending further orders of the court.

On April 24, 1991, the father filed a motion to dismiss the

DHS petition, and after a hearing at which Darby Snell testified and a transcript of the evidence taken in the chancery case was introduced, along with the pleadings and orders of that case, the court dismissed the petition upon a finding that the issue of sexual abuse by the father had been fully litigated in the contempt hearing held March 21, 1991, had been determined in favor of the father, and that the DHS petition was barred by the doctrine of collateral estoppel.

In its first two arguments on appeal DHS argues the trial court erred in applying the doctrine of collateral estoppel because the issue litigated in chancery court was not the same issue as that sought to be litigated in juvenile court and because DHS was neither a litigant in chancery court nor in privity with the children's mother. The Ozark Legal Services was appointed guardian ad litem for the minor children and has filed a brief which, essentially, makes the same argument made by DHS.

The doctrine of collateral estoppel or issue preclusion bars the relitigation of issues of law or fact actually litigated by parties in the first suit. *Toran* v. *Provident Life & Accident Ins. Co.*, 297 Ark. 415, 764 S.W.2d 40 (1989). It is based upon the policy of limiting litigation to one fair trial on an issue, *Scogin* v. *Tex-Ark. Joist Co.*, 281 Ark. 175, 662 S.W.2d 819 (1984), and is applicable only when the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question. *Bailey* v. *Harris Brake Fire Protection Dist.*, 287 Ark. 268, 697 S.W.2d 916 (1985).

In Newbern, *Arkansas Civil Practice and Procedure*, Section 26-12 at 262-63 (1985), the author, in discussing res judicata and collateral estoppel, quotes from *Lovell* v. *Mixon*, 719 F.2d 1373 (8th Cir. 1983) as follows:

> Under the doctrine of collateral estoppel, four criteria must be met before a determination is conclusive in a subsequent proceeding: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment. . . . Thus, the application of collateral estoppel or issue preclusion is limited to those

> matters previously at issue which were directly and necessarily adjudicated. . . . However, both doctrines are applied only when the party against whom the earlier decision is being asserted had a "full and fair opportunity" to litigate the issue in question. [Citations omitted.]

In the instant case, the issue of appellee's sexual abuse was raised by the mother in her counterclaim in chancery court. The court heard extensive testimony on the issue from the father and mother, from the child, J.D., and from the DHS investigator, Darby Snell. Based upon the evidence, the chancery judge found the allegations of the counterclaim were not supported by the evidence and the counterclaim was dismissed.

Nineteen days later, DHS filed its Petition for Emergency Custody based upon allegations of sexual abuse committed by the appellee. At the hearing on appellee's motion to dismiss, Darby Snell, the DHS investigator whose affidavit accompanied the petition, testified that the allegations of sexual abuse litigated in chancery court were the same ones she was talking about in her affidavit; that there were no new allegations of sexual abuse committed by the father since the time of the chancery court hearing; and that the question of what happened to J.D. had been litigated in chancery court.

Therefore, we find the issue in both cases to be identical, i.e., whether or not the father sexually abused his daughter, J.D.; that this issue has been tried before and determined by a valid judgment; and that the determination of this issue was necessary to the judgment on the mother's counterclaim.

The question of who may be bound by a judgment is considered in Freidenthal, Kane, and Miller, *Civil Procedure* § 14.9 (1985). In discussing the general issue underlying collateral estoppel, the authors state:

> When an issue has been litigated fully between the parties, spending additional time and money repeating this process would be extremely wasteful. This is particularly important in an era when the courts are overcrowded and the judicial system no longer can afford the luxury — if it ever could — of allowing people to relitigate matters already decided.

Id. at 658. The authors also state that this doctrine applies only to persons who were parties or who are in privity with persons who were parties in the first action and that persons in a privity relationship are deemed to have interests so closely intertwined that a decision involving one necessarily should control the other. *Id*, § 14.13 at 682-83.

It has been suggested that privity is merely a word used to say that the relationship between one who is a party and another person is close enough that a judgement that binds the one who is a party should also bind the other person. *Bruszewski* v. *United States*, 181 F.2d 419 (3d Cir. 1950) (Goodrich, J., concurring). This is the view taken in 18 Wright, Miller, and Cooper, *Federal Practice and Procedure* § 4448 (1981) where it is stated:

> As to privity, current decisions look directly to the reasons for holding a person bound by a judgment. This method should be adopted generally so that a privity label is either discarded entirely or retained as no more than a convenient means of expressing conclusions that are supported by independent analysis.

The Arkansas Supreme Court has said that privity within the meaning of res judicata means a person so identified in interest with another that he represents the same legal right. *Spears* v. *State Farm Fire & Casualty Ins.*, 291 Ark. 465, 468, 725 S.W.2d 835 (1987). In *Restatement (Second) of Judgments* § 39 (1982) it is stated that "a person who is not a party to an action but who controls or substantially participates in the control of the present action on behalf of a party is bound by the determination of issues decided as though he were a party." It has also been held that the identity of parties or their privies for res judicata purposes is a factual determination of substance, not mere form. *People* v. *Tynan*, 701 P.2d 80, 83 (Colo. Ct. App. 1984). *Accord Watts* v. *Swiss Bank Corporation*, 27 N.Y.2d 270, 265 N.E.2d 739 (1970).

In *Moore* v. *Hafeeza*, 515 A.2d 271 (N.J. Super. Ct. Ch. Div. 1986), the mother of a child born out of wedlock was held to be in privity for purposes of res judicata and collateral estoppel with the county board of social services which had brought an earlier paternity and support action. The court said:

> The underlying purpose of the modern rule is fundamental fairness and common sense. Courts everywhere are being deluged with law suits and the necessity to reduce the volume of litigation must be considered so long as we do not adopt a constitutionally flawed rule which subverts fairness in a due process sense. Thus, it appears to be the modern rule that privity should be applied when:
>
> 1. The claim of the nonparty is based on the same transaction or occurrence,
>
> 2. The interests of both claimants are similar and no adverse interests exist,
>
> 3. The nonparty had notice of the earlier action, and
>
> 4. The nonparty did or had an opportunity to participate or intervene in the earlier case.

515 A.2d at 274.

And in *Department of Human Services* v. *Seamster*, 36 Ark. App. 202, 820 S.W.2d 298 (1991), it was held that where the child's mother had brought a paternity action against the appellee in compliance with the statutes then in effect, and it was clear that she brought that action to obtain support for the child, the trial court properly found the action brought by DHS, which was also brought to obtain support for the child, was barred by res judicata.

In the present case both the mother's counterclaim and DHS's Petition for Emergency Custody are based on allegations of sexual abuse. There is an identity of interest between the mother and DHS in that both seek to prove allegations of sexual abuse against the father of the children, to remove them from his custody, and to protect the best interests of the children. DHS had notice of the earlier action and the opportunity to participate. Indeed, the mother testified that Darby Snell and her supervisor, Janet Richardson, told her that for the best interest of the children they should not be returned to their father. Ms. Snell testified in both chancery court and juvenile court as to the allegations of sexual abuse. And, at the hearing on the father's motion to dismiss, Ms. Snell testified that without these allegations DHS would not have brought the Petition for Emergency

Custody and would not have been interested in bringing a dependency/neglect case against the mother. Moreover, it was only after the chancery court failed to remove the children from appellee's custody that DHS decided to file its petition for custody.

Therefore, we find the relationship between the mother and DHS sufficient to bar DHS, under the principle of collateral estoppel, from maintaining this action. Collateral estoppel or *issue* preclusion is not the same concept as res judicata or *claim* preclusion. *Toran* v. *Provident Life & Accident Ins. Co., supra.* The record clearly supports the trial judge's finding that the issue in this case is the same issue litigated on the mother's counterclaim in the case in chancery court. The record also clearly shows that in both cases, under the modern view of privity, the relationship between the mother and DHS in the attempt to remove the custody of the two girls from their father was so closely intertwined that the mother and DHS were in privity and are each bound by the chancery court judgment.

Appellant also argues juvenile court is *required* by Ark. Code Ann. § 9-27-315(a) (1987) to hold a probable cause hearing. That statute provides:

> Following the issuance of an emergency order removing the custody of a juvenile from a parent, guardian, or custodian, the court shall within five (5) business days of the issuance of the ex parte order, hold a hearing to determine if probable cause to issue the emergency order continues to exist.

Assuming without deciding that the court was required to hold a probable cause hearing, we think that requirement was satisfied by the hearing held on appellee's motion to dismiss.

Affirmed.

JENNINGS and DANIELSON, JJ., dissent.

JOHN E. JENNINGS, Judge, dissenting. The majority holds that the Department of Human Services is barred by collateral estoppel from bringing an action in juvenile court in an attempt to establish that the parties' children are "dependent-neglected." I cannot agree that on these facts the doctrine of collateral estoppel

is applicable.

Collateral estoppel is, as the court says, issue preclusion. One requirement for the doctrine's application is an identity of issues. David Newbern, *Arkansas Civil Practice & Procedure* § 26-12 (1985); Jack H. Friedenthal, et al., *Civil Procedure* § 14.10 (1985). It is said that the requirement that the issues be identical is strictly construed. Friedenthal, *supra*. In the prior proceeding in chancery court the ultimate questions the court had to decide were whether the mother was in contempt of the court's prior orders and whether primary custody of the child should be changed from the father to the mother. In the proceeding brought by DHS in juvenile court, the judge would ultimately have had to decide whether the children were dependant-neglected and where their physical custody should be placed, at least on a temporary basis. I agree with the majority that the underlying issue in both cases is whether the father has abused the children, or either of them. Perhaps this is enough to satisfy the requirement that the issues be identical.

I cannot agree, however, that DHS was in privity with the mother in a way which would operate to bar DHS, under the doctrine of collateral estoppel, from bringing a dependency-neglect proceeding. I agree with the majority's general approach that it is preferable to examine and state the reasons why a non-party should or should not be barred by collateral estoppel, rather than simply concluding that there is or is not "privity." *See* 18 Charles A. Wright, et al., *Federal Practice & Procedure* § 4448 (1981). *See also, generally* Friedenthal, *supra* at 683; 46 Am. Jur. 2d *Judgments* § 532 (1969); Note, *Collateral Estoppel of Nonparties*, 87 Harv. L. Rev. 1484 (1974).

The majority finds privity here based on § 39 of the *Restatement (Second) of Judgments* (1980): "A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party." *See also, Montana* v. *United States*, 440 U.S. 147 (1979); Friedenthal, *supra* at 684. The same principle was approved in *Carrigan* v. *Carrigan*, 218 Ark. 398, 236 S.W.2d 579 (1951), where the supreme court said:

> The strict rule that a judgment is operative, under the

> doctrine of *res judicata*, only in regard to parties and privies is sometimes expanded to include as parties, or privies, a person who is not technically a party to a judgment, or in privity with him, but who is, nevertheless, connected with it by his interest in the prior litigation and by his right to participate therein, at least where such right is actively exercised by the employment of counsel, control of the defense, filing of an answer, payment of expenses or costs of the action, or doing of such other acts as are generally done by parties.

Carrigan at 403, (quoting 30 Am. Jur. *Judgments* § 227). In *Mixon* v. *Barton Lumber & Brick Co.*, 226 Ark. 809, 295 S.W.2d 325 (1956), Justice Millwee, in referring to the rule approved in *Carrigan*, added:

> An essential condition recognized expressly by most of the cases for the application of the rule is that the prosecution of the action or the defense by the nonparty, or his assistance or co-operation with the party, must have been for the promotion or protection of some interest of his own which would otherwise be prejudicially affected. And another condition frequently, but not always, attached to the application of the rule is that such person had the control or a right of control over the litigation, with the privilege of exercising all the rights of a party of record, such as the right to introduce evidence, examine and cross-examine witnesses, and appeal from the decision of the court, etc. . . .

Mixon at 814 (quoting 30 Am. Jur. *Judgments* § 227 (Supp. 1956)). *See also*, *Montana* v. *United States*, 440 U.S. 147 (1979) at pp. 154 and 155. In the case at bar there is no question but that DHS was not a party to the custody proceeding between the parents. DHS did, through its agent Ms. Snell, advise the mother to continue to violate the prior court order and not return the children to their father. Ms. Snell also testified favorably for the mother in the custody litigation, although she was subpoenaed by the father. It is also true, as the majority states, that both the mother and DHS sought to prove allegations of sexual abuse against the father. Finally, DHS had notice of the custody proceeding, in the sense that its agents were aware of it.

The question in my view is whether this all adds up to sufficient participation and control of the litigation to require the bar of collateral estoppel. I think not. The case at bar has none of the factors typically present when a finding of privity is based on participation and control of the litigation. In the custody suit DHS did not pay attorney's fees or costs, examine witnesses, argue to the court, or participate in the preparation of the pleadings. DHS did not appeal the chancellor's order — indeed it could not have as it was not a party to the action. Even though one who has a right to intervene is not by that fact alone bound by the doctrine of res judicata, *see UHS of Ark., Inc.* v. *City of Sherwood*, 296 Ark. 97, 752 S.W.2d 36 (1988), it is significant that the dependency-neglect proceeding could not have been joined with the custody proceeding in chancery for the reason that the juvenile court had exclusive jurisdiction. Ark. Code Ann. § 9-27-396(a)(1) (Repl. 1991). Arkansas Code Annotated section 16-13-605(c) (Supp. 1991) prohibits an assignment of such cases out of the juvenile division.

Privity is not established by the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts. 46 Am. Jur. 2d *Judgments* § 532 (1969). That one person helps another in litigation, by itself, does not justify imposing preclusion on one of them on the basis of a judgment affecting the other. *Restatement (Second) of Judgments) § 62 cmt. c (1980).* Clearly one does not become bound by res judicata merely because of having been a witness in the prior lawsuit. *See Hogan* v. *Bright*, 214 Ark. 691, 218 S.W.2d 80 (1949). DHS's inability to appeal the custody decree provides a specific exception to the application of collateral estoppel. *Restatement (Second) of Judgments* § 28(1) (1980).

The paternity cases cited by the majority do not seem to me to be persuasive. In *Moore* v. *Hafeeza*, a decision of a New Jersey trial court, the mother brought a paternity action against Hafeeza some fourteen years after she had participated in the same cause of action brought by a New Jersey Board of Social Services against the same man. In *Department of Human Services* v. *Seamster* we had the converse situation: DHS brought a paternity action against Seamster some twelve years after the mother of the child had received an adverse determination of the same claim. In *Seamster* we did not discuss the question of

privity. Our decision was a limited one, based upon the particular language of the paternity statute in effect in 1979. *Seamster*, 36 Ark. App. at 205. The situations in both cases seem analogous to barring successive trustees from filing the same claim on behalf of the same beneficiary against the same defendant. *See generally* Friedenthal, *supra* at 684.

Finally, there are constitutional problems. "It is elementary that one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U.S. 100 (1969). In *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), the Court said:

> . . . [T]he requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.
>
> Some litigants - those who never appeared in a prior action - may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Blonder-Tongue, 402 U.S. at 329.

While I do not approve of DHS's advice to the mother to continue to violate the chancellor's order, I cannot understand how this justifies imposing the bar of collateral estoppel. And while it seems perhaps unwise, given the principle of comity[1], for DHS to file a petition in juvenile court based on the same evidence that was so recently found insufficient in chancery court, I cannot agree DHS is legally barred from doing so.

DANIELSON, J., joins in this dissent.

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[1] *See Triplett* v. *Lowell*, 297 U.S. 638 at 642 (1936), overruled in part, on other grounds, in *Blonder-Tongue*, *supra*.

D.D., A Juvenile *v.* STATE of Arkansas

CA 92-221 842 S.W.2d 62

Court of Appeals
Division I
Opinion delivered November 25, 1992

Gibson Law Office, by: *C.S. "Chuck" Gibson II*, for appellant.

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

MELVIN MAYFIELD, Judge. This is an appeal from a judgment of Ashley County Chancery Court, Juvenile Division, which found appellant to be a delinquent juvenile because he had committed rape, theft of property, breaking or entering, and criminal mischief. Appellant was committed to the Pine Bluff Youth Services Center, a secure detention facility operated by the Arkansas Youth Services Board.

Appellant argues the trial court erred in denying his motion for directed verdict on the charge of rape, and in allowing the prosecutor to ask the victim leading questions on the subject of "sex" and "sexual intercourse."

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *McIntosh* v. *State*, 296 Ark. 167, 753 S.W.2d 273 (1988). In resolving the question of the sufficiency of the evidence in a criminal case, we view the evidence in the light most favorable to the appellee and affirm if there is substantial evidence to support the decision of the trier of fact. *Ryan* v. *State*, 30 Ark. App. 196, 786 S.W.2d 835 (1990). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty and precision, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Williams* v. *State*, 298 Ark. 484, 768 S.W.2d 539 (1989); *Ryan*, supra.

Appellant was adjudged a delinquent juvenile because of rape by forcible compulsion. Arkansas Code Annotated § 5-14-103(a)(1) (1987) provides a person commits rape if he engages in sexual intercourse or deviate sexual activity with another person by forcible compulsion. Both deviate sexual activity and sexual intercourse require penetration "however slight." Ark. Code Ann. § 5-14-101(1) and (9) (1987).

Essentially the appellant argues there was insufficient evidence of penetration to support his conviction. He argues the victim provided no details to substantiate her conclusion that she was raped; that her statements were ambiguous and conclusory; that there was no physical evidence to corroborate her testimony; and that it is reasonable to conclude the victim might equate a physical attack with rape.

In *Jackson* v. *State*, 290 Ark. 375, 720 S.W.2d 282 (1986), our supreme court stated:

> The testimony of the alleged victim which shows penetration is enough for conviction. Penetration can be shown by circumstantial evidence, and if that evidence gives rise to more than a mere suspicion, and the inference that might reasonably have been deduced from it would leave little room for doubt, that is sufficient.

290 Ark. at 385 (citations omitted).

Here the 87-year-old victim testified that appellant grabbed her and commenced beating her; dragged her into the house and then raped her. She said she begged him to behave and to stop; that he raped her in the kitchen and in the living room; and that he had sex with her. The victim testified that she was a married woman; that she had sex with her husband during the years of her marriage; that she understood what it meant for someone to have sex; that this is what happened between her and the appellant; and that she thought appellant finished the sex act because he was "up there long enough." She testified further that while the sex act was going on her dress was completely off.

A number of courts have held similar testimony sufficient to constitute evidence of penetration. In *State* v. *Golden*, 430 A.2d 433 (R.I. 1981), the victim, a twenty-three-year-old woman, testified that the appellant said the victim was going to "give him sex." A struggle ensued and the victim was cut severely. The victim's recollection was somewhat vague, but she testified the next thing she knew the appellant was on top of her. Three neighborhood youths were in the vicinity. One of them, Alan, testified that he saw the victim and appellant "having sex" and the appellant "going up and down" on the victim; the youths informed Alan's grandmother that they had seen some girl get

"raped." And the first officer on the scene testified they "appeared to be having intercourse." The court stated that the victim had stated on several occasions during her testimony that the defendant "had intercourse" and "forceful * * * forcibly [sic] sex" with her and held that when one of understanding testifies to a completed act of sexual intercourse, it has been held to be sufficient proof of penetration. 430 A.2d 436-37.

In *State* v. *Sneeden*, 274 N.C. 498, 164 S.E.2d 190 (1968), the victim testified the defendant told her to remove her pants, she became hysterical, and then felt a blow on the head. Thereafter she didn't remember what happened until she came to and "he was in the act of raping me." The court held that the victim's statement that when she regained consciousness the appellant was in the act of raping her was merely her way of saying he was having intercourse with her; she was not expressing her opinion of what happened; but was stating in shorthand fashion her version of the events to which she had already testified.

In *State* v. *Ashford*, 301 N.C. 512, 272 S.E.2d 126 (1980), the state argued that the victim testified the defendant had "intercourse" and "sex" with her and that these terms are sufficient as shorthand statements of fact on the issue of penetration. The Supreme Court of North Carolina agreed and held the testimony sufficient to support a finding by the jury that there was penetration.

In *State* v. *Brown*, 100 N.M. 726, 676 P.2d 253 (1984), the victim died when after the attack the appellant abandoned her injured, helpless, and unconscious on a winter night. On appeal, the appellant claimed there was a failure of proof of penetration to support his conviction. Nevertheless the court held evidence that the appellant had assisted two co-defendants in forcibly removing the victim's clothing and "then each in turn removed their pants and laid on top of the victim's unclothed body" sufficient for the jury to have reached a reasonable conclusion that the appellant did penetrate the victim.

In *State* v. *Steinbrink*, 297 N.W.2d 291 (Minn. 1980), a 15-year-old victim testified that "sexual intercourse" occurred, but she was not asked to explain what she meant by "sexual intercourse." The appellate court held that its examination of the record "convinces us" that the victim knew the meaning of the

terms ("making love" and "sexual intercourse") which she used to describe the act of penetration.

And in *Williams* v. *Commonwealth*, 202 Ky. 664, 261 S.W. 18 (1924), a 16-year-old victim testified the appellant took her off in the woods; that they slept on the ground all night; that they had sexual intercourse; and that she was then 14 years old. The court held:

> A fact may be proved by circumstances no less than by words, and this rule is applied to the question of penetration just as it is in other questions of fact arising in criminal cases. Here the parties went to the woods for this purpose; the witness testified they stayed on the ground all night, and defendant got on top of her and had sexual intercourse with her two or three times that night. Certainly a jury giving this evidence reasonable effect did not need to be told that there was penetration of the female parts. This was the purpose of the whole adventure, and it must be presumed that the witness used the words "sexual intercourse" in their ordinary sense.

202 Ky. at 665, 261 S.W. at 19.

Although appellant in the instant case argues the evidence was ambiguous and conclusory, the evidence in this case rests upon the credibility of the victim, and while the victim, a lady of advanced age, might have been a little confused, it is the job of the trier of fact to resolve any contradictions, conflicts, and inconsistencies in a witness's testimony. *Franklin* v. *State*, 308 Ark. 539, 825 S.W.2d 840 (1992). The trial judge, who was the trier of fact in the instant case, stated that he believed the victim's testimony that the appellant "raped" her and had "sex" with her was given in its "ordinary, common, everyday sense, that anybody would understand," and the judge overruled appellant's motions for a directed verdict and found that he had committed the offense of rape. We think the evidence was for the trial judge to evaluate. The victim said she had sex with her husband during the years of their marriage, that she knew what that means, and she said "that's what happened" between her and the appellant. We think there is substantial evidence to support the trial judge's decision.

Appellant also argues the trial court erred in allowing the

prosecuting attorney to ask the victim leading questions on the subject of "sex" and "sexual intercourse." Appellant argues that the victim's confusion should not entitle the prosecuting attorney to advise the victim what the term "rape" means.

During direct examination the following exchange took place between the victim and the prosecutor:

> Q All right. After the beating was happening, what happened next?
>
> A Well, you know what he did.
>
> Q Yes, ma'am. But you have got to tell the Court what he did.
>
> A Yes, sir. Okay. Yes, sir. He raped me. He surely did. Yes, sir.

Later, the following exchange took place:

> Q You say he raped you. Tell the judge exactly what that meant.
>
> A Going with you.
>
> Q Well, rape normally means a sex act. Did he—
>
> A Yes, sir. Uh-huh.
>
> Q Did he have sex with you?
>
> A Yes, sir.

At this point, appellant's attorney objected on the basis that the questions were leading. The trial judge responded that the prosecutor was simply trying to have the victim define what she meant by rape.

Assuming, however, that some questions asked by the prosecutor were leading questions, Ark. R. Evid. 611(c) allows the trial judge some discretion in permitting leading questions, and it has been said that "it is always in the sound discretion of the trial judge to permit a witness to be asked leading questions on direct examination." *Hamblin* v. *State*, 268 Ark. 497, 501, 597 S.W.2d 589 (1980). *See also Scantling* v. *State*, 271 Ark. 678, 609 S.W.2d 925 (1981). Here, the victim was 87 years of age. The transcript shows that she had some difficulty

understanding, and she was reluctant to answer questions on a subject not normally discussed in public. Under the circumstances, we cannot find that the trial judge abused his discretion.

Affirmed.

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

Herman MITCHELL *v.* Erma MITCHELL

CA 91-483 842 S.W.2d 66

Court of Appeals
Division II
Opinion delivered November 25, 1992

Baxter Law Office, by: *Angela Yvette Baxter*, for appellant.

Wilton E. Steed, for appellee.

MELVIN MAYFIELD, Judge. Herman Mitchell appeals from an order filed August 29, 1991, entitled "Second Amended Supplement to Decree of Divorce Qualified Domestic Relation Order."

Appellant and appellee, Erma Mitchell, were divorced by decree filed April 23, 1986. The decree provided that the court would reserve ruling on the wife's request for one-half of the husband's retirement, and the parties were given thirty days to file briefs on the issue. Although it is not in the record, the parties agree that the trial court entered an Amended Decree and Order on September 29, 1986, in which the court held that the husband's pension was vested, that it was marital property and should be divided equally, and that, when the husband began to draw his pension benefits, the wife would be entitled to receive one-half of it. No appeal was taken from this order, but it apparently failed to meet the federal requirements for a Qualified Domestic Relations Order (QDRO).

The requirements for a QDRO are contained in 26 U.S.C.A. § 414(p) (West 1988 & Supp. 1992). This section defines a QDRO as a domestic relations order which creates or recognizes the existence of an alternate payee's right to receive all or a portion of the benefits payable to a participant in a pension plan. A domestic relations order means a judgment, decree or order (including approval of a property settlement agreement) made pursuant to a state's domestic relations or community property law and relating to the provision of child support, alimony, or marital property rights to a spouse, former spouse, child or other dependent of a plan participant. To qualify as a QDRO, a domestic relations order must meet certain specific standards. Within a reasonable period after receipt of a domestic relations order, the administrator of the plan shall determine whether such

order is a QDRO, and if the administrator determines that an order does not meet the standards, the administrator will not honor the order until it does meet the standards.

The husband in this case was a participant in the Central States Southeast and Southwest Areas Pension Fund. In an effort to make the September 29, 1986, order comply with the federal regulations, three subsequent orders were entered by the trial court. It is the latest of these, entered August 29, 1991, which was finally accepted as a QDRO and which is the subject of this appeal by the husband.

The gist of appellant's argument is that the trial court erred in amending a decree that was over 5 years old. Specifically, appellant argues that the appellee failed to meet the requirements of Ark. R. Civ. P. 60 which bars the amendment or modification of a decree after 90 days, absent compliance with Rule 60(c), and that appellee failed to present to the trial court a proper motion requesting the relief which the court granted.

We are unable to reach the merits of appellant's argument because he has failed to properly perfect his appeal. Arkansas Rule of Appellate Procedure 4 provides:

> (a) Time for Filing Notice. Except as otherwise provided in subsequent sections of this rule, a notice of appeal shall be filed within thirty (30) days from the entry of the judgment, decree or order appealed from. . . .
>
> (b) Time for Filing Notice of Appeal Extended by Timely Motion. Upon the filing in the trial court within the time allowed by these rules of a motion for judgment notwithstanding the verdict under Rule 50(b), of a motion to amend the court's findings of fact or to make additional findings under Rule 52 (b), or of a motion for a new trial under Rule 59(b), the time for filing of notice of appeal shall be extended as provided in this rule.
>
> (c) Disposition of Posttrial Motion. If a timely motion listed in section (b) of this rule is filed in the trial court by any party, the time for appeal for all parties shall run from the entry of the order granting or denying a new trial or granting of denying any other such motion. Provided, that if the trial court neither grants nor denies the motion

> within thirty (30) days of its filing, the motion will be deemed denied as of the 30th day. *A notice of appeal filed before the disposition of any such motion or, if no order is entered, prior to the expiration of the 30-day period shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion or from the expiration of the 30-day period.* No additonal [additional] fees shall be required for such filing. (Emphasis added by Court of Appeals.)

The sequence of events in this case relevant to the disposition of this appeal is as follows:

August 29, 1991	SECOND AMENDED SUPPLEMENT TO DECREE OF DIVORCE QUALIFIED DOMESTIC RELATIONS ORDER
September 4, 1991	Appellant's notice of appeal
September 5, 1991	Appellant's MOTION FOR THE COURT'S FINDINGS OF FACTS AND CONCLUSIONS OF LAW
September 5, 1991	Appellant's motion for RELIEF FROM THE SECOND SUPPLEMENT TO QUALIFIED DECREE OF DIVORCE OF QUALIFIED DOMESTIC RELATIONS ORDER
October 14, 1991	Hearing after which court orally denies appellant's motions.

In the September 5, 1991, motion entitled "MOTION FOR THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW," appellant stated the request was made "in compliance with Rule 52 of the Arkansas Rules of Civil Procedure." Under Appellate Procedure Rule 4(b), the filing of a motion to amend the court's findings of fact or to make additional

findings under Rule 52(b) extends the time for filing notice of appeal. In addition, appellant's second motion, filed on September 5, 1991, entitled "RELIEF FROM THE SECOND SUPPLEMENT TO QUALIFIED DECREE OF DIVORCE OF QUALIFIED DOMESTIC RELATIONS ORDER," is in essence a motion for new trial under Rule 59(b). Appellate Procedure Rule 4(b) also extends the time for filing notice of appeal when a motion for new trial is filed as provided in Ark. R. Civ. P. 59(b).

Therefore, under either motion filed by appellant on September 5, 1991, the time to appeal would run from the entry of an order on the motion or from the thirtieth day after the filing of the motion, whichever came first. *See Ferguson* v. *Sunbay Lodge, Ltd.*, 301 Ark. 87, 781 S.W.2d 491 (1989); *Jasper* v. *Johnny's Pizza*, 305 Ark. 318, 807 S.W.2d 664 (1991); *Phillips Construction Co.*, v. *Cook*, 34 Ark. App. 224, 808 S.W.2d 792 (1991). These cases also make it clear that even when an appealable order has been entered and a notice of appeal has been filed within 30 days thereafter, the filing of a motion provided for in Appellate Procedure Rule 4(b) will extend the time for filing the notice of appeal, and the notice of appeal filed *before* the time is extended will be ineffective.

In the instant case, the notice of appeal filed on September 4, 1991, was ineffective because of the motions filed on September 5, 1991. Moreover, those motions were deemed denied at the end of 30 days after they were filed — unless the trial court ruled on them before that time. Although the trial court orally denied the motions at a hearing on October 14, 1991, this was more than 30 days after they were filed and they were already deemed denied; therefore, it was necessary to file a new notice of appeal within 30 days after the motions were deemed denied. Because this was not done, no appeal has been perfected. While this issue was not raised by the appellee, it is jurisdictional and we must raise it even if the parties do no. *Eddings* v. *Lippe*, 304 Ark. 309, 802 S.W.2d 139 (1991).

Dismissed.

COOPER and DANIELSON, JJ., agree.

IN THE MATTER OF THE ADOPTION OF B.A.B.

CA 92-60 842 S.W.2d 68

Court of Appeals
Division I
Opinion delivered November 25, 1992

[redacted]

Christopher M. Jester, for appellant.

Martin E. Lilly, for appellee.

JUDITH ROGERS, Judge. The child in this adoption case, B.A.B., was born on July 7, 1988, to appellee Tanya B., who was a single person. Shortly after the child's birth, Tanya married appellee, Scotty B. In 1990, it was established in a paternity action that John Dane L. was the child's natural father, and in October of 1990, appellant Regina W., John Dane's mother, was granted court-ordered visitation with her granddaughter one weekend a month. In November of 1990, Tanya joined Scotty in filing a petition for him to adopt the child. The court subsequently entered an order allowing appellant to intervene in the case. After a hearing, the probate judge granted the adoption after determining that the natural father's consent was not necessary due to his

failure to communicate with or support the child and upon finding that the adoption was in the child's best interest. On appeal, appellant, the child's paternal grandmother, argues that both of these findings are clearly against the preponderance of the evidence. We affirm the probate judge's decision to grant the adoption.

Arkansas Code Annotated § 9-9-206(a)(2) (1987) provides in part that a petition to adopt a minor may be granted only if written consent is executed by a father who has "otherwise legitimated the minor according to the laws of the place in which the adoption proceeding is brought." However, under Ark. Code Ann. § 9-9-207(a)(2) (1987), a parent's consent is not required if it is found that "the parent for a period of at least one year has failed significantly without justifiable cause to communicate with the child or to provide for the care and support of the child as required by law or judicial decree." There is a heavy burden placed upon the party seeking to adopt a child without the consent of a natural parent to prove the failure to communicate or the failure to support by clear and convincing evidence. *Dale* v. *Franklin*, 22 Ark. App. 98, 733 S.W.2d 747 (1987). As her first issue, appellant argues that the probate judge's finding that the consent of John Dane was not necessary is clearly erroneous. Because we conclude that appellant lacks standing to raise this issue, we decline to address her argument.

In *Quarles* v. *French*, 272 Ark. 55, 611 S.W.2d 757 (1981), the supreme court held that grandparents who have been awarded visitation rights are entitled to intervene in adoption cases involving their grandchildren for the limited purpose of offering such evidence as may be relevant to the focal issue of whether the proposed adoption is in the best interest of the children. Later, in *Cox* v. *Stayton*, 273 Ark. 298, 619 S.W.2d 617 (1981), the court ruled that grandparents did not have standing to claim error in the trial court's failure to appoint independent counsel for the natural parents in proceedings where their parental rights were terminated and their children were adopted by foster parents. The court said:

> Constitutional rights, including the guarantees of due process, are personal rights and may not be asserted by a third party. A very narrow exception exists where the issue

> presented to the court would not otherwise be susceptible of judicial review and it appears that the third party is sufficiently interested in the outcome that the rights of the other party would be vigorously asserted and, thus adequately represented. We agree that the issue of the children's possible right to counsel would not otherwise be susceptible to judicial review, and therefore, we reach that issue as stated above. However, any right to counsel by the parents could be as well asserted by the parents themselves and would be easily reviewable had the parents joined in this appeal to claim such right, or had they remained as parties to the proceedings below. We therefore decline to recognize standing by these appellants to raise constitutional arguments on behalf of the parents, who themselves have declined to do so.

Id. at 302, 619 S.W.2d at 619-20 (citations omitted). By analogy, the court's reasoning in *Cox* is applicable here. The right of natural parents with respect to the care, custody, management and companionship of their minor children has been described as a personal right. *See Carroll* v. *Johnson*, 263 Ark. 280, 565 S.W.2d 10 (1978). As one means of protecting this right, our laws afford a natural father who has legitimated a child the privilege of consenting to an adoption, unless it is found that his consent is excused. It is apparent that the question of a natural father's consent is a matter that is personal to him. In this case, although the natural father filed an answer to the petition and declined to offer his consent to the adoption, he did not appear at the hearing and has not himself pursued an appeal of the probate judge's decision. We hold that appellant does not have standing to question the probate judge's decision on this issue.

Secondly, appellant contends that the probate judge erred in finding that the adoption was in the best interest of the child. Unlike the first issue, we do not question appellant's standing to contest this finding. *See Quarles* v. *French*, *supra*.

A probate court may grant a petition for adoption if it determines at the conclusion of a hearing that the required consents have been obtained or excused and that the adoption is in the best interest of the child or individual to be adopted. *Bemis* v. *Hare*, 19 Ark. App. 198, 718 S.W.2d 481 (1986); Ark. Code Ann.

§ 9-9-214(c) (Supp. 1991). While this court reviews probate proceedings *de novo* on the record, we will not reverse a probate court's decision regarding the best interest of a child to be adopted unless it is clearly against the preponderance of the evidence, giving due regard to the opportunity and superior position of the trial court to judge the credibility of the witnesses. *In re Adoption of Perkins/Pollnow*, 300 Ark. 390, 779 S.W.2d 531 (1989). In cases involving minor children a heavier burden is cast upon the court to utilize to the fullest extent all its power of perception in evaluating the witnesses, their testimony, and the children's best interests. *In the Matter of the Adoption of J.L.T.*, 31 Ark. App. 85, 788 S.W.2d 494 (1990). This court has no such opportunity, and we know of no case in which the superior position, ability, and opportunity of the probate court to observe the parties carries as great a weight as one involving minor children. *Id.*

At the hearing, Tanya testified that she had married Scotty ten days after the child's birth and that Scotty's name had been placed on the child's birth certificate. She related that she and Scotty were presently attending college and were thus unemployed. She hoped that they would be better able to provide for their children with a college education. She said that she and Scotty had discussed their plans for college with her mother and Scotty's parents, who all agreed to provide financial assistance while they were in school. In addition, she said that the cost of tuition and books were paid by federal grants and that they received HUD assistance and food stamps as well. Besides the child in question, she and Scotty have two other small children. She said that Scotty was the only father figure the child had ever known and that they had a normal father-daughter relationship. Tanya also explained that her previous reluctance to allow visitation with appellant was due to her fear of the child's being around her natural father, who had a severe drug problem. She testified that if the adoption were granted she would allow appellant visitation with the child, even though she realized that she would be under no legal obligation to do so.

Scotty testified that he considered the child to be his daughter and felt that the adoption would strengthen their relationship. He said that he helps care for the child, as well as their other children. Scotty acknowledged that his work history had been poor since he was involved in a car accident in 1988. He

said, however, that he was presently in good health and would probably work during the summer break from school. Scotty further testified that he would allow appellant to continue visitation with the child.

Scotty's father, Lavaughn B., testified that he saw the children five, six and sometimes seven days a week. He said that he considered the child to be his granddaughter and that no distinction was made between the child in question and his other grandchildren. Lavaughn stated that the children were properly cared for, fed and clothed.

Dr. Michael Prince performed a psychological evaluation of the child at appellant's request. It was his opinion that the adoption would be in the child's best interest. He hesitated, however, to be entirely in favor of the adoption due to the relationship the child shared with appellant and her husband. He explained that, because of the closeness of this relationship, it would also serve the child to continue to have contact with appellant. He also felt that the loss of contact with appellant might cause the child anxiety and grief. Dr. Prince further testified though that the child deserved a "full-fledged" father and that it would be more devastating for the child to lose contact with Scotty than with appellant.

Appellant testified that she was opposed to the adoption because she loved her granddaughter and because she had little hope of maintaining contact with the child if the adoption were granted. She stated that she had a great relationship with the child and that they were very close. Appellant also informed the court that she had paid the medical bills associated with the child's birth, including the cost of prenatal care, and that she had continued providing support for the child by purchasing her clothing, shoes and toys.

It is the appellant's primary contention that the probate judge should have denied the adoption given the testimony of Dr. Prince that both the adoption and continuing contact with appellant would be in the child's best interest. However, as the court in *Quarles* v. *French*, *supra*, recognized, it is for the probate judge in such cases to weigh the benefits flowing to children from the granting of an adoption, as opposed to disadvantages which may result from the severing of ties between

grandparents and grandchildren. As shown by the probate judge's comments, we are satisfied that the judge carefully considered these competing interests in making his decision. Based upon our *de novo* review, we cannot say that his decision was clearly against the preponderance evidence.

Affirmed.

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

Alishisa OFOCHEBE *v.* STATE of Arkansas

CA CR 91-333 844 S.W.2d 373

Court of Appeals of Arkansas
Division I
Opinion delivered December 2, 1992

Daniel D. Becker and *Terri Harris*, for appellant.

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

Gen., for appellee.

JOHN E. JENNINGS, Judge. Alishisa Ofochebe was one of three drivers involved in a traffic accident in Garland County which caused two deaths. She was charged with and convicted of two counts of manslaughter and was sentenced to ten years on each count, with the sentences to run consecutively.

Appellant's counsel has now filed a no-merit brief stating that he "has examined the record of these proceedings and found no reversible errors." Counsel's brief then discusses a list of "adverse rulings which could possibly support an appeal."

The procedure for the filing of a no-merit brief is governed by *Anders* v. *California*, 386 U.S. 738 (1967) and Rule 11(h) of the Rules of the Supreme Court. The test is not whether counsel thinks the trial court committed no reversible error, but rather whether the points to be raised on appeal would be "wholly frivolous." *Anders*, 386 U.S. at 744. Under *Anders*, the appellate court is also required to make a determination "after a full examination of all the proceedings," whether the case is wholly frivolous. Similarly, Rule 11(h) permits the filing of a no-merit brief only when "the appeal is wholly without merit."

After examining the record we are not convinced that the appeal is wholly without merit or "so frivolous that it may be decided without any adversary presentation." *Penson* v. *Ohio*, 488 U.S. 75, 82 (1988). We need not and do not determine whether error was committed; we hold merely that some of the issues raised are not "wholly frivolous."

By way of example there exists in this case an issue under the United States Supreme Court's holding in *Batson* v. *Kentucky*, 476 U.S. 79 (1986). That issue clearly deserves an adversary presentation. Many of the other adverse rulings received by appellant were on evidentiary matters. Some of the points are wholly without merit. Others, however, are not so frivolous as to obviate the need for a full adversary presentation.

For the reasons stated, and pursuant to *Anders* v. *California*, counsel's motion to withdraw is denied, and the case is remanded for rebriefing in adversary form. A new briefing schedule is established to start December 2, 1992.

DANIELSON and ROGERS, JJ., agree.

Shirley Dean KELLER *v.* L. A. DARLING FIXTURES

CA 91-447 845 S.W.2d 15

Court of Appeals of Arkansas
Division II
Opinion delivered December 2, 1992

Murrey L. Grider, for appellant.

Penix, Penix & Lusby, by: *Richard Lusby*, for appellee.

MELVIN MAYFIELD, Judge. This is a workers' compensation case. The Administrative Law Judge's decision awarded the appellant 15 percent permanent disability to the body as a whole, based upon a 10 percent anatomical impairment to the body as a

whole, plus an additional 5 percent impairment of wage-earning capacity. The opinion of the Chairman of the Commission reversed the law judge's decision and dismissed the claim. Another Commissioner concurred, and the third Commissioner dissented. Each Commissioner wrote a separate opinion.

The first issue is whether the evidence will satisfy the requirements of Ark. Code Ann. § 11-9-704(c)(1) (1987), which provides that "any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical and mental findings."

We think it will be helpful to begin our discussion by looking at the circumstances under which the above provision became a part of our "Workers' Compensation Law." The provision was added to our law by Act 10 of the Secondary Extraordinary Session of 1986. Section 10 of that act amended "Subsections (b) and (c) of Section 23 of Initiated Measure No. 4 of 1948, as amended, the same being Arkansas Statutes Annotated § 81-1323(b) and (c)." Section "c" was amended to read as follows: (The emphasized portion was added by the 1986 amendment.)

> (c) Evidence and Construction. (1) At such hearing the claimant and the employer may each present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose. Such evidence may include verified medical reports which shall be accorded such weight as may be warranted from all the evidence of the case. *Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings.* (2) When deciding any issue, administrative law judges and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence. *Administrative law judges, the Commission, and any reviewing courts shall construe the provisions of this Act liberally, in accordance with the Act's remedial purposes. In determining whether a party has met the burden of proof on an issue, administrative law judges and the Commission shall weigh the evidence impartially and without giving the benefit of the doubt to any party.*

The above section has now been codified as Ark. Code Ann. § 11-9-704(c)(1)-(9) (1987). Before examining the language involved in this case, we note that the amendment specifically provides that the *provisions* of the Act *shall be construed liberally in accordance with the Act's remedial purposes.*

The opinion of the Chairman of the Commission contains a extended discussion of the requirement for *objective* physical or mental findings. It states that findings based solely on complaints of pain are purely subjective and insufficient but that diagnoses developed by physicians based on results obtained from clinical tests which reveal consistent and repeated responses to specific stimuli "fall toward the objective end of the continuum." At this point the opinion points out that "many conditions can *only* be diagnosed by such clinical tests, and by excluding findings based upon all such clinical tests claimants who suffer from such conditions are absolutely excluded from receiving permanent disability benefits." The opinion then notes that the term "objective" is subject to different interpretations, and states "with regard to the objectivity of symptoms, the term means perceptible to persons other than an affected person." *Webster's New Collegiate Dictionary* 791 (1973) is cited as authority for that definition. The opinion then expresses the belief that the legislature "used the term 'objective' to assure consistency in findings of permanent disability and to eliminate malingering." The opinion adds:

> However, we cannot conclude that the Legislature intended to exclude universally accepted diagnostic clinical evaluation or measuring procedures which yield consistent results on repeated trials under carefully controlled conditions. To reach any other conclusion would mean that the Legislature intended to eliminate entire classes of physical conditions from receiving the compensation provided for under the Act merely because the condition is not confirmable by a specific type of test, and it is inconceivable that the Legislature intended such a result especially where the condition is confirmable by tests which are routinely and consistently relied upon by the medical profession and where the accuracy and dependability of the procedure is not disputed in the medical profession. Moreover, many of

> these conditions are just as disabling, if not more so, than many conditions which are confirmable by tests which do not require a response from the claimant. Consequently, to find that injured employees suffering from such conditions are totally excluded from ever receiving permanent disability benefits simply because their condition is confirmable by a test accepted without question by the medical profession but not this Commission would result in disparate treatment of entire classes of injured employees.

Although the concurring opinion agrees with the result reached by the opinion of the Chairman, the concurring Commissioner expresses the "fear" that the principal opinion could be seen as a retreat from the legislative mandate requiring that permanent disability be supported by objective and measurable physical findings. (At this point we are only considering the term "objective," leaving the term "measurable" for a later discussion in this opinion.)

This court has already considered the "objective" requirement in the cases of *Taco Bell* v. *Finley*, 38 Ark. App. 11, 826 S.W.2d 213 (1992), and *Reeder* v. *Rheem Manufacturing Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992). In *Taco Bell* we said the word "objective" means "based on observable phenomena," and we cited *The American Heritage Dictionary* 857 (2d College ed. 1982) as our authority. We said that dictionary also gives a specific medical definition: "Indicating a symptom or condition perceived as a sign of disease by someone other than the person afflicted." We then said "under either definition, in our view, observations made by a doctor as a result of range of motion tests qualify as 'objective physical findings.' " We also said that the Commission was not prohibited by Ark. Code Ann. § 11-9-704(c) from considering "the claimant's testimony about her symptoms, including pain, and the effect of activity on those symptoms" so long as the record contains objective and measurable findings to support the Commission's ultimate determination. And in *Reeder* we said:

> It is apparent that the word "determination" as used in the statute might refer either to a determination of impairment made by a doctor or to one made by the Commission. The Commission took the view that unless

> the doctor's opinion as to permanent impairment was expressly based on objective and measurable physical findings, it was unworthy of consideration. We think that the word "determination" as used in the statute refers to the Commission's determination of physical impairment. The statute prohibits such a determination unless the record contains supporting "objective and measurable physical or mental findings." Our view is closer to the position taken by the dissenting commissioner: "The statute precludes an award for permanent disability *only* when it would be based *solely* on subjective findings."

38 Ark. App. at 251 (emphasis supplied).

Because of the number of cases now reaching us in which the requirement of "objective" physical or mental findings is involved, we have looked to other states for possible guidance in the meaning and application of this requirement.

Louisiana has a statute, La. Rev. Stat. § 23:1317, which provides that workers' compensation payments are for "such injuries as are proven by competent evidence, of which there are or have been objective conditions or symptoms proven, not within the physical or mental control of the injured employee himself." *See Abshire* v. *Dravo Corp.*, 396 So. 2d 521, 523 (La. Ct. App. 1981). This case explained the meaning of the Louisiana statute by quoting from *Drummer* v. *Central Pecan Shelling Co.*, 366 So. 2d 1333 (La. 1978), as follows:

> In interpreting the statutory language this Court has indicated that "objective conditions or symptoms" have a broad meaning, including "symptoms of pain, and anguish, such as weakness, pallor . . . sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition . . . ." Accordingly, the objective conditions or symptoms required by the statute are not limited to symptoms of an injury which can be seen or ascertained by touch. Moreover, there need not be a continued exhibition of objective symptoms to entitle the employee to compensation if the injury complained of is causally connected with the original accident.

366 So. 2d at 1335 (citations omitted).

The State of Missouri has a statute, Mo. Rev. Stats. § 287.020[2] (1965), which defines the word "accident" as used in its workers' compensation law as "an unexpected or unforseen event happening suddenly and violently, with or without human fault and *producing at the time objective symptoms of an injury*." (Emphasis added.) In *Todd* v. *Goostree*, 493 S.W.2d 411 (Mo. Ct. App. 1973), the court said "objective symptoms . . . are not limited to external wounds, bruises, and the like which can be seen or ascertained by touch, but include as well all involuntary expression of pain or distress, such as weakness, faintness, pallor or sickness, indicating a deleterious change in the body condition." 493 S.W.2d at 417. In an earlier case, *Schroeder* v. *Western Union Telegraph Co.*, 129 S.W.2d 917 (Mo. Ct. App. 1939), the court said:

> The word "objective" has been defined medically to mean "perceptible to persons other than the patient." Webster's New Internat'l. Dictionary. The term "objective symptoms" has been held to mean those symptoms which a surgeon or physician discovers from an examination of his patient, while "subjective symptoms" are those which he learns from what his patient tells him. The "crazy" actions and irrational "talk" of the claimant on the morning after he received the blow on the head were all "objective symptoms" of insanity following the injury arising out of and in the course of his employment."

129 S.W.2d 922 (citations omitted).

In *Sandel* v. *Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982), the Nebraska Supreme Court construed a provision in the workers' compensation law of that state which defined "accident" as did the statute in Missouri. The Nebraska court said that "symptoms of pain; and anguish, such as weakness, pallor, faintness, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute." 317 N.W.2d at 915-16. The court also said, in reference to the evidence before it, "No one can reasonably argue that a swollen arm and the inability to move the arm so as to be able to perform one's work, together with

apparent signs of pain and discomfort requiring medical attention, are not objective symptoms of an injury." 317 N.W.2d at 916.

Looking at the record in the instant case, we note that it was stipulated that appellant had sustained a compensable injury to her chest on May 2, 1988. She testified that after being off a short time she returned to work, and in July 1988, while trying to pull some big shelves apart, she again injured her chest. She was off another couple of days and returned to light duty for four weeks. She injured her chest for the third time just before Christmas that year and, at the time of the hearing on September 25, 1990, had not returned to work.

The appellant testified that she was 43 years old and had a ninth-grade education. Although she once worked, for a short period, as a bank teller, appellant testified she had mainly worked at factory jobs. She said she continues to suffer severe pain with only slight physical exertion and often goes to the emergency room for a shot when her medication does not relieve the pain. According to appellant, the problem is with her right side and she is right-handed; she cannot use her right arm to cook or mop the floor without having pain for several hours afterward; before her injury she enjoyed painting pictures on saw blades and pieces of wood, but she no longer can even do that very well because her arm shakes.

Dr. Randy D. Roberts, a rheumatologist, saw appellant in February of 1989, on referral by another doctor, and diagnosed appellant's condition as "Chest wall syndrome with injury to the costochondral junctions." In a letter to appellant's attorney, dated February 28, 1989, Dr. Roberts stated that appellant "will qualify for a 10 percent permanent partial disability rating based on pain and problems using her upper extremities for any lifting or repetitive activity which exacerbates her discomfort." Subsequently, in a letter to appellee's attorney, Dr. Roberts again rated appellant at 10 percent permanent partial disability and recommended that she not be returned to her former job. He stated, "I reviewed 'light' duties at Darling and could seem to find nothing that was light enough that she could manage with this present condition."

Dr. Hugh Franklin Burnett, a general, thoracic, and vascu-

lar surgeon, testified by deposition that, at the request of the appellee's insurance carrier, he reviewed appellant's records and x-rays and examined her to provide another opinion relative to her symptoms, complaints, findings, and injury. He said it was his opinion that appellant had a costochondritis or inflammation of the cartilages which attach to the sternum and/or muscle strain associated with this." When asked if this was an objective finding or was based upon appellant's subjective complaints, Dr. Burnett stated:

> It relies on both. The fact that she historically had recurrent pain in the anterior chest wall, particularly along either side of the sternum, perhaps, more so on the right than on the left. But in addition to that, the objective finding that there was tenderness over the costal cartilages on either side.

Dr. Burnett also said he had "no reasons to disagree with" Dr. Roberts' opinion that appellant had a 10 percent permanent partial disability rating.

Based upon the evidence and his interpretation of the meaning of the requirement of "measurable physical or mental findings" the opinion of the Chairman of the Commission states "the claimant in the present case failed to establish that the findings are measurable. Therefore, the findings fail to satisfy the second prong of the test . . . ." Since one Commissioner concurred with the Chairman's opinion and one Commissioner dissented on the basis that there were findings "not only objective but measurable as well," it is clear that all three commissioners agree that there were "objective findings" of permanent anatomical impairment. We think the law on the "objective" requirement as stated in the Chairman's discussion is generally correct. It is not, in general, at odds with what this court has previously held in the *Taco Bell* and *Reeder* cases. Moreover, it is not, in general, at odds with the cases we have discussed from Louisiana, Missouri, and Nebraska. So, without embracing every statement in the Chairman's opinion regarding the meaning of the phrase "objective finding," we affirm the Commission's decision on the law and the facts as to the "objective findings" requirement. However, we do not agree with the majority of the Commission on its decision as to the "measurable findings" requirement.

As we have already stated in this opinion, when considering the requirement that "any determination of physical impairment shall be supported by objective and measurable physical or mental findings," we think the word "determination" refers to the Commission's determination. *Reeder, supra.* In making that determination, the opinion of the Chairman of the Commission states that the basis of Dr. Roberts' rating of a 10 percent anatomical impairment "is not readily apparent." The opinion states that Dr. Roberts said his rating was based upon the appellant's pain and problems using her upper extremities for any lifting or repetitive activity which exacerbates her discomfort. The Chairman's opinion says that "while loss of use of the upper extremities may be measurable, there is no evidence explaining how he used these factors to obtain the rating that he assigned." "Consequently," the opinion states, "we find the Claimant failed to prove . . . that she sustained any permanent impairment since she failed to establish that the findings that she presented were measurable."

■ In the first place, we point out that the reasoning relied upon in the Chairman's opinion as to the "objective findings" requirement — that the legislature did not intend to exclude injured employees from ever receiving permanent disability benefits simply because their condition is not confirmable by a test accepted by the medical profession but not by the Commission — is equally applicable to the "measurable findings" requirement. In light of the statutory requirement that the provisions of the Act shall be construed liberally in keeping with its remedial purposes, we think it is error to require a standard of measurability greater than the standard of objectivity. Surely if there are sufficiently objective findings upon which the doctor can make a diagnosis and give treatment, the Commission should not refuse to consider the doctor's findings as to the extent of physical impairment simply because the doctor cannot make a precise measurement of that impairment.

■ In the second place, we cannot be sure that the Chairman's opinion correctly defined the term "measurable." His opinion simply states that "measurable obviously means capable of being quantified in some sense." Although the opinion does not say what "in some sense" means, we do not think it means in a "precise" sense. *Webster's Third New International*

Dictionary (Unabridged) (1976) gives one definition of "measurable" as "great enough to be worth consideration." Just as the cases we have cited hold that objective symptoms are not limited to those that can be seen or ascertained by touch, we do not think measurable findings have to be precise. We also do not think that doctors are confined to any specific chart or guideline in making their evaluation of the existence or extent of physical impairment. The State of Oklahoma has a a statute, Okla. Stat. Ann. tit. 85 § 3(11) (1991), which requires "except as otherwise provided herein," that any examining physician shall only evaluate impairment in accordance with the latest publication of The American Medical Association's "Guides to the Evaluation of Permanent Impairment" in effect at the time of the incident for which compensation is sought. *See Davis* v. *Goodrich*, 826 P. 2d 587 (Okla. 1992) (medical report which evaluates permanent impairment in workers' compensation cases must comply with statutory guide.) Had the Arkansas Legislature wanted to prescribe definite guidelines for use in evaluating the extent of physical impairment it could have done as Oklahoma did in that regard.

■ We agree with the opinion of the dissenting Commissioner that measurable findings may involve the extent, degree, dimension, or quantity of the physical condition. In this case there is evidence from the records of Dr. Roberts that appellant suffered from chest wall syndrome with injury to the costochondral junctions and a possible decreased grip in the right hand. The records of Dr. Roberts also report that palpation of the appellant's "chest revealed marked tenderness in the Costochondral junctions bilaterally particularly on the right at 3, 4 and 5, and on the left at 1, 2 and 3." Dr. Burnett, who examined the appellant at the request of the appellee, agreed with Dr. Roberts' diagnosis and testified that tenderness to palpation is considered an objective finding. He indicated that not only did palpation of the costal cartilages elicit an indication of pain, but other locations were palpated also to determine whether or not the complaints of pain were appropriate for the diagnosis he had made. The dissenting Commissioner's observation of this evidence is worth noting:

> Dr. Roberts is obviously referring to the costochondral junctions at these specific ribs as being particularly tender or symptomatic. Since every costochondral junction is not

involved in claimant's symptomatology, and Dr. Roberts is specific about the affected area, Dr. Roberts' findings of tenderness to palpation in this configuration document the *extent* or *dimensions* of claimant's physical condition and are thus, measurable findings.

While it can be argued that these were the initial findings and not indicative of the permanent character of claimant's work-related injury, Dr.Roberts' subsequent reports describe claimant's condition as "not improved," "as previously" found, "much the same", and finally as "permanent." Thus, the initial findings are also the findings documenting claimant's permanent disability. Moreover, even though Dr. Roberts stated that the calcification of the costochondral cartilages found in claimant's x-rays "can be seen in people without any chest wall pain," such findings can be seen in people with chronic costochondritis and are obviously objective and measurable findings corroborating the findings of tenderness to palpation. Therefore, there are sufficient objective and measurable findings in the record to support an award of benefits for a permanent anatomical impairment.

We do not believe that the decision of the Chairman of the Commission, concurred in by another Commissioner, is supported by the law and evidence as to the holding that there is insufficient evidence of measurable physical findings to support a determination of physical impairment. When the term "measurable" is properly construed there is no reason to reject the 10 percent anatomical impairment rating agreed to by both doctors; and when the appellate court is convinced that fair-minded persons, on the same facts, could not have reached the same conclusion arrived at by the Commission, the decision of the Commission must be reversed. *International Paper Co.* v. *Tuberville*, 302 Ark. 22, 27, 786 S.W.2d 830 (1990).

The Chairman's opinion also held that appellant was not entitled to wage loss disability because of the provisions in Ark. Code Ann. § 11-9-522(b) (1987) that deny, under certain circumstances, an injured employee permanent partial benefits in excess of the employee's percentage of permanent physical impairment. To support that holding the opinion states "the

Respondent *apparently* was prepared to allow the Claimant to return to work at a job compatible with her limitations, and a representative for the Respondent testified that a variety of jobs were available." (Emphasis added.) The only representative of the Respondent-Appellee who testified was Ted Mabry who said he was an employee of the appellee and that safety and workers' compensation came within the jurisdiction of his job. He testified that if appellant "had reported" for work she would have been assigned to a job which would have permitted her to work without repetitively lifting as much as fifteen pounds. On cross examination he was asked if the job she would have done would be less strenuous than mopping a floor and he said "Yes." He was then asked if it was more or less repetitive than mopping a floor and he said it was more repetitive. Mabry also said he had sent a list of jobs available to appellant to Dr. Roberts; however, the doctor stated he reviewed the list of available jobs sent to him by Mabry and found none that appellant could do. The appellant testified that she went back to work for appellee on two occasions after her injury and was unable to do the work assigned to her. She also testified that she did not believe appellee had a job that she was able to perform. Although, the Chairman's opinion states that appellant admitted she could do work physically comparable to the bank teller's job she once had, the appellant testified that job was in 1977 and that she would need to go for more schooling to be able to do that work today. We also note that the appellant is 43 years old, has a ninth-grade education, and her treating physician's progress notes of September 15, 1989, state: "I recommend that the patient not be returned to work. I think this is a permanent condition."

Arkansas Code Annotated § 11-9-522(c) (1987) contains two subdivisions which qualify the provisions that limit an injured employee's disability benefits if the employee returns to work or has reasonably obtainable offer to work at wages equal to those made at the time of injury. Those two subdivisions provide (1) that the burden is on the employer to prove the employee returned to work or that he had a reasonably obtainable offer to return to work at equal wages, and (2) that the intent of these provisions is to enable an employer to reduce disability payments when the disability no longer exists or if the employee is discharged for misconduct or leaves work without good cause

connected with the work.

Based on the evidence in the record, the burden of proof, and the purpose of Ark. Code Ann. § 11-9-522(b) and (c), we do not believe the Commission's decision to deny wage loss compensation under the provisions of Ark. Code Ann. § 11-9-522(b) is supported by the law and the evidence.

We reverse the Commissions' decision and remand with directions to assess appellant's permanent physical impairment and her permanent partial disability benefits.

Reversed and remanded.

COOPER and ROGERS, JJ., agree.

D. J. MOSER *v.* ARKANSAS LIME COMPANY

CA 92-180 842 S.W.2d 456

Court of Appeals of Arkansas
Division II
Opinion delivered December 9, 1992
[Supplemental Opinion on Denial of Rehearing
February 17, 1993.]

J. Scott Davidson, for appellant.

Friday, Eldredge & Clark, by: *Chuck Gschwend*, for appellee.

JAMES R. COOPER, Judge. The claimant appeals from the Arkansas Workers' Compensation Commission's holding that he failed to prove by a preponderance of the evidence that he is permanently and totally disabled. The appellant is a 62-year-old laborer with a fifth grade education who sustained a scheduled injury to his right eye. After finding that he suffered a work-related injury, the Commission remanded to the Administrative Law Judge to award benefits. He awarded temporary total disability benefits, and found the appellant to be permanently and totally disabled. The Commission reversed the finding of permanent and total disability, and we reverse that decision.

On August 17, 1988, the appellant was employed by appellee Arkansas Lime Company. He was shoveling lime dust that had settled to the floor from a conveyor belt upon which lime was being grated. Fans were utilized in the work area and apparently blew dust into his eyes. The result was extensive medical treatment, surgery, and a permanent vision loss in excess of 95% to his right eye. A claim for benefits was filed and the Administrative Law Judge found that the appellant did not sustain a work-related injury. The Commission reversed that decision, finding that the appellant had proven by a preponderance of the evidence

that he had sustained a work-related injury and has proven a causal connection between his injury and subsequent eye problems. The case was remanded to the Administrative Law Judge to award benefits. He awarded temporary total disability benefits from August 17, 1988 to January 21, 1989, and found that the appellant was permanently and totally disabled. The appellee did not appeal the finding of compensability, but did appeal the award of benefits to the full Commission which reversed the decision. It limited the award of temporary total benefits to a period from August 18, 1988 to October 31, 1988, and found that the appellant failed to prove that he was permanently and totally disabled.

The Commission found in its opinion that the appellant lost the use of his eye as the result of a compensable injury suffered while working for the respondent on August 17, 1988. The appellee has challenged this finding of fact by arguing in its brief that the appellant's injury was not entirely the result of his work-related injury. However, the appellee has failed to file a cross-appeal, as it was permitted to do under Ark. Code Ann. § 11-9-711(b) (1987), and we will not address its challenge to the Commission's finding of fact. Even were we to consider the appellee's argument, however, we would reach the same conclusion, because our review of the record indicates that there was clearly substantial evidence to support the Commission's finding that the appellant's condition was caused by his work-related injury with no significant aggravation or intervening cause. Given our resolution of this question, the only issue to be decided on this appeal is whether the Commission erred in denying the appellant benefits for permanent and total disability.

■ In cases such as the case at bar, where the Commission's denial of relief is based on the claimant's failure to prove entitlement by a preponderance of the evidence, the substantial evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Weller* v. *Darling Store Fixtures*, 38 Ark. App. 95, 828 S.W.2d 858 (1992). The Commission's opinion states:

> Although there is no question that this claimant has lost the use of his right eye, and that he functions in the borderline mentally retarded age, that does not automati-

cally mean that claimant is permanently totally disabled.

The Commission referred to a report by Dr. Capps, the appellant's physician, who addressed only physical impairment, stating that the appellant's loss of vision in one eye affected his fine depth perception, but that his gross depth perception would remain intact and that he was capable of performing jobs similar to the jobs he had held in the past. The Commission concluded, without stating its basis for such conclusion, that "most manual labor jobs do not require fine depth perception." The only other stated basis for the Commission's denial of relief was the alleged lack of effort the appellant showed in finding a new job. The commission stated that the appellant's "lack of interest and negative attitude is an impediment to the Commission's full assessment of the claimant's loss and is a factor to be considered."

The appellant is 62 years old, has a fifth grade education, and has always had jobs involving manual labor. He now has a permanent vision loss of 95% to his right eye which was caused by a work-related injury. He testified that he did not think he could return to his job because he could not see; that any of his previous jobs would be difficult to perform due to exposure to the sun which caused pain in his eye and ear leading to headaches; that he is unable to drive, hunt, fish, or mow the yard as he used to do; and that due to the added strain to see, he now tires easily. Imogene Burris, a woman who lives in the appellant's home, testified that the appellant continues to have medical treatment and she drives him; that he is negatively affected by heat; that he cannot even groom himself; and that, before the injury, he was an active person and hard worker.

Though not noted in the opinion, the Commission's factual finding that the appellant is borderline mentally retarded is supported by a report by Dr. James Chaney, a psychologist, who examined the appellant and found him to be mentally retarded and functionally illiterate. He noted that "because of his mental retardation, his lack of educational achievement, his ocular difficulties, and his advanced vocational age, he appears to be 100% disabled from a vocational standpoint . . . ." Dr. Chaney's report is the only evidence in the record bearing on wage-loss factors.

The appellee argues that these factors do not include any

opinion by a medical doctor placing any physical restrictions on the appellant, or stating that he could not perform any of the jobs he held in the past; however, when wage loss benefits (permanent and total disability) are at issue, not only should the medical evidence, i.e., the impairment rating, be considered, but also the claimant's "age, education, experience, and other matters affecting wage loss." *Glass* v. *Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). Arkansas Code Annotated § 11-9-522 (1987) provides in pertinent part:

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

An employee who is injured to the extent that he can perform services that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist may be classified as totally disabled. *Lewis* v. *Camelot Hotel*, 35 Ark. App. 212, 816 S.W.2d 632 (1991). These employees are said to fall within the odd-lot category of disabled workers. In *Walker Logging* v. *Paschal*, 36 Ark. App. 247, 821 S.W.2d 786 (1992), Professor Larson's treatise was cited as follows:

> If the evidence of degree of obvious physical impairment, coupled with other factors such as claimant's mental capacity, education, training, or age, places claimant *prima facie* in the odd-lot category, the burden should be on the employer to show that some kind of suitable work is regularly and continuously available to the claimant. [2 Larson, *Workmens' Compensation Law*, § 57-61, pages 10-136 and 10-137.]

> The odd lot doctrine refers to employees who are able to work only a small amount. The fact they can work some does not preclude them from being considered totally disabled if their overall job prospects are negligible. 2 Larson, *supra*, § 57-51, pp. 10-107, *et seq.*

There is no evidence that placement of the appellant in the odd-lot

category was specifically argued to or addressed by the Commission, but because of the total and permanent disability claim after the scheduled injury, the appellee was on notice that the odd-lot doctrine was in issue. *See Walker Logging, supra*, 36 Ark. App. at 253.

In *M.M. Cohn* v. *Haile*, 267 Ark. 734, 589 S.W.2d 600 (Ark. App. 1979), the Court cited *Arkansas Best Freight Sys., Inc.* v. *Brooks*, 244 Ark. 191, 424 S.W.2d 377 (1968), where the Supreme Court sustained an award of compensation for total disability despite medical evidence that the claimant was functionally disabled to the extent of 50%.

> Loss of the use of the body as a whole involves two factors. The first is functional or anatomical loss. That percentage is fixed by medical evidence. Secondly, there is the wage-loss factor, that is, the degree to which the injury has affected claimant's ability to earn a livelihood . . . the second element is to be determined by the Commission, based on medical evidence, age, education, experience and other matters reasonably expected to affect the earning power. (Citation omitted.)

Based on the Commission's factual findings of disability and borderline mental retardation along with the undisputed evidence of the appellant's advanced age and lack of education or vocational training, the appellant is *prima facie* within the odd-lot category. Therefore, the burden shifted to the employer to show evidence that suitable work is regularly and continuously available to the appellant. *Walker Logging, supra*. The appellee failed to do so, and therefore we reverse. The case is remanded to the Commission with direction to award total and permanent disability benefits.

Reversed and remanded.

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

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING

FEBRUARY 17, 1993

846 S.W.2d 188

113-A

J. Scott Davidson, for appellant.

Charles Gschwend, Jr., for appellee.

JAMES R. COOPER, Judge. The appellee has petitioned for rehearing of our decision in this case. We deny the appellee's petition, and we issue this supplemental opinion to explain our reasons for doing so.

The appellee contends that our December 9, 1992, opinion was erroneous because, the appellee asserts, we "made a finding of fact that the claimant was within the 'odd lot' category," and that, by permitting the appellant to raise the odd-lot doctrine at the appellate level, we gave the appellees no opportunity to present evidence to satisfy their burden of proof, and thereby denied them due process. We disagree for several reasons.

While it is true that it is the function of the Commission, and not the appellate courts, to act as fact finder in workers' compensation cases, *see* Ark. Code Ann. § 11-9-711 (1987), it is also true that it is the duty of the appellate court to reverse the Commission's decision when convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Franklin Collier Farms* v. *Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986). The reviewing court must set aside the Commission's decision when it cannot conscientiously find from a review of the entire record that the evidence supporting the decision is substantial; in this context, substantial evidence has been defined as more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *College Club Dairy* v. *Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988). We take this opportunity to clarify our opinion of December 9, 1992, by stating that our decision was not based on a finding that the appellant was within the odd-lot category, but was instead based on our conviction that, on the evidence before the Commission, reasonable men could not conclude that the appellant was not within the odd-lot category of workers.

Nor do we find merit in the appellees' contention that our application of the odd-lot doctrine on appeal deprived it of an opportunity to present evidence on this issue. It should be noted

that the appellant in this case suffered a scheduled injury. *See* Ark. Code Ann. § 11-9-521(c) (1987). Such injuries differ from unscheduled injuries in that the award for a scheduled injury generally is limited to the benefits provided for that particular scheduled injury. *Rash* v. *Goodyear Tire and Rubber Co.*, 18 Ark. App. 248, 715 S.W.2d 449 (1986). However, as long ago as 1966, the Arkansas Supreme Court held that the benefits for scheduled injuries are not limited to the schedule when the scheduled injury results in permanent total disability. *McNeely* v. *Clem Mill & Gin Co.*, 241 Ark. 498, 409 S.W.2d 502 (1966); *see also Johnson Construction Co.* v. *Noble*, 257 Ark. 957, 521 S.W.2d 63 (1975). Given that, in scheduled injury cases, the nature of the injury is fixed, the finding of permanent and total disability under such circumstances necessarily hinges on factors, such as those described in *Glass* v. *Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961), which bear on the claimant's age, education, experience, and other matters affecting wage loss. For example, in *McNeely, supra*, the discussion is directed at the effect of the scheduled injury in light of circumstances peculiar to the particular claimant, the Court noting that "the award for the loss of one hand is compensation for 150 weeks, despite the fact that such injury might be totally disabling to a musician, a surgeon, or a watchmaker, and not at all disabling to a lawyer, a stockbroker, or an educator." *McNeely, supra*, 241 Ark. at 500.

In 1979, Judge Newbern, writing for the Court of Appeals, quoted with approval Professor Larson's formulation of the odd-lot doctrine and employed the doctrine in determining that a finding of total disability was supported by substantial evidence. *M.M. Cohn Co.* v. *Haile*, 267 Ark. 734, 589 S.W.2d 600 (Ark. App. 1979). As quoted in *Haile, supra*, the odd-lot doctrine provides that:

> If the evidence of degree of obvious physical impairment, coupled with other factors such as claimant's mental capacity, education, training, or age, places claimant *prima facie* in the odd-lot category, the burden should be on the employer to show that some kind of suitable work is regularly and continuously available to the claimant.

Haile, supra, 267 Ark. at 736.

Given these decisions, we think it clear that, for more than a decade, employers have been on notice that an employee with a scheduled injury who claims to be permanently and totally disabled will necessarily be presenting proof of wage-loss factors such as mental capacity, education, training, or age, and that a sufficient showing by the claimant will require the employer to show that suitable work is available on a regular and continuous basis. Here, the appellee knew that the appellant was making a claim for total and permanent disability prior to the hearing, and as such was on notice that the odd-lot doctrine was at issue. *Walker Logging* v. *Paschel*, 36 Ark. App. 247, 821 S.W.2d 786 (1992).

Petition for rehearing denied.

Ricky EDWARDS *v.* STATE of Arkansas

CR CR 92-94 842 S.W.2d 459

Court of Appeals of Arkansas
Division II
Opinion delivered December 9, 1992

J.G. Molleston, for appellant.

Winston Bryant, Att'y Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. A Ouachita County jury found Ricky Edwards guilty of the second degree murder of Annie Christopher. The circuit judge, following the recommendation of the jury, sentenced Edwards to twenty years in the Department of Correction. For reversal Edwards makes three arguments: (1) that the jury's verdict is not supported by substantial evidence; (2) that the court gave an incorrect instruction on second degree murder; and (3) that the court erred in excluding evidence offered to show the violent character of his brother, Billy Joe Weaver. We find no reversible error and affirm.

A person commits murder in the second degree if he knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life. Ark. Code Ann. § 5-10-103(a)(1) (Supp. 1991). A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such result. Ark. Code Ann. § 5-2-202(2) (1987). When the sufficiency of the evidence is challenged on appeal, we affirm the jury's verdict if it is supported by substantial evidence. *Franklin* v. *State* 308 Ark. 539, 825 S.W.2d 263 (1992). Substantial evidence is evidence which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another, without resort to speculation or conjecture. *Wooten* v. *State*, 32 Ark. App. 198, 799 S.W.2d 560 (1990). It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Payne* v. *State*, 21 Ark. App. 243, 731 S.W.2d 235 (1987). The fact that evidence is circumstantial does not render it insubstantial as the law makes no distinction between direct evidence of a fact and circumstances from which it may be inferred. *Ryan* v. *State*, 30 Ark. App. 196, 786 S.W.2d

835 (1990). While it is true that in the case at bar no motive for the killing was established, this does not necessarily render the evidence insubstantial. *See Dowell* v. *State*, 191 Ark. 311, 86 S.W.2d 23 (1935); *Jones* v. *State*, 11 Ark. App. 129, 668 S.W.2d 30 (1984). Purpose and intent are frequently not subject to proof by direct evidence and may be inferred from the facts and circumstances of the case. *Furr* v. *State*, 308 Ark. 41, 822 S.W.2d 380 (1992). In considering the sufficiency of the evidence on appeal, we view it in the light most favorable to the State. *Bargery* v. *State*, 37 Ark. App. 118, 825 S.W.2d 831 (1992).

Annie Christopher, the victim, lived in a house in Stephens with her fifteen-year-old daughter, Kameka Smith, and other children. Kameka testified that sometime in the late evening hours of June 9, 1990, her mother came home with the defendant, Ricky Edwards. Her mother went into her room to lie down and Edwards followed her. About five minutes later Kameka and others asked Edwards if they could use his car to go to the store to get ice cream and he agreed. Kameka and the others returned in about an hour. When Kameka entered her mother's room she saw her mother on the floor with her head lying on the bed and the defendant lying in the bed, pretending to be asleep. When Edwards jumped out of bed Kameka saw blood on his pants. As Ms. Christopher was being taken to the hospital, Edwards said he did not want to go and Charles Baker, Kameka's boyfriend, dropped Edwards off at his uncle's house.

Baker's testimony was similar to that of Kameka Smith. He also testified that the defendant would not help carry Ms. Christopher to the car until he was asked "four or five times." Baker also testified that when Edwards jumped up out of bed he said, "I didn't do it." Another of Ms. Christopher's children, Corey, heard the defendant say, "I hope I didn't hurt that woman."

Ms. Christopher bled to death from a severe stab wound in the arm. A kitchen knife was found underneath a window of the front room of the house. Deputy Lamar Nowlin investigated the incident. He testified that the defendant asked him if Annie Christopher had any cuts on her body. Edwards told Nowlin that he did not own a knife and that if the victim was cut it must have been when she was being transferred from the car to the pickup

truck on the way to the hospital.

Ricky Edwards testified that he and Annie Christopher were both asleep in her room and that he knew nothing about the stabbing until he was awakened. The evidence in this case was circumstantial: no one saw the defendant stab the victim and no motive was established. Nevertheless, we hold that reasonable minds could reach the conclusion, without resort to speculation or conjecture, that the defendant did stab Ms. Christopher thereby causing her death. A defendant's improbable explanations of incriminating circumstances are admissible as proof of guilt. *Howard* v. *State*, 283 Ark. 221, 674 S.W.2d 936 (1984).

Edwards next contends that the trial court erred in excluding proffered evidence as to the reputation for violence of Billy Joe Weaver, the defendant's brother. Whether evidence is relevant is a decision within the sound discretion of the trial court. *See Skiver* v. *State*, 37 Ark. App. 146, 826 S.W.2d 309 (1992). Here, as the trial judge noted, there was no evidence to put Weaver at the Christopher house at the time of the stabbing. Furthermore, there was already in the record evidence that Ms. Christopher had lived with Weaver, that she had moved to a women's shelter because he had beaten her, and, through the testimony of Charles Baker, that Weaver had a reputation for violence in the community. It is not reversible error to exclude evidence which is merely cumulative. Ark. R. Evid. 403; *Graham* v. *State*, 2 Ark. App. 266, 621 S.W.2d 4 (1981).

Finally, Edwards argues that the court's instruction on second degree murder was reversible error. While we agree that the instruction given was incomplete, reversal is not required under the circumstances.

The defendant was charged with first degree murder and the court instructed on the lesser included offenses of second degree murder, manslaughter, and negligent homicide. The relevant portion of the court's charge was as follows:

COURT'S INSTRUCTION NO. 9

> Ricky Edwards is charged with Murder in the First Degree. This charge includes the lesser offenses of Murder in the Second Degree and Manslaughter, and Negligent Homicide.

You may find the defendant guilty of one of these offenses or you may acquit him outright.

If you have a reasonable doubt as to which offense the defendant may be guilty of, you may find him guilty only of the lesser offense. If you have a reasonable doubt as to the defendant's guilt of all offenses, you must find him not guilty.

COURT'S INSTRUCTION NO. 10

Ricky Edwards is charged with the offense of Murder in the First Degree. To sustain this charge, the State must prove the following things beyond a reasonable doubt.

That with the purpose of causing the death of any person, Ricky Edwards caused the death of Annie Marie Christopher.

* * *

COURT'S INSTRUCTION NO. 12

If you have a reasonable doubt of the defendant's guilt on the charge of Murder in the First Degree you will then consider the charge of Murder in the Second Degree.

COURT'S INSTRUCTION NO. 13

Ricky Edwards knowingly caused the death of Annie Marie Christopher under circumstances manifesting extreme indifference to the value of human life.

* * *

COURT'S INSTRUCTION NO. 14

If you have a reasonable doubt of the defendant's guilt on the charge of Murder in the Second Degree you will then consider the charge on Manslaughter.

* * *

To sustain this charge the State must prove beyond a reasonable doubt that:

Ricky Edwards recklessly caused the death of Annie Marie Christopher.

* * *

COURT'S INSTRUCTION NO. 16

> If you have a reasonable doubt as to the defendant's guilt on the charge of manslaughter you will then consider the charge of negligent homicide. To sustain this charge, the State must prove beyond a reasonable doubt that Ricky Edwards negligently caused the death of Annie Christopher.

The court's instruction number 13 should have begun. "To sustain this charge, the State must prove beyond a reasonable doubt . . . ." For reversal appellant quotes language from *Weatherford* v. *Wommack*, 298 Ark. 274, 766 S.W.2d 922 (1989):

> The assumption of a disputed fact in a jury instruction is a prejudicial error. Even if one instruction does include the assumption of a disputed fact, it is not necessarily reversible error if another instruction leaves the fact question to be decided by the jury. [Citation omitted.]

In the case at bar the jury was given, in addition to the instruction set out above, the general instruction found in Arkansas Model Jury Instructions, Criminal 107 on the burden of proof and Arkansas Model Jury Instructions, Criminal 109 on the presumption of innocence.

The omission of the prefatory language in the court's instruction on second degree murder was obviously inadvertent. Although the defendant offered a correct instruction, no specific objection was made to the court's incomplete one. Under similar circumstances, the supreme court in *Leonard* v. *State*, 251 Ark. 1090, 476 S.W.2d 807 (1972), said:

> We cannot say that appellant's offered instruction constituted an objection to the omission he now complains of, because both the instruction given and the one offered were quite lengthy and covered the law governing numerous points. Such an offer does not adequately direct the court's attention to the fault in the comprehensive instruction of which complaint is now made. In such cases, we have said that if the court's mind had been directed to the

> specific fault, the language would have been changed to meet the objection. We can say the same here. If appellant believed that the instruction was subject to misconstruction on the question of the burden of proof, it was incumbent upon him to call particular attention to this possibility, and his request for an instruction did not have that effect. [Citations omitted.]

See also, *Sammons* v. *State*, 211 Ark. 532, 201 S.W.2d 37 (1947). The same reasoning applies in the case at bar.

For the reasons stated the judgment of the circuit court is affirmed.

COOPER, and DANIELSON, JJ., agree.

CITY of FORT SMITH *v.* Robert BROOKS

CA 92-239 842 S.W.2d 463

Court of Appeals of Arkansas
Division I
Opinion delivered December 9, 1992
[Rehearing denied January 13, 1993.]

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

Walker Law Firm, by: *Eddie H. Walker*, for appellee.

ELIZABETH W. DANIELSON, Judge. The City of Fort Smith appeals from a decision of the Workers' Compensation Commission finding that appellee Robert Brooks was entitled to benefits for his psychological condition. Appellant contends on appeal that the Commission's decision is not supported by substantial evidence and that in the alternative, if the claim is compensable, appellee is not entitled to benefits prior to September 20, 1990. We affirm.

Appellee was employed with the Fort Smith Police Department for sixteen years. During this time, he worked in patrol duty, criminal investigation, and internal affairs. The Commission found that he had an excellent police record and that, prior to the injury in question, he had never demonstrated any signs of

psychological illness. The Commission further found that until the May 17, 1990, incident, appellee was healthy and stable; that he had no financial or marital problems; and that he appeared to have the perfect disposition to be a supervising officer. In 1978, appellee was forced to kill man in the line of duty. At that time, psychological counseling was offered but was not mandatory. Appellee declined counseling after the shooting incident. He testified that following the shooting he experienced a range of emotions and reactions, including depression, but felt that he could handle the matter and eventually "try to block it out" of his mind, which he felt he was able to do.

In May of 1988, appellee was promoted to captain, and in November of 1989, he was transferred to the Internal Affairs Division. He as the only employee in that division and, as the captain in charge, was responsible for the investigation of complaints against and allegations of misconduct by police officers; the investigation of minor complaints against police officers; assisting in the hiring process, i.e., conducting interviews, examinations, testing, and background investigations; and the serving of subpoenas. Since appellee left this position in May of 1990, three of these job responsibilities have been removed from the Internal Affairs Division and assigned to other departments, leaving only the job of investigating complaints and allegations of misconduct. Appellee testified that when he first started working for internal affairs, he was successful in having investigations resolved within a 30 day period, but during the period of time he was in that position the volume of complaints doubled and it began taking anywhere from 60 to 90 days to get a determination on a complaint.

Chief Ralph Hampton, Chief Don Taylor, Captain Larry Hammonds, and appellee all described the internal affairs job as being stressful. The internal affairs officer was described as a "headhunter" and the officer being investigated as the "victim." When questioned about the job-related stress in internal affairs, Chief Hampton testified that there was a certain amount of self-imposed isolation since the officer would have to guard against any type of associations that might be interpreted as partiality.

In November of 1989, appellee had to investigate a shooting in the line of duty by a fellow police officer. During the course of

the investigation, appellee was called upon at a press conference to relate his own experience of shooting a suspect in the line of duty. Appellee testified that the investigation and press conference incident brought back memories of the shooting, which he described as "a horrible experience, one that very few police officers have to face in their career."

Appellee continued to function as the internal affairs officer until May 17, 1990. On that date, while making a presentation at a retirement party, he began experiencing trouble breathing, dizziness, shaking, and nervousness. He testified he felt like everything was closing in on him. He returned to his office, hoping the symptoms would go away, but they became worse instead. Appellee left work then and was seen by a psychiatrist the next day. He has been under regular treatment since then. He attempted to return to work for three days in July of 1990 but was unable to continue.

Reports from three different physicians indicated that appellee's psychological condition was work related. Dr. Joe Dorzab diagnosed appellee as having major depression and described his personality as that of a workaholic. Dr. Dorzab concluded that appellee was "suffering from a disabling disorder that is at least in part work related and may be mostly job related." The Commission found that appellee's psychological injury arose out of and occurred during the course of his employment and awarded temporary total disability benefits from June 6, 1990, to a date yet to be determined.

Appellant's first argument is that the Commission's decision is not supported by a preponderance of the evidence because the record does not show that appellee was subjected to greater job stress than other internal affairs officers. We disagree.

In *McClain* v. *Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1990), we stated that when determining the compensability of nontraumatically induced mental illness that is alleged to have resulted from the claimant's work, the claimant must show more than the ordinary day-to-day stress to which all workers are subjected, and that this rule implies that the comparison be made between similarly situated employees. 29 Ark. App. 218 at 220, 224. We also stated that while comparisons to fellow employees may be of some evidentiary value, the

ultimate test in determining compensability is whether the stress constitutes an abnormal working condition for that type of employment. 29 Ark. App. at 224. Whether the stress was more than ordinary and whether the psychological injury was causally connected to it or aggravated by it are questions of fact for the Commission to determine. *Barrett* v. *Arkansas Rehabilitation Servs.*, 10 Ark. App. 102, 661 S.W.2d 439 (1983).

When the Commission's findings of fact are challenged on appeal, we affirm if they are supported by substantial evidence. *Patrick* v. *Arkansas Oak Flooring Co.*, 39 Ark. App. 34, 833 S.W.2d 790 (1992). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Lewis* v. *Camelot Hotel*, 35 Ark. App. 212, 816 S.W.2d 632 (1991). We do not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the Commission. *Willmon* v. *Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992).

Appellee's position was described by himself and another witness as that of a "headhunter." Those being investigated were considered "victims." The testimony of the other officers who had at some point served as internal affairs officers established that while they would characterize the job as "stressful," the conditions under which they served were much less strenuous than that encountered by appellee. During appellee's time as internal affairs officer, the number of complaints doubled. Two employees had to be discharged as a result of complaints and the subsequent investigations. Appellee was handling four different categories of duties, three of which have since been reassigned to other departments. In addition to the stress due to the nature of the office and the increased workload, appellee was put in the position of having to recall the shooting death he was involved in, which caused many of the emotions and problems associated with that event to resurface. All of this constitutes substantial evidence to support the finding that appellee was subjected to abnormal working conditions for an internal affairs officer, and that he was under greater stress than others similarly situated.

Appellant also argues that the Commission's decision was not supported by substantial evidence because the record did not

show that appellee's condition was caused by work-related stress as opposed to other stress factors in his life. To the contrary, all the work-related factors just discussed support the Commission's finding of causation. Additionally, the Commission found that prior to the May 1990 psychological incident, appellee was healthy and stable, and had no marital or financial problems. In describing appellee, Chief Hampton said, "I would have to describe Mike generally, in order to give you a true picture of him. I don't think I ever saw Mike Brooks lose his cool. Mike . . . represented a very, very controlled person, a self-controlled person."

Considering the absence of any history of psychological problems, appellee's excellent work history as a police officer for sixteen years, the evidence of greater than ordinary work-related stress factors, the clear history of a psychological injury occurring at work, and the medical evidence supporting causation, we hold there was substantial evidence to support the Commission's decision.

Appellant also argues in the alternative that if the claim is compensable, appellee is not entitled to benefits prior to September 20, 1990. The Commission notes that there was some confusion as to when appellant received a report of appellee's injury as required by Ark. Code Ann. § 11-19-701(a)(1) (1987), but finds that this question was settled by the testimony of Chief Hampton. When asked when he first learned that appellee was relating his illness to his employment, Chief Hampton said "I believe it was while he was at Harbor View [hospital] . . . but that would have been probably two weeks or so after Mike had taken off." This testimony provides substantial evidence to support the Commission's decision that appellee was entitled to benefits beginning June 6, 1990.

Affirmed.

JENNINGS and ROGERS, JJ., agree.

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC. *v.* ARKANSAS PUBLIC SERVICE COMMISSION

CA 91-499 843 S.W.2d 855

Court of Appeals of Arkansas
En Banc
Opinion delivered December 16, 1992

Wright, Lindsey & Jennings, for appellant.

Susan D'Auteuil, for appellee.

JOHN E. JENNINGS, Judge. This appeal results from a determination by the Arkansas Public Service Commission that customer-owned coinless-operated telephones are not in the public interest and therefore should not be authorized for use by the Commission. Because we find the Commission's actions were arbitrary and capricious and its findings not supported by the evidence, we reverse and remand.

In 1990, Southwestern Bell instituted a tariff filing with the Arkansas Public Service Commission pertaining to the intercon-

nection of customer-owned coinless telephones to the public switch network. After reviewing the pleadings, the Commission determined that the issue of customer-owned coinless telephone service should be considered on a generic basis. The Commission stayed Southwestern Bell's request until after the completion of its generic docket, the purpose of which was stated in Order No. 1:

> The purpose of this Docket is to consider whether or not customer-owned, coinless telephones (telephone instruments for use by the public not requiring coins for operation but using credit cards or other methods of payment or charge to complete a call) are in the public interest and should be authorized for use in the State of Arkansas. This docket is also for the purpose of considering what type of regulation should apply to such telephones if authorized and whether there should be any restriction or limitations on such telephone service if authorized.

In response to Order No. 1, comments were filed by Southwestern Bell, AT&T Communications of the Southwest, Inc. (AT&T), Intellicall, Inc., Americall Dial 0 Service (Americall), and the staff of the Commission. After a hearing, in which witnesses for these parties testified, the administrative law judge entered Order No. 4, finding that it is not in the public interest to authorize customer-owned coinless telephones, that there is adequate service, and that competition in the area will not yield benefits to the end user. Order No. 4, however, also found that AT&T should be allowed to maintain the coinless sets it currently has in Arkansas. AT&T petitioned for rehearing, and after thirty days passed, the petition was deemed denied.

The Arkansas Public Service Commission has broad discretion in exercising its regulatory authority, *Associated Natural Gas Co.* v. *Arkansas Pub. Serv. Comm'n*, 25 Ark. App. 115, 118, 752 S.W.2d 766, 767 (1988), and courts may not pass upon the wisdom of the Commission's actions or say whether the Commission has appropriately exercised its discretion. *Russellville Water Co.* v. *Arkansas Pub. Serv. Comm'n*, 270 Ark. 584, 588, 606 S.W.2d 552, 554 (1980). It has often been said that, if an order of the Commission is supported by substantial evidence and is neither unjust, arbitrary, unreasonable, unlawful, or discriminatory, then this court must affirm the Commission's actions.

Arkansas Elec. Energy Consumers v. *Arkansas Pub. Serv. Comm'n*, 35 Ark. App. 47, 76, 813 S.W.2d 263, 279 (1991). Nevertheless, it is for the courts to say whether there has been an arbitrary or unwarranted abuse of discretion, even though considerable judicial restraint should be observed in finding such an abuse. *Russellville Water Co.* v. *Arkansas Pub. Serv. Comm'n*, 270 Ark. at 588, 606 S.W.2d at 554. Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis, and something more than mere error is necessary to meet the test. *Woodyard* v. *Arkansas Diversified Ins. Co.*, 268 Ark. 94, 97, 594 S.W.2d 13, 15 (1980). To set aside the Commission's action as arbitrary and capricious, the appellant must prove that the action was a willful and unreasoning action, made without consideration and with a disregard of the facts or circumstances of the case. *Partlow* v. *Arkansas State Police Comm'n*, 271 Ark. 351, 353, 609 S.W.2d 23, 25 (1980). *See also Beverly Enters.-Ark., Inc.* v. *Arkansas Health Servs. Comm'n*, 308 Ark. 221, 230, 824 S.W.2d 363, 367 (1992).

The Commission in Order No. 4 described customer-owned coinless telephones as:

> Coinless pay telephones are telephone instruments located in public or semi-public locations accessible to the general public, business patrons, employees or visitors, and the end user pays for local or toll calls from the instrument on a per call basis. Payment for calls on a coinless pay telephone may be collect, third-party billed or charged to a credit card, either a commercial credit card or a telephone company issued card. Customer-owned coinless pay telephones are those instruments owned and operated by any person or entity other than the local exchange company (LEC) authorized to serve the area where the telephone is located.

Order No. 4 also addressed the factors the Commission must consider in determining whether to authorize customer-owned coinless telephones:

> [T]he Commission must consider whether the services and/or providers comply with Arkansas law and whether the provision of such service is in the public interest. Public

> interest considerations include the determination of the potential benefits or detriments of the service to the public in general, the potential impacts on existing services and the need for the services. Benefits come in the form of increased services or lower rates and detriments may be increased rates or loss of services to certain areas or ratepayers.

Order No. 4 went on to state that the "ultimate issue in this proceeding. . .is whether or not competition in the pay telephone market is beneficial to the public, regardless of the method of payment." The Commission concluded that competition in the customer-owned coinless telephone market would not yield benefits to the customer and therefore should not be authorized.

AT&T contends on appeal that the substantial evidence supported a finding that customer-owned coinless telephones are in the public interest and that Order No. 4 of the Commission is arbitrary and capricious. The question on review of an administrative board's decision, however, is not whether the evidence would have supported a contrary finding but whether it supports the finding that was made. *Fontana* v. *Gunter*, 11 Ark. App. 214, 216, 669 S.W.2d 487, 488 (1984). Judicial inquiry terminates if the action of the Commission is supported by substantial evidence and its action is not unjust, unreasonable, unlawful, or discriminatory. *Southwestern Bell Tel. Co.* v. *Arkansas Pub. Serv. Comm'n*, 24 Ark. App. 142, 144, 751 S.W.2d 8, 9 (1988). In order to establish an absence of substantial evidence, the aggrieved party must show that the proof before the Commission was so nearly undisputed that fair-minded persons could not reach its conclusion. *Beverly Enters.-Ark., Inc.* v. *Arkansas Health Servs. Comm'n*, 308 Ark. 221, 226, 824 S.W.2d 363 (1992). The court must not look at whether the conclusions of the Commission are supported by substantial evidence, but whether its findings of fact are so supported. *Arkansas Pub. Serv. Comm'n* v. *Continental Tel. Co.*, 262 Ark. 821, 829, 561 S.W.2d 645, 649 (1978).

In concluding that competition in the customer-owned coinless telephone market would not yield benefits to the consumer, the Commission found that customer-owned coinless telephones do not offer any benefits to the public that cannot be

offered by the local exchange carriers and that adequate service is available; that customer-owners would not comply with the regulations of the Commission; that competition in the customer-owned coinless telephone market would increase rates to the consumer; and that customer-owned coinless telephone service would not be reliable. Although we acknowledge that this Court must give due regard to the expertise of the Commission, we cannot say the findings of the Commission are supported by substantial evidence or that its decision not to authorize customer-owned coinless telephones is supportable on any rational basis.

The Commission first found that customer-owned coinless telephones do not offer any benefits to the public that cannot be offered by the local exchange carrier and that adequate service is available. In Order No. 4, however, the Commission stated that benefits come in the form of lower rates *or* increased services. Although there was no evidence that competition in the coinless telephone market causes decreased rates to the end users, considerable evidence was introduced regarding the features of customer-owned coinless telephones which increase services to consumers.

AT&T's witness, Dennis Corrigan, testified that many of AT&T's customer-owned coinless telephones offer assistance to both visually-impaired and senior citizens through the use of display screens which show services and usage instructions in larger characters and loud buttons, some adding up to twenty decibels of amplification. He also testified that many of AT&T's customer-owned coinless telephones provide foreign language instruction in an effort to assist non-English-speaking telephone users. Other features AT&T offers which are beneficial to the general public include speakerphone capability, desk-mounted telephones, and dataports for accessing portable computers.

Intellicall stated in its comments that the technological innovations contained in coinless pay telephones make it possible to provide service tailored to the circumstances or conditions of a particular location and to provide new service options to the end users. Intellicall's witnesses states that, besides processing calling-card and collect calls automatically, these telephones offer callers the option of recording a message to be played back if

subsequent automatic attempts to reach the call number fail because the number is busy or not answered. The option of leaving a recorded message, they said, is particularly appropriate for hotels, motels, airport, and other locations where the predominant use of pay telephones is by travelers placing long-distance calls. In addition, they testified these telephones can also be programmed to permit only collect-calling, to block calls to specific numbers, and to limit call duration, features that are particularly needed by prisons and other confinement facilities.

Americall's testimony and comments centered on how its customer-owned coinless telephones would benefit correctional institutions. Larry Norris, who supervises telephone systems in nine correctional facilities in Arkansas, testified that Americall's telephone system would benefit the prison system by cutting down on security risks and freeing guards who presently must escort prisoners to make telephone calls for other duties.

Although most of the testimony regarding the benefits of customer-owned coinless telephones concerned the benefits of a provider's specific telephone, no party disputed that these telephones offer benefits to the public. The Commission staff agreed that customer-owned coinless telephones are in the public interest, stating:

> [S]taff has had the opportunity to experience demonstrations of customer-owned coinless public telephones, as well as to review and study the various comments filed earlier in this docket. Staff has been convinced by the demonstrations and filed initial comments of the other participants that the customer-owned coinless public telephones do provide a public service and, therefore, are in the public interest.

Clearly, customer-owned coinless telephones offer features which increase services to the public; however, except in the area of specific telephone features needed by confinement facilities, there was no evidence that Southwestern Bell's coinless telephones or the coinless telephones of any other local exchange carrier offer these features. Nor was there any evidence before the Commission from which it could have found that adequate service is available. The Commissions' finding that local exchange carriers offer the same benefits as those of customer-

owned coinless telephones and that adequate service is available is not supported by substantial evidence.

We also find that there is no rational basis for the Commission's conclusion that customer-owned coinless telephone providers would be unwilling to comply with Arkansas law. In Order No. 4, the Commission emphasized testimony by Americall's and Intellicall's witnesses to the effect that, in providing customer-owned coinless telephone service, they would also want to provide local exchange service. The Commission noted that it is contrary to current law for anyone other than the local exchange carrier to provide local and intralata service and responded to this testimony in Order No. 4, stating:

> Even though the Commission did not include reconsideration of its prior decisions on local and intralata traffic in this Docket, Americall and Intellicall said that unless customer-owned coinless pay telephones are allowed in these markets, private ownership of these telephones is not feasible. Mr. Stenson did not know whether Americall's telephones were capable of sending local and intralata traffic to the appropriate LEC because Americall does not operate in any jurisdiction where it could not handle this traffic. After consideration of the benefits and detriments of competition in those areas, the Commission adopted its present policies on local and intralata service on the basis that they were in compliance with Arkansas law, in the public interest, and promoted universal telephone service in the state. If customer-owned coinless pay telephones cannot be operated pursuant to these policies and endanger universal service, then the service is not in the public interest.

After reviewing the testimony of these witnesses, we do not find it demonstrates that customer-owned coinless telephone providers would be unwilling to comply with the existing laws and regulations in this area. In fact, the Commission recognized in Order No. 4 that AT&T has been providing customer-owned coinless telephones in compliance with the law and Commission policy:

> The AT&T coinless pay telephones have been in operation for a number of years, providing interlata and interstate

service, and routing intralata and local traffic to the appropriate LEC. Therefore, AT&T's coinless pay telephones do not divert revenues from the LECs. Further, AT&T is an experienced certificated interexchange carrier with a proven record of providing service at tariffed rates and in compliance with the laws and policies governing public utilities in this state.

We also find that the Commission's concern that competition in the customer-owned coinless telephone market would cause increased rates to the consumer is based upon speculation and not upon the evidence. The Commission stated that competition in the customer-owned coinless telephone market would create bidding wars for telephone locations, with the ultimate victim being the captive consumer, who would be forced to pay increased rates in order to cover the commissions. The Commission relied on testimony by Americall's and Intellicall's witnesses that coinless telephone owners could pay a commission to location owners for installing their telephones. From this testimony, the Commission concluded that providers might attempt to recoup the commissions they pay by increasing their rates to consumers.

We acknowledge that any rate could be charged by a provider of a coinless telephone in the absence of regulation by the Commission; however, only Intellicall proposed that customer-owned coinless telephones should not be regulated. In determining whether customer-owned coinless telephones are in the public's interest, the Commission must view them in the context of the appropriate regulatory treatment. Indeed, one of the stated purposes of the generic proceeding was to consider what types of regulations should apply to customer-owned coinless telephones. To consider the merits of customer-owned coinless telephones only in the context of no regulation is arbitrary.

The Commission also quoted from an order of the Florida Public Service Commission which found that competition in the coinless telephone market had not resulted in lower rates to the end user. We note, however, there was no finding that competition had increased rates, nor did the Florida commission question its earlier finding that customer-owned coinless telephones were in the public interest. For the Commission here to

conclude that customer-owned coinless telephones do not offer any benefits to the public merely because there is no evidence that competition in another state has reduced rates to the end user is to ignore the Commission's own statement that "benefits come in the form of *increased services* or lower rates." (Emphasis added.)

In justifying its refusal not to authorize customer-owned coinless telephones, counsel for the Commission, in its brief and in oral argument before this Court, argued that the supervision of customer-owned coinless telephones would create a regulatory nightmare. We cannot consider this argument on appeal, however, because it was not given by the Commission as justification for its decision not to authorize customer-owned coinless telephones, and there is no evidence in the record to support such a finding. Although the Commission may take official notice of facts within its specialized expertise, the notice the Commission takes of such facts must be based on evidence already in the record. *See Colorado Mun. League* v. *Mountain States Tel. and Tel. Co.*, 759 P.2d 40, 45 (1988). Courts may not accept appellate counsel's *post hoc* rationalizations for agency action; an agency's action must be upheld on a basis articulated by the agency itself. *Motor Vehicle Mfr. Ass'n of the United States, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

The Commission in Order No. 4 also implied that customer-owned coinless telephone service would not be reliable. Again this finding by the Commission is based upon speculation and does not provide a rational basis for not authorizing customer-owned coinless telephones. This conclusion apparently results from testimony by Intellicall's witnesses that its telephone sets operate on AC power and, therefore, if a power outage occurs, its telephones are inoperable unless they have a battery back-up, and from testimony that Intellicall sells its coinless sets to customers who then become responsible for any repairs to the telephones they purchase. Nevertheless, there is no evidence in the record describing the number of break-downs customer-owned coinless telephones experience or that customer-owned coinless telephones are subject to more breakdowns than the telephones of local exchange carriers.

Finally, AT&T argues that the Commission acted

arbitrarily and capriciously by allowing it to continue to maintain over 200 customer-owned coinless telephones in Arkansas after finding that customer-owned coinless telephones are not beneficial to the public. Although we do not find this action on the part of the Commission to be arbitrary and capricious, we do find it demonstrates that customer-owned coinless telephones can be operated in compliance with Commission regulation and in a manner not detrimental to the public.

In summary, we hold that the findings on which the Commission relied for holding that it was not in the public interest to authorize customer-owned coinless telephones are not supported by substantial evidence.

Reversed and remanded.

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

MELVIN MAYFIELD, Judge, dissenting. I respectfully dissent. The majority has questioned the jurisdiction and right of the Arkansas Public Service Commission to determine whether customer-owned coinless telephones should be authorized for use in Arkansas. Arkansas Code Annotated § 23-2-304(a)(2) (1987) gives the Commission the power to "determine the reasonable, safe, adequate, sufficient service to be observed, furnished, enforced, or employed by a public utility and to fix this service by its order, rule, or regulation." Because the Commission acts in a legislative capacity and not in a judicial one, orders of the Commission are viewed as having the same force and effect as would an enactment of the General Assembly. *Arkansas Elec. Energy Consumers* v. *Arkansas Pub. Serv. Comm'n*, 35 Ark. App. 47, 66-67, 813 S.W.2d 263, 274 (1991). On appeal, we give due regard to the expertise of the Commission. *Id.* at 71, 813 S.W.2d at 277.

The Commission here, acting within its regulatory authority, considered the evidence on the issue of whether competition in the coinless telephone market would be beneficial to the public and, using its expertise, determined that it would not. It is the province of the Commission as trier of fact to assess the credibility of the witnesses, the reliability of their testimony, and the weight to be accorded the evidence before the Commission. *General Tel. Co. of the Southwest* v. *Arkansas Pub. Serv. Comm'n*, 23 Ark.

App. 73, 83, 744 S.W.2d 392, 397 (1988). It is not for the courts to advise the Commission how to discharge its function in arriving at findings of fact or to say whether the Commission has appropriately exercised its discretion. *Southwestern Bell Tel. Co.* v. *Arkansas Public Service Commission*, 267 Ark. 550, 557, 593 S.W.2d 434, 439 (1980), and courts should not attempt to substitute their judgments for that of administrative agencies. *Department of Human Services* v. *Berry*, 297 Ark. 607, 609, 764 S.W.2d 437, 438 (1989). A decision of an administrative agency may be supported by substantial evidence even through this court might have reached a different conclusion had we heard the case *de novo* or sat as trier of fact. *Arkansas Elec. Energy Consumers* v. *Arkansas Pub. Serv. Comm'n*, 35 Ark. App. at 67, 813 S.W.2d at 277.

The majority's opinion concludes that customer-owned coinless telephones are beneficial to the public and should be authorized. In reaching this conclusion, the majority has disregarded our standard of review and has substituted its judgment for that of the Commission. In my view, the issue is much deeper than whether the technological gadgetry of customer-owned coinless telephones is in the public interest. It should be understood that the telephones involved will be accessible to the general public for use but will not be owned by the local exchange company authorized to serve the area where the specific telephone is located. The Commission's order clearly demonstrates that it was concerned with the problems that will obviously exist in the supervision and regulation of the rates and services provided by the myriad owners of — what will actually be — separate little telephone companies. I am not prepared to say that the Commission was wrong in holding that the "supervision" of these telephones "would create a regulatory nightmare."

I would affirm the order of the Commission.

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

Ted DEWEESE *v.* POLK COUNTY CHILDREN & FAMILY SERVICES

CA 91-471 842 S.W.2d 446

Court of Appeals of Arkansas
Division I
Opinion delivered December 16, 1992

Young, Patton, & Folsom, by: *Damon Young*, for appellant.

Bruce P. Hurlbut, Asst. Chief Counsel, for appellee.

MELVIN MAYFIELD, Judge. Ted DeWeese appeals from the decision of the Circuit Court of Polk County which affirmed the agency finding of some credible evidence that the appellant engaged in sexual contact with S.J. on April 10, 1987, and which denied appellant's request to remove his name from the Arkansas Child Abuse and Neglect Central Registry.

On April 25, 1987, Elizabeth Thomas, a Field Service Specialist with the Arkansas Department of Human Services (DHS), received a complaint regarding alleged sexual activity involving appellant and S.J., a four-year-old child. Ms. Thomas turned the investigation over to the Arkansas State Police in accordance with DHS policy in cases where the alleged perpetrator is not responsible for the welfare of the child or related to the child and on April 28, 1987, appellant was charged with the crime of rape.

Appellant filed a request for expunction of the Arkansas Child Abuse and Neglect Central Registry records on the case and on July 6, 1987, Ms. Pat Page, Assistant Deputy Director for Field Operations, notified appellant that DHS had determined there is "some credible evidence" of abuse/neglect and that his request for expunction was therefore denied.

On November 19, 1987, a trial was held on the criminal charges which resulted in a "hung" jury. The jury voted 11 to 1 to acquit. Subsequently, on February 9, 1988, the trial court granted the motion of the State of Arkansas to nolle prosequi the case.

On December 9, 1987, S.J. and her family filed a civil suit against appellant and the guidance center at which appellant worked alleging appellant had engaged in deviate sexual activity with S.J. On May 10, 1989, the judge in that case granted a motion for summary judgment filed by appellant and the other defendants, and the complaint was dismissed with prejudice.

On July 21, 1989, an administrative hearing was held concerning appellant's request for expunction. In a final order dated August 18, 1989, the department determined there was "some credible evidence" to support the finding that appellant engaged in sexual contact with S.J. during speech therapy sessions, specifically during the session held April 10, 1987. Appellant's application for amendment and correction to the records of the Arkansas Child Abuse and Neglect Central Registry was denied.

On appeal to circuit court, the trial judge stated the standard of review as "whether there is substantial evidence to support the agency decision that there was some credible evidence" and,

based on that standard, denied appellant's request for reversal.

Appellant argues on appeal to this court that: (1) hearsay was erroneously admitted into evidence at the administrative hearing; (2) the hearing officer's denial of appellant's application was not supported by substantial evidence; and (3) appellant was denied his constitutional rights in that he was required to prove his entitlement to relief three times. Because the trial judge used the wrong standard of review, we are unable to reach the merits of appellant's arguments.

Judicial review of administrative adjudication is established by the Arkansas Administrative Procedure Act. Arkansas Code Annotated § 25-15-212 (Repl. 1992) provides for review of administrative action by circuit court. Subsection (h) provides:

> The court may affirm the decision of the agency or remand the case for further proceedings. It may reverse or modify the decision if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the agency's statutory authority;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error or law;
>
> (5) Not supported by substantial evidence of record; or
>
> (6) Arbitrary, capricious, or characterized by abuse of discretion.

In *Arkansas State Bank Commissioner* v. *Bank of Marvell*, 304 Ark. 602, 804 S.W.2d 692 (1991), our supreme court stated:

> The applicable standard of review has been often stated. The rules governing judicial review of decisions of administrative agencies are the same for both the circuit and appellate courts. This review is limited in scope and such decisions will be upheld if supported by substantial

> evidence and not arbitrary, capricious or characterized by an abuse of discretion. Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis. It has been said that the appellate court's review is directed, not toward the circuit court, but toward the decision of the agency.

304 Ark. at 604 (citations omitted).

■ However, the substantial evidence standard contained within the Administrative Procedure Act was apparently superseded by our code provisions concerning child abuse reporting. In *Crawford/Sebastian County SCAN* v. *Kelly*, 300 Ark. 206, 778 S.W.2d 219 (1989), the trial court, after reviewing the record of the administrative hearing, found that the decision of the Department was not supported by substantial evidence. Our supreme court held that under Ark. Code Ann. § 12-12-516 (1987) the question was whether there was some credible evidence of the alleged abuse to support the maintenance of an accused's name on the registry, and the case was reversed and remanded for an appropriate determination by the trial court.

■ Because the trial judge in the instant case also applied the substantial evidence standard rather than the some credible evidence standard, we reverse and remand to the trial court for an appropriate determination.

We note, however, that although the some credible evidence standard supersedes the substantial evidence standard established by Ark. Code Ann. § 25-15-212(h), the remaining portions of that subsection remain in effect.

Reversed and remanded.

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

Joe E. MADDEN *v.* U.S. ASSOCIATES, et al.

CA 91-488 844 S.W.2d 374

Court of Appeals of Arkansas
Division I
Opinion delivered December 16, 1992

Winston Bryant, Att'y Gen., by: *Jeanette L. Hamilton*, Asst. Att'y Gen., and the Arkansas Securities Dept., by: *Bruce H. Bokony* and *David H. Smith*, for appellant.

Randell E. Loftin, Ronald Floyd Davis, and *Gary Ellis Johnson*, pro se, for appellees.

JUDITH ROGERS, Judge. In its regulatory capacity, the appellant, the Arkansas Securities Department (hereinafter "Department"), revoked the registration of U.S. Associates, Inc.,

and the licenses of appellees Rondell Eugene Loftin, Ronald Floyd Davis and Gary Ellis Johnson. The circuit court, upon review, reversed the Department's decision based on the determination that appellees had not been afforded a fair hearing before the agency's tribunal as evidenced by an *ex parte* discussion that took place between the agency's hearing officer and department representatives. On appeal, the department contends that the trial court erred in holding that appellees had been denied due process and further argues that its decision was otherwise supported by substantial evidence. We affirm.

On March 13, 1989, the Department's staff filed an administrative complaint against the appellees and others alleging certain violations of Arkansas securities laws and regulations. In general, it was alleged that appellees Ellis and Johnson, as agents of U.S. Associates, had engaged in various unlawful trading practices and that appellee Loftin, the president and chief executive officer of U.S. Associates, had failed to discharge his supervisory duties and obligations with respect to these and the other named agents of the firm. On November 21, 1989, as provided under Ark. Code Ann. § 23-42-202(b) (1987), the Commissioner, Beverly Basset, delegated to Joe E. Madden, Jr., an Assistant Commissioner, the authority to act as the hearing officer in this matter.[1] Pursuant to Ark. Code Ann. 25-15-213(2)(C) (Repl. 1992), the appellees, as well as another named respondent, Adron Jerome Gilbert, filed affidavits of personal bias and disqualification in which they requested the removal of Madden as the hearing officer. Madden denied the appellees' motions for disqualification, but granted the motion of Gilbert, based on his personal involvement in the investigation of Gilbert and the attempted negotiation of a settlement with him.

The hearing began on December 5, 1989, and continued for a period of thirty-nine days. At the conclusion of the twenty-fourth day, the appellees renewed their requests for Madden's disqualification. In their oral motions, appellees contended that

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[1] Appellant, Joe E. Madden, Jr., the current Commissioner of the Arkansas Securities Department, succeeded Commissioner Beverly Bassett in January of 1991. Throughout the period of time that this matter was before the Department, Bassett held the position of Commissioner.

Madden had also taken part in the investigation which led to the complaint being filed against them. Their argument was based on Gilbert's testimony that morning suggesting that the appellees had been a topic of discussion in a June 29, 1989, meeting conducted by Madden with Gilbert and other staff members, including Deputy Commissioner Becky Berry. At the outset of the proceedings the next day, Madden denied the Department's motion to quash the subpoena requested by appellees for Ms. Berry, and appellee Loftin proceeded to question Ms. Berry as to her recollection of the June 29, 1989, meeting. During Loftin's examination, the witness was confronted with a tape recording of a conversation which had occurred during the noon recess the previous day between the hearing officer, Ms. Berry, and attorneys and representatives for the Department, Drake Mann, John Moore and David Smith. A transcript of the *ex parte* discussion was introduced into the record, which states as follows:

> Ms. Berry: Gary Johnson . . . he is, I mean really, yesterday, for a couple of days he just sits there nonchalant and then he just gets . . .
>
> Mr. Mann: All wound up.
>
> Ms. Berry: Yeah, if he was a female I could understand it.
>
> Mr. Moore: Who says he isn't.
>
> Mr. Mann: Cross-examination . . .
>
> Ms. Berry: Well he says that Glen Reese made all the recommendations and that he didn't. He also says . . . I can remember he said it again in the meeting. All I remember is that we discussed League and all. He said what did y'all discuss . . . all of it . . . we discussed League and all the other allegations in the complaint . . . That's a lie.
>
> Mr. Moore: Well we're going to have to attach [sic] his credibility and show he is biased. That's what we're going to have to do.
>
> Ms. Berry: I do not . . . as God is my witness I do not remember.
>
> Hearing Officer: If you don't remember, you don't

remember.

Ms. Berry: I don't, I don't . . . refreshing memory . . . do you believe that?

Mr. Moore: What are we going to do for lunch here?

Ms. Berry: Very Quick.

Mr. Mann: What time is it?

Mr. Moore: I've got to get someone to handle the meeting over there.

Hearing Officer: We're breaking for lunch.

Mr. Smith: If you want to John, you can run over and do that.

Hearing Officer: We're breaking til one.

Mr. Smith: 'cause we're going to have that meeting. We can go through our notes.

Hearing Officer: There's not that much cross-examination.

Ms. Berry: Then why even open it up for them any.

Hearing Officer: Now you've told them that your [sic] going to.

Ms. Berry: You could go down and tell them.

Mr. Moore: Screw them. I don't care if we've told them anything at all . . . We've changed our minds . . . screw them . . . I don't care.

Mr. Mann: Your [sic] prejudice is becoming self-evident.

Ms. Berry: That's right.

Mr. Moore: I am. I will not hide it. In fact more so today than I think I have ever been.

Ms. Berry: . . . Is Gary Johnson . . . has he not won the contest:

Mr. Moore: Asshole of the year.

Ms. Berry: No that's just to . . .

Mr. Smith: . . . say's anything right.

Mr. Mann: He succeeding in pissing y'all off.

Hearing Officer: . . . That's the only thing he's trying to do.

Mr. Moore: I'm assuming that you're going to overrule any objections we make . . . regarding that stuff.

Hearing Officer: No, not if I think it's a good solid valid objection.

Mr. Moore: Like we haven't been objecting to the hearsay nature of all this 'cause I figure you're gonna allow it anyway.

Hearing Officer: I'm gonna let him tell about what happened and his recollection of it.

Mr. Moore: Of course the only thing he says . . .

Hearing Officer: I think the record is perfectly clear that he says . . . I think that I remember . . . I think . . .

Mr. Moore: Yeah.

Ms. Berry: So we cover everything.

Mr. Moore: The only thing that I think hurts about that meeting is he says Johnson and Davis were mentioned.

Ms. Berry: Right.

Mr. Moore. He never has, really said that Ron Loftin was mentioned.

Mr. Mann: And that hurts because of Joe's bias.

Hearing Officer: Yeah.

Mr. Mann: So we can drop this out of the complaint. . . if we want to . . . if we think it's that bad . . . Right?

Hearing Officer: No. Because it's Johnson and Davis.

Mr. Mann: Oh, it's Johnson and Davis . . . Right . . . O.k., never mind.

Hearing Officer: . . . I don't remember it either.

Ms. Berry: Listen . . . it was not.

Hearing Officer: There was . . . When he started talking about it . . . The only thing I remember . . . is there was a discussion about that FNMA IO day.

Ms. Berry: Right.

Hearing Officer: That everybody took their commissions.

Ms. Berry: But that wasn't either one of those guys. That was Tim Gibbons.

Hearing Officer: But see, I couldn't remember who that was.

Ms. Berry: And you weren't involved in that at all.

Hearing Officer: See I couldn't remember. But see, at that point I didn't know who any one of those people were.

Ms. Berry: You didn't know what we were talking about . . . That had nothing to do with either one of those people.

Mr. Moore: Well they'll ask you about it.

Ms. Berry: Well am I going to get up there.

Hearing Officer: I think you should get prepared.

Ms. Berry: Fine . . . I'd love to.

Mr. Moore: See y'all after lunch.

Hearing Officer: I'm going back to the office, I've got a ton of calls to make including calling Gerald Hannahs.

In explaining the substance of the conversation, Ms. Berry acknowledged that the testimony discussed was that of Mr. Gilbert, who had testified on behalf of the appellees before the lunch break. After further questioning, appellees alleged that the witness's testimony was inconsistent in certain material respects and the hearing officer granted a brief continuance from that day, a Wednesday, until the following Monday, so that her testimony could be transcribed. When the hearing was resumed on Monday, the hearing officer stated for the record that he had been informed by the court reporter that a transcript of Ms. Berry's testimony could not be completed on such short notice. The hearing officer

then reversed his earlier decision and granted the Department's motion to quash the subpoena for Ms. Berry. Consequently, no further examination of this witness was allowed. Appellees again renewed their request for disqualification of the hearing officer; the request was denied.

On September 26, 1990, the hearing officer filed a lengthy opinion consisting of his findings of fact, conclusions of law, and his recommendation that the appellee's licenses be revoked. On that day, the Commissioner approved and adopted the hearing officer's decision in its entirety. Appellees pursued an appeal in the circuit court seeking to set aside the agency's order pursuant to Ark. Code Ann. § 25-15-212 (Repl. 1992). The circuit judge determined that the hearing officer had abused his discretion by taking part in the *ex parte* discussion and concluded that the appellees had been deprived of the constitutional right to a fair hearing. In its order, the court stated that "it in no way questions the integrity of the hearing officer, Joe Madden, but that litigants, such as the plaintiffs, are not only entitled to a fair hearing but also to a hearing that has the 'appearance' of a fair hearing and that in this case simply was not done." The court reversed the Department's decision and remanded for a new hearing. In so doing, the court did not address the question of whether the agency's decision was supported by substantial evidence.

A fair trial by a fair tribunal is a basic requirement of due process. This rule applies to administrative agencies as well as to courts. *See Sexton* v. *Ark. Supreme Court Comm. on Professional Conduct*, 299 Ark. 439, 774 S.W.2d 114 (1989) (*citing In re Murchison*, 349 U.S. 133 (1955). *See also Ark. Elec. Energy Consumers* v. *Ark. Pub. Serv. Comm'n*, 35 Ark. App. 47, 813 S.W.2d 263 (1991). The supreme court has held that administrative agency adjudications are also subject to the "appearance of bias" standard which is applicable to judges. *Acme Brick Co.* v. *Missouri Pacific R.R.*, 307 Ark. 363, 821 S.W.2d 7 (1991). As observed by the court in *Ark. Racing Comm'n* v. *Emprise Corp.*, 254 Ark. 975, 981, 497 S.W.2d 34, 38 (1973), "Since the underlying philosophy of the Administrative Procedure Act is that fact finding bodies should not only be fair but appear to be fair, it follows that an officer or board member is disqualified at any time 'there may be reasonable suspicion of unfairness.' " The Administrative Procedure Act includes a provision which states

that members of an agency assigned to render a decision or to make final or proposed findings of fact or conclusions of law in any case of adjudication shall not communicate, directly or indirectly, in connection with any issue of fact with any person or party nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. Ark. Code Ann. § 25-15-209(a) (Repl. 1992). The act further provides that all presiding officers and all officers participating in decisions shall conduct themselves in an impartial manner and may at any time withdraw if they deem themselves disqualified. Ark. Code Ann. § 25-15-213(2)(B) (Repl. 1992).

Based on the existence and content of the *ex parte* communication, particularly when viewed in conjunction with the hearing officer's actions after the discussion was bought to light, we cannot disagree with the circuit judge's conclusion that the appearance of a fair hearing was compromised. Accordingly, we affirm the circuit judge's decision. Because this matter is remanded for a new hearing, it is unnecessary for us to consider appellant's argument whether the Department's decision was supported by substantial evidence.

Affirmed.

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

Randall BURKETT *v.* STATE of Arkansas

CA CR 92-392 842 S.W.2d 857

Court of Appeals of Arkansas
Division II
Opinion delivered December 23, 1992

Bob Keeter, for appellant.

Winston Bryant, Att'y Gen., by: *Didi Sallings*, Asst. Att'y Gen., for appellee.

JOHN E. JENNINGS, Judge. Randall Burkett was convicted in Polk County Circuit Court of possession with intent to deliver a controlled substance (marijuana) and possession of drug paraphernalia and was sentenced to a total of fourteen years in the Department of Correction. For reversal Burkett argues that the

trial court erred in admitting in evidence a statement made by his girlfriend, Sherry Smith, and that the evidence is insufficient to support the verdict. We agree that the out-of-court statement should not have been received in evidence and reverse and remand for new trial.

We first address the issue of the sufficiency of the evidence. *Harris* v. *State*, 284 Ark. 247, 681 S.W.2d 334 (1984). In determining the sufficiency of the evidence we consider all of the evidence, including that which may have been erroneously admitted. *Enoch* v. *State*, 37 Ark. App. 103, 826 S.W.2d 291 (1992). We will affirm on the question of the sufficiency if the jury's verdict is supported by substantial evidence. *Bargery* v. *State*, 37 Ark. App. 118, 825 S.W.2d 831 (1992). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. *Kellogg* v. *State*, 37 Ark. App. 162, 827 S.W.2d 166 (1992).

The evidence at trial was that the Polk County Sheriff and other law enforcement officers went to an apartment in Mena at 415 Mena Street on October 16, 1990, to serve a felony warrant on the defendant. The only person in the apartment was Sherry Smith.[1] Ms. Smith signed a consent to search and the officers found a large quantity of marijuana under a mattress in the bedroom. In a kitchen cabinet they also found two packages of cigarette rolling papers, one pair of folding type scissors (which, according to an officer, was used to trim hand-rolled cigarettes), a box of pills, a glass vial containing "a clear rock substance," a brass type container, various Ziplock bags "common to the delivery of marijuana," a pipe lighter, and $80.00 in cash.

Sherry Smith was called as a witness by the State, but claimed her privilege against self-incrimination under the Fifth Amendment to the United States Constitution. The trial court ruled that she was unavailable as a witness under Rule 804(a)(1) of the Arkansas Rules of Evidence and admitted into evidence her out-of-court statement as a statement against interest under Rule 804(b)(3). Her statement was:

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[1] Ms. Smith and the defendant were married on December 4, 1990.

> I live at Apt. 5, 415 Mena Street and live with Randall D. Burkett. We are not married, but have a child, Courtney Smith, age 1 year old. The marijuana found by Officer Nelson in my apartment is not mine, nor do I use dope. The drugs found in my apartment is Randy Burkett's. I do not sell drugs and have never sold any drugs. I would always go outside when Randy sold drugs. I know some of the guys who come to our house to pick up marijuana, but I never delivered anything to them.

We hold that the evidence was sufficient to support the jury's verdict. According to the evidence the only persons living in the apartment on Mena Street were Randall Burkett, Sherry Smith, and their one-year-old baby. According to Ms. Smith's statement the marijuana in the apartment belonged to Burkett and he was in the business of selling it. This evidence is sufficient to support the jury's verdict on the possession count.

While the evidence linking the defendant with the drug paraphernalia is circumstantial, we think the jury could properly infer that the paraphernalia belonged to the defendant from his joint occupancy of the apartment coupled with Ms. Smith's statement that he was selling marijuana from time to time. We have said many times that the law makes no distinction between direct and circumstantial evidence. *Duncan* v. *State*, 38 Ark. App. 47, 828 S.W.2d 847 (1992).

The case must, however, be reversed on the issue of the admissibility of Sherry Smith's statement. We find no fault with the circuit judge's conclusion that the witness was unavailable within the meaning of Rule 804 nor with his conclusion that the statement qualified generally as a "statement against interest." But the case is clearly governed by the last sentence of Rule 804(b)(3): "A statement or confession offered against the accused in a criminal case, made by a co-defendant or other person implicating both himself and the accused, is not within this exception." In the case at bar Sherry Smith's statement was "offered against the accused in a criminal case" and it implicated both herself and the defendant. The statement was therefore not within the hearsay exception and its admission requires reversal.

Reversed and Remanded.

COOPER and DANIELSON, JJ., agree.

Lucius MOSLEY *v.* STATE of Arkansas

CA CR 92-495 844 S.W.2d 378

Court of Appeals of Arkansas
Division II
Opinion delivered December 23, 1992
[Supplemental Opinion on Denial of Rehearing January 27, 1993.]

Daniel D. Becker, for appellant.

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

JOHN E. JENNINGS, Judge. Lucius Mosley was found guilty by a jury of possession of cocaine and was sentenced to seven years

imprisonment. The sole argument on appeal is that the evidence was insufficient to support the conviction. We agree and reverse.

When the sufficiency of the evidence is challenged on appeal, we must view it in the light most favorable to the State. *Bailey* v. *State*, 307 Ark. 448, 821 S.W.2d 28 (1991). Only three witnesses testified at trial: Mike Gregor, Henry Boyer, and Norman Kemper. Mr. Gregor, a detective with the Hot Springs Police Department, testified that he and other members of the Eighteenth District Judicial Drug Task Force had conducted surveillance on a duplex apartment at 700 1/2 School Street in Hot Springs. He obtained a search warrant and on July 8, 1991, at 11:00 p.m. he went to the apartment to search it. Three members of the Hot Springs SWAT Team were with him, including Officer Henry Boyer.

Detective Gregor went up to the apartment and kicked the front door in and entered the front room, followed by the other officers. When the door was kicked in, one of the occupants was struck by the door and knocked "partially" across the room.

The detective described the room as approximately eight feet by ten feet. When the officer entered there were seven people in the room: three men seated on a couch to the officer's right (the appellant was identified as the man sitting in the middle); two men to the officer's left who were "in a semi-crouched position;" a woman sitting in an armchair directly across from the officer; and the man the door had struck.

Detective Gregor went into a back room to see if anyone else was there, and as he returned to the front room he saw a plastic bag stuffed in between the back of the chair and the wall. The bag contained thirty-three "rocks" of crack cocaine. The chair was described as being four or five feet from the couch where the appellant was sitting. Viewing the evidence in the light most favorable to the State, the appellant might have been able to see the top of the plastic bag from his position on the couch.

Detective Gregor also found cocaine beneath a cushion on the couch. He testified, "We seized another amount of crack cocaine from a cushion — center portion of the couch, which the three defendants had been seated on — I'm sorry, three other individuals had been seated. It was a cellophane cigarette

wrapper containing a few, and then there were a numerous—or a total of twenty-eight rocks of crack cocaine scattered about in that general area underneath." A glass pipe containing burnt residue was found beneath the couch itself. The detective testified that the appellant was "very fidgety and nervous, somewhat scared or shocked." The detective also testified that when he entered the room he did not observe anyone smoking crack cocaine and that to his knowledge the appellant did not live in the apartment. The appellant was searched but no drugs were found on his person. Fingerprints from the bags were taken but came back from the crime lab as inconclusive.

Officer Henry Boyer, a member of the Hot Springs SWAT Team, testified that the appellant appeared "extremely agitated and nervous." He also testified that two of the SWAT team members who entered the apartment carried nine millimeter machine guns.

Finally, Norman Kemper, a chemist for the State Crime Lab testified that the substances found were in fact cocaine.

When the issue on appeal is the sufficiency of the evidence, we affirm if the jury's verdict is supported by substantial evidence. *Buckley* v. *State*, 36 Ark. App. 7, 816 S.W.2d 894 (1991). Substantial evidence has been defined as evidence that is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. It must force or induce the mind to pass beyond suspicion or conjecture. *Sanchez* v. *State*, 288 Ark. 513, 707 S.W.2d 310 (1986). In *Cassell* v. *State*, 273 Ark. 59, 616 S.W.2d 485 (1981), the court said, "[O]ur substantial evidence rule in a case depending on substantial evidence means simply that the proof must go beyond presenting the jury a choice so evenly balanced that a finding of guilt must rest not on testimony but on conjecture."

In *Parette* v. *State*, 301 Ark. 607, 786 S.W.2d 817 (1990), the supreme court said:

> Constructive possession may be implied where the contraband is found in a place immediately and exclusively accessible to the defendant and subject to his control. Where, however, there is joint occupancy of premises, then

> some additional factor must be present linking the accused to the contraband. The state must prove that the accused exercised care, control and management over the contraband and that the accused knew that it was in fact contraband.

301 Ark. at 616, 786 S.W.2d at 822 (citing *Plotts* v. *State*, 297 Ark. 66, 759 S.W.2d 793 (1988)). *See also Nichols* v. *State*, 306 Ark. 417, 815 S.W.2d 382 (1991); *Crossley* v. *State*, 304 Ark. 378, 802 S.W.2d 459 (1991); *Cerda* v. *State*, 303 Ark. 241, 795 S.W.2d 358 (1990); *Embry* v. *State*, 302 Ark. 608, 792 S.W.2d 318 (1990); *Sanchez* v. *State*, 288 Ark. 513, 707 S.W.2d 310 (1986).

In the case at bar there was no evidence that the appellant lived in the apartment. There is no evidence as to how long he had been there before the officers entered. Assuming that the appellant's mere presence in the apartment qualifies as "joint occupancy," it remained for the State to prove that he exercised care, control and management over the contraband and that he knew that it was in fact contraband. *Parette, supra.* While such control and knowledge may be inferred from the circumstances where there are additional factors linking the accused to the contraband, *see Nichols* v. *State, supra*, there is not enough evidence in the case at bar to permit that inference. Here, the appellant, along with two others, was near the cocaine scattered beneath the cushion on the couch—he was sitting on it. But this was not a place "exclusively accessible to the accused and subject to his control." *Crossley, supra.* The plastic bag stuffed between the back of the armchair and the living room wall was not "in plain view" as that term is used in the relevant cases. *See e.g., Sanchez, supra; Nichols, supra.*

Finally, under the circumstances presented here, we cannot say that the fact that the appellant appeared "shocked or scared," alone or in combination with the other facts of the case will support an inference of guilt. In *Cerda* v. *State*, 303 Ark. 241, 795 S.W.2d 358 (1990), the court said, "The fact that appellant was extremely nervous is some indication of guilty knowledge, but does not compel such a conclusion since nervousness during an arrest and search would be expected." That statement applies with somewhat more force to the facts here.

Our conclusion is that under the law the evidence was insufficient to support the verdict of guilt.

Reversed and Dismissed.

COOPER and DANIELSON, JJ., agree.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
JANUARY 27, 1993

Daniel Becker, for appellant.

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

JOHN E. JENNINGS, Judge. On December 23, 1992, Division II of this court delivered an opinion in which we held that the evidence was insufficient to support the conviction of the appellant for possession of cocaine. The State has now filed a petition for rehearing, contending that our opinion failed to address certain incriminating evidence which the State believes is sufficient to render the evidence sufficient. We agree that the evidence is not without significance and that it should have been mentioned in our opinion, but we were aware of its existence at the time our opinion was issued and our view that the evidence was insufficient to support the conviction remains unchanged.

The evidence the State refers to was testimony of Hot Springs detective Henry Boyer:

Q. Sir, when you saw the defendant seated in the middle of this couch, how far would you estimate that he was from the arm chair in the living room?

A. From the arm chair, oh, four, maybe five feet.

Q. And what was his demeanor at the time?

A. Extremely agitated and nervous.

Q. Was he making any movements with his hand?

A. Yes, ma'am.

Q. What movements was he making with his hand?

A. For the officers' safety, we request that the people put their hands behind their head. He kept dropping his hands toward the side.

Q. Towards his — I'm sorry, the air conditioner just turned on.

A. Towards his side or his legs.

Q. And how many times did you observe him drop his hands towards his legs?

A. I don't remember. Several times.

Q. Sir, did you observe the chair in the living room?

A. Yes, I did.

Although the State concedes that it is not clear from the record whether this took place before or after the cocaine was discovered, it nevertheless argues that the officer's testimony constitutes evidence that the defendant was making an "effort to dispose of the contraband," citing decisions such as *Crossley* v. *State*, 304 Ark. 378, 802 S.W.2d 459 (1991).

Certainly the jury was entitled to consider this testimony but, whatever the jury may have made of it, it is not enough to render the evidence sufficient in this case, even when viewed in the

light most favorable to the State. The petition for rehearing is denied.

Fred Randle ALLEN *v.* STATE of Arkansas

CA CR 92-404 842 S.W.2d 468

Court of Appeals of Arkansas
Division II
Opinion delivered December 23, 1992

William L. Wharton, for appellant.

Winston Bryant, Att'y Gen., by: *Didi Sallings*, Asst. Att'y Gen., for appellee.

ELIZABETH W. DANIELSON, Judge. Appellant Fred Allen was convicted by a jury of arson and sentenced to six years imprisonment. He argues on appeal that the trial court erred in denying his motion for a directed verdict based on the insufficiency of the State's evidence. We affirm.

In reviewing the denial of a motion for directed verdict, we consider the evidence in the light most favorable to the appellee and affirm the trial court's decision if there is substantial evidence to support the conviction. *Safely* v. *State*, 32 Ark. App. 111, 797 S.W.2d 468 (1990). Substantial evidence is evidence of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resort to speculation or conjecture. *Id.*

A person commits arson if he starts a fire or causes an explosion with the purpose of destroying or otherwise damaging an occupiable structure that is the property of another person. Ark. Code Ann. § 5-38-301 (Supp. 1991). The State alleged that appellant started a fire in the home of his parents with the purpose of destroying or damaging the home, and that the fire caused damage in an amount between $20,000 and $100,000. Appellant argues that the State failed to put on evidence sufficient to overcome the common law presumption against arson.

In *Ross* v. *State*, 300 Ark. 369, 779 S.W.2d 161 (1989), the supreme court stated that in order to overcome the common law presumption against arson, the State must prove not only the burning of the building, but also that it was burned by the willful act of some person criminally responsible for his acts, and not by natural or accidental causes. 300 Ark. at 377. At appellant's trial, the State presented the testimony of Linda Cook, a neighbor of appellant's parents, who testified that she saw appellant and his wife, Becky, having what she described as a "deep conversation" on the night of the fire. She said after appellant spoke on the telephone a couple of times, Becky left and appellant appeared to be "aggravated." After this, Ms. Cook saw appellant come and go from the house four or five times, driving fast and "throwing

gravel." The second to the last time Ms. Cook saw appellant come back carrying a sack. The bedroom light went on and off, then the light in the kitchen. The last time appellant left, he turned out all the lights and sped away. L. G. Caldwell, another neighbor, also testified that around that same time appellant was going in and out a lot, "racing around up and down the streets." Shortly after appellant left the last time, both witnesses heard sirens and saw smoke coming from the Allen residence.

Becky Allen testified that appellant had been drinking the night of the fire and that they had argued because he wanted to use her car. She also testified that when she saw Mr. and Mrs. Allen, appellant's parents, the next morning, Mr. Allen said, "He's burned our home," and Mrs. Allen said, "I can't believe he's done this to us." Both of appellant's parents denied making these statements.

The State also presented the testimony of expert witness Lieutenant Harvis Jacks, an inspector with the Little Rock Fire Department. Lt. Jacks testified that he was called in on the case due to the suspicious nature of the fire. The house was locked when firemen arrived and a bedroom had been ransacked. Lt. Jacks investigated this bedroom and determined that a mattress in the room was the point of origin of the fire. He described the fire in the mattress as a free-burning fire, which occurs when something is ignited on top of the mattress. Due to the nature of the fire and the surrounding circumstances, Lt. Jacks believed the fire was intentionally set. He investigated the scene for any other possible cause of the fire and could find none. However, he did find a partially used bottle of charcoal lighter fluid in the dining area of the house.

Considering all the testimony, the evidence presented by the State is sufficient to meet the requirements set forth in *Ross* v. *State*, 300 Ark. 369, 779 S.W.2d 161, to overcome the common law presumption against arson. We cannot say the trial court erred in denying appellant's motion for a directed verdict.

Affirmed.

COOPER and JENNINGS, JJ., agree.

HELENA-WEST HELENA SCHOOL DISTRICT
v. Ronald DAVIS

CA 92-273 843 S.W.2d 873
Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1992
[Supplemental Opinion on Denial of Rehearing March 24, 1993.*]

*Mayfield, J., would grant rehearing.

David Solomon, for appellant.

McCullough Law Firm, by: *R.S. McCullough*, for appellee.

ELIZABETH W. DANIELSON, Judge. The appellant in this case appeals from a ruling by the Phillips County Circuit Court that reversed the school board's decision to terminate a teacher, appellee Ronald Davis, pursuant to the Teacher Fair Dismissal Act, Ark. Code Ann. §§ 6-17-1501—1510 (1987). The trial court found that appellant was denied due process during the school board proceeding. We disagree and reverse the decision of the trial court.

Appellee, a nonprobationary school teacher in the Helena-West Helena School District, acted as one of several chaperones on a field trip to Hot Springs for twenty-four third and fourth graders. When two other chaperones discovered that two girls were missing from their hotel room and began to inquire up and down the hall, appellee announced that they had become alarmed in their own room and were in his room watching television. After the group returned to West Helena the next day, principal Ernest Simes was notified by the parents of one of the two girls that their daughter was reporting she had been sexually molested by appellee when the two girls were in appellee's hotel room.

Mr. Simes and several of the chaperones met with the girl's parents that same night. Mr. Simes then met with appellee and told appellee of the accusation against him. On Sunday, Mr. Simes became aware that the other girl was making similar accusations. Following meetings with the parents on Monday and another meeting with appellee, appellee was suspended with pay.

Due to the pendency of the criminal charges that had been filed against appellee, the school district took no further action for several months. On January 6, 1989, the superintendent notified appellee by letter that he was recommending appellee's discharge based on sexual molestation of students during the Hot Springs field trip, and advised appellee of his rights under the Teacher

Fair Dismissal Act.

Appellee requested a hearing, which was held April 6, 1989. The medical reports of the two girls were introduced, along with the testimony of Mr. Simes and three others who had served as chaperones on the trip. At the beginning of the hearing, appellee acknowledged that the girls and their parents had chosen not to be present, and then requested a private hearing. At no time did appellee object to the absence of the girls or their parents, or to the fact that he would not be able to cross-examine them due to this absence. The trial court, however ruled that appellee was denied due process because he did not have the opportunity to cross-examine these parties. Appellant argues that the trial court was clearly erroneous in finding that the school board was arbitrary and capricious in dismissing appellee.

The decision to terminate a teacher pursuant to the Teacher Fair Dismissal Act is a matter within the discretion of the school board, and the reviewing court cannot substitute its opinion for that of the school board in the absence of an abuse of that discretion. *Caldwell* v. *Blytheville School District No. 5*, 23 Ark. App. 159, 746 S.W.2d 381 (1988). In reviewing the trial court's decision, we will affirm unless the court's findings are clearly erroneous. *Id.* It is not the function of this court to substitute its judgment for that of the circuit court or the school board. *Allen* v. *Texarkana Public Schools*, 303 Ark. 59, 794 S.W.2d 138 (1990).

In Re Sugarloaf Mining Co., 310 Ark. 772 at 776-777, 840 S.W.2d 172 (1992), the supreme court set out the standard of review of administrative decisions:

> Review of administrative decisions, both in Circuit Court and here, is limited in scope. Such decisions will be upheld if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion. Administrative action may be regarded as arbitrary and capricious only when it is not supportable on any rational basis. It has been said that the appellate court's review is directed not toward the circuit court, but toward the decision of the agency. . . .
>
> The standard has its origin in the Administrative

> Procedure Act and our case law which requires that appellate review under the act be "narrowly prescribed" with "a role of limited scope". . . .

In *Wright* v. *Arkansas State Plant Board*, 311 Ark. 125 at 130-131, 842 S.W.2d 42 (1992), the supreme court also discussed the review of administrative decisions:

> [W]hen reviewing the administrative decisions, we review the entire record to determine whether there is any substantial evidence to support the administrative agency's decision, whether there is arbitrary and capricious action, or whether the action is characterized by abuse of discretion. . . .
>
> To determine whether a decision is supported by substantial evidence, we review the whole record to ascertain if it is supported by relevant evidence that a reasonable mind might accept as adequate to support a conclusion. . . . To establish an absence of substantial evidence to support the decision the appellant must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusion.

In reaching his decision to reverse the school board's determination, the trial court relied on *Casada* v. *Booneville School District No. 65*, 686 F. Supp. 730 (W.D. Ark. 1988). In *Casada*, the court found that the teacher was denied due process where he was not given prior notice of the names of his accusers or the specific nature and factual basis for the charges and was not allowed to cross-examine the witnesses. *Casada*, however, is distinguishable from the case at bar because appellee was promptly notified of the identity of his accusers and the specific nature and factual basis of the charges against him. Although appellee did not have the opportunity to cross-examine the girls or their parents due to their absence, he never objected to this fact or indicated in any way that he desired to exercise his right to cross-examine these parties. Even constitutional issues may be waived if they are not raised below. *See Caldwell* v. *Blytheville School District No. 5*, 23 Ark. App. 159, 746 S.W.2d 381.

In *Alcoholic Beverage Control Div.* v. *Barnett*, 285 Ark.

189, 685 S.W.2d 511 (1985), the court cited a United States Supreme Court decision, *Unemployment Commission* v. *Oregon*, 329 U.S. 143 (1946), in explaining why it is essential to a judicial review under the Arkansas Administrative Procedures Act that issues must be raised before the administrative agency appealed from:

> A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not therefore presented and deprives the [administrative agency] of an opportunity to consider the matter, make its ruling, and state the reason for its action.

And in *American Transportation Corporation* v. *Director*, 39 Ark. App. 104 at 108, 840 S.W.2d 198 (1992), we noted that where "the party does not request the right to cross-examine the witnesses whose hearsay statements have been received in evidence, he effectively waives his right of cross-examination, and due process requirements are not violated."

Appellee's failure to raise the issue of his right to cross-examine the witnesses resulted in a waiver of that right. Considering the testimony and evidence introduced at the school board hearing, and the deference we give to administrative decisions, we find the school board's decision to terminate appellee was supported by substantial evidence and was not arbitrary or capricious. The trial court's reversal of that decision is therefore clearly erroneous and must be reversed.

Reversed.

MAYFIELD and ROGERS, JJ., concur.

JUDITH ROGERS, Judge, concurring. I reluctantly concur in holding that appellee waived both the right to confront and cross-examine the witnesses. If these issues had been preserved, we might be faced with several problems that are glaring by omission in terms of the administrative procedures used by school boards. Significantly, there appears to be no procedural rules that provide for the subpoena power to compel witnesses to appear. Consequently, hearsay problems and confrontation problems are likely to occur in these proceedings. It is difficult to have adequate due process, when there is no process at all prescribed by the rules that

govern such hearings.

MAYFIELD, J., concurs.

SUPPLEMENTAL OPINION ON DENIAL OF REHEARING
MARCH 24, 1993

853 S.W.2d 285

David Soloman, for appellant.

R.S. McCullough, for appellee.

PER CURIAM. Petition for rehearing is denied.

MELVIN MAYFIELD, Judge. This court has today denied the appellee's petition for rehearing our decision in *Helena-West Helena School District* v. *Davis*, 40 Ark. App. 161, 843 S.W.2d 873 (1992). The appellee was a school teacher in the appellant school district, but was terminated at the conclusion of a hearing held by the school board. Appellee appealed to circuit court and that court reversed the school board's decision on the finding that appellee was denied due process because he was not given the opportunity to cross-examine his accusers.

As our original opinion stated, the appellee was one of several chaperons on a field trip by 24 elementary students to Hot Springs. The school principal testified that he received a report from the parents of one of the girls that their daughter and another girl had been sexually molested by the appellee during the group's stay at a Hot Springs hotel.

During the hearing before the school board the appellee's attorney objected to the school principal testifying what a parent of one of the girls had told the principal. Counsel for appellee stated:

> I realize this is not a judicial proceeding but we would object to him saying what they said to him as they chose not to appear here themselves, the parents. We feel that there was no reason for them not to be here.

Notwithstanding the objection, the principal gave a very detailed account of conversations he had with the parents of one of the girls and what he had told other people the parents had told him. And, although the school board's decision was appealed to circuit court where additional evidence was heard, the parents of the two girls did not appear and did not testify at the school board hearing or at

the hearing before the circuit judge.

In reviewing the school board's decision, the court relied upon a United States District Court decision in *Casada* v. *Booneville School District No. 65*, 686 F. Supp. 730 (W.D. Ark. 1988). In that case, Judge Morris Sheppard Arnold said:

> [T]he Eighth Circuit has held in a public employee discharge case that "[i]t is fundamental to a full and fair review required by the due process clause that a litigant have an opportunity to be confronted with all adverse evidence and to have the right to cross-examine available witnesses." *Nevels* v. *Hanlon*, 656 F.2d 372, 376 (8th Cir. 1981). In our case, although plaintiff was confronted with the witnesses against him he was denied the right to cross-examine.

Id. at 732-33.

The opinion of this court which reversed the trial court's decision stated that, although the appellee did not have the opportunity to cross-examine the parents of the girls because of their absence, "he never objected to this fact." The objection which I have quoted above appears on page 54 of the transcript. The circuit judge found it sufficient to raise the due process question and reversed the school board's decision on that point. It is clear that it is not our function to substitute our judgment in these cases for the judgment of the circuit court. *Allen* v. *Texarkana Public Schools*, 303 Ark. 59, 794 S.W.2d 138 (1990); *King* v. *Elkins Public Schools*, 22 Ark. App. 52, 733 S.W.2d 417 (1987).

I would point out that I did not dissent from the original opinion in this case; however, I did agree with an opinion that "reluctantly" concurred in holding that the appellee "waived the right to confront and cross-examine the witnesses." I have now decided that our original decision was wrong. While neither of the girls appellee was accused of molesting testified in either hearing in this case, I do not find any objection to a lack of opportunity to confront and cross-examine the girls. This objection was made with reference to the parents, and considering the testimony as to what the parents of one of the girls said, given as first and second-hand hearsay, and the part those parents played in bringing the charges against the appellee — I now agree with the trial judge that the school board's decision should be reversed.

I am authorized to say that Rogers, J., would grant the Petition for Rehearing in this case but does not join in this opinion.

Linda HUNT *v.* Thomas HUNT

CA 92-490 842 S.W.2d 470

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1992

Tom Garner, for appellant.

Bill H. Walmsley, for appellee.

ELIZABETH W. DANIELSON, Judge. Linda Hunt appeals from an order of the Fulton County Chancery Court reducing appellee Thomas Hunt's child support obligation for the parties' two minor children. We affirm.

The parties were divorced in May 1989, and in that decree, appellee was ordered to pay $160.00 every two weeks for the support of the children. That decree also incorporated an agreement of the parties requiring appellee to carry medical and dental insurance on the children. On September 3, 1991, appellee filed a petition for modification of his child support obligation, alleging a change in circumstances because of his decreased ability to pay.

At trial, appellee testified that he is fifty-six years old and has worked for Union Pacific Railroad for over twenty years. He testified that, in 1989, his take-home pay was $18,280.79; in 1990, it was $18,488.86; and in 1991, he received a three percent increase in gross pay. Appellee testified that, at the time of the divorce, he was working in Yellville and living in Bexar, a distance of approximately fifty-five miles. In August 1991, the railroad transferred appellee's headquarters to Branson, Missouri, and appellee now lives 140 miles away in Calico Rock, Arkansas. He stated that he does not drive back and forth each day but stays overnight and takes his meals at a motel in Branson from Sunday through Thursday. He stated that, at the time of the divorce, his 1988 Chevrolet four-wheel-drive truck was relatively new, but that it now has 111,000 miles on it and that its maintenance has become much more expensive. He stated that he needs to replace his truck and a new truck comparable to the one he now drives would cost him $287.02 for sixty months. Appellee admitted that he has not looked into the cost of a reliable, but less expensive, vehicle. Appellee introduced evidence that his weekly work-

related expenses in 1989 were $122.50; in 1991, they were $279.40, including fifteen meals at $6.00 per meal and five nights at a motel. Because appellee's position with the railroad is a "headquarter job," he is not reimbursed by his employer for these expenses. He also introduced evidence that the cost of maintenance on his vehicle rose from $7.50 per week in 1989 to $25.00 per week in 1991. Appellee testified that, in 1989, medical and dental insurance on the parties' children was provided by his employer but, in July 1991, appellee began paying $50.00 a month for this coverage. According to appellee, the increase in his travel and insurance expenses from 1989 to 1991 was $305.85 per month.

On cross-examination, appellee testified that he has a $9,500.00 savings account upon which he draws $500.00 to $600.00 interest per year but that he has had to withdraw $1,000.00 the past six months to meet expenses and obligations. In explaining why he maintains a home so far away from his work, appellee stated that he needs a place to stay on the weekends when he sees his children.

Appellant testified that she has recently changed jobs and brings home approximately $200.00 more per month than she did at her previous place of employment. Now, however, she pays $120.00 every two weeks for child care, and this new expense is more than the increase in her salary. She stated that she drives a total of forty miles to and from work each day in a 1983 Buick with 113,000 miles on it. She also testified that she helps support her oldest daughter, who is in college.

At the conclusion of the trial, the court took the case under advisement. On February 4, 1992, the chancellor entered an order in which he granted appellee's request for a reduction in his child support payments and ordered him to pay $120.00 twice a month. This modification has reduced the amount of support appellant is receiving by $106.00 per month. Appellant has appealed from this reduction of appellee's child support obligation and argues that the evidence does not support a finding of a change in circumstances.

A change in circumstances must be shown before a court can modify an order regarding child support, and the party seeking modification has the burden of showing a change in

circumstances. *Reynolds* v. *Reynolds*, 299 Ark. 200, 201-02, 771 S.W.2d 764, 765 (1989); *Ross* v. *Ross*, 29 Ark. App. 64, 67, 776 S.W.2d 834, 835-36 (1989). The assumption is that the chancellor correctly fixed the proper amount in the original divorce decree. *Id.*

> In determining whether there has been a change in circumstances warranting adjustment in support, the court should consider remarriage of the parties, a minor reaching majority, change in the income and financial conditions of the parties, relocation, change in custody, debts of the parties, financial conditions of the parties and families, ability to meet current and future obligations, and the child support chart. *Thurston* v. *Pinkstaff*, 292 Ark. 385, 730 S.W.2d 239 (1987). However, there is no hard and fast rule concerning the specific nature of the changed circumstances. *Eubanks* v. *Eubanks*, 5 Ark. App. 50, 632 S.W.2d 242 (1982).

Reynolds v. *Reynolds*, 299 Ark. at 202, 771 S.W.2d at 765. In making this decision, the chancellor must consider the needs of one party as compared to the ability of the other to pay. *See McFadden* v. *Bramlett*, 270 Ark. 850, 852, 606 S.W.2d 375, 377 (Ark. App. 1980).

A chancellor's determination as to whether there are sufficient changed circumstances to warrant an increase in child support is a finding of fact, and this finding will not be reversed unless it is clearly erroneous. *See Freeman* v. *Freeman*, 29 Ark. App. 137, 139, 778 S.W.2d 222, 224 (1989).

In light of appellee's testimony, we find sufficient evidence of a change in circumstances to uphold the chancellor's reduction of child support.

Affirmed.

ROGERS, J., concurs.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. At a hearing on January 7, 1992, the appellee testified that his paycheck "runs between" $600 and $700 each pay day, and he gets paid twice a month. He has minor children whose custody was awarded to

their mother in a divorce decree entered on May 8, 1989. At that time, appellee was ordered to pay $160 every two weeks for child support. After the hearing in January 1992 the chancery court reduced appellee's child support payments to $120 every two weeks.

The appellant argues that the chancellor erred because the evidence does not support a finding that there has been a change in circumstances which supports the modification. I dissent from the decision of this court affirming the chancellor.

My dissent is based on the fact that the Arkansas Supreme Court, in accordance with Ark. Code Ann. § 9-12-312(a) (Repl. 1991), issued a per curiam opinion on February 5, 1990, adopting its most recent revision of the family support chart, *see In Re: Guidelines for Child Support Enforcement*, 301 Ark. 627, 784 S.W.2d 589 (1990), and under that chart a monthly take-home pay of $1200 per month calls for monthly support payments in the amount of $325 for two dependents. Therefore, under the chart, the chancellor's order fixing appellee's support payments for his two children at $120 per month conflicts with the family support chart.

In *Black* v. *Black*, 306 Ark. 209, 812 S.W.2d 480 (1991), the Arkansas Supreme Court reversed and remanded a chancery court order which modified a previous support order. The Supreme Court said it was "unable to determine" whether the chancellor followed the correct procedure required by the court's per curiam order issued on February 15, 1990. The court stated under that per curiam:

> Reference to the chart is mandatory, and the chart itself establishes a rebuttable presumption of the appropriate amount which can only be explained away by written findings stating why the chart amount is unjust or inappropriate.

306 Ark. at 214. In *Cochran* v. *Cochran*, 309 Ark. 604, 832 S.W.2d 252 (1992), the trial court's modification of child support was reversed because the "sum and substance" of the chancellor's remarks in making the modification was that "the chart amount of $78 was unreasonable." The Arkansas Supreme Court said:

> Given the presumption that the chart amount is reasona-

> ble, we believe it is incumbent on the trial courts to give a fuller explanation of their reasons for rejecting the chart. If appellate review is to have much significance, a greater account of why the chart is inappropriate under the circumstances of the case is essential.

309 Ark. 607.

In the present case, the trial court's order made no reference at all to the support chart. It is my view that the two cases quoted from above make it clear that trial courts *must* comply with the Arkansas Supreme Court's per curiam order of February 5, 1990. That order refers to Ark. Code Ann. § 9-12-312(a)(2) and provides, in accordance with that statute, that the amount of child support set out in the chart creates a rebuttable presumption that it is correct, and it is only by "a written finding or specific finding on the record," which states why the chart amount is unjust or inappropriate, that the trial court may deviate from the chart.

The appellant's argument, in the present case, is not specifically based upon the trial court's failure to consider or follow the family support chart. Apparently, that is why the majority opinion makes no mention of the chart or of the chancellor's failure to refer to the chart. However, I think the Supreme Court's decision in *Black* and *Cochran, supra*, and its per curiam of February 5, 1990, clearly indicate that trial courts *must* demonstrate that they have properly considered the chart and that the appellate courts should require that this be done, even if the attorneys do not raise the issue on appeal.

Therefore, I would remand for the trial judge to make written findings explaining his decision to deviate from the family support chart in this case.

PROPERTY OWNERS IMPROVEMENT DISTRICT NO. 247 OF PULASKI COUNTY, ARKANSAS *v.* W. Douglas WILLIFORD, Willis E. and Juanita Starks, Thomas C. and Peggy Joyce Starks, Ronald Reed Hopper and Diana R. Griffin Hopper

CA 91-369 843 S.W.2d 862

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1992

[redacted]

Friday, Eldredge & Clark, by: *Michael G. Thompson* and *Andrew T. Turner*, for appellant.

Hardin & Grace and *John T. Harmon & Assoc., P.A.*, for appellees.

MELVIN MAYFIELD, Judge. The appellant is an improvement district which was formed for the purpose of building a sewer system to serve certain lands in Pulaski County. It filed suit against the appellees to condemn the permanent and temporary easements alleged to be necessary to construct and maintain the system. A total of .7558 acres was taken for the permanent easement and 1.8213 acres for the temporary construction easement.

There are five tracts of land owned separately by the appellees. The tracts vary in size from about 8 to slightly less than 2 acres. Appellees own a total of 17 acres, with more than one-half of it located within the Rock Creek "floodway" as designated by the Federal Emergency Management Agency. Other portions are located within the designated "floodplain." The property is effectively severed by the creek. The portion north of the creek fronts on Kanis Road. Access to the portion south of the creek is severely limited.

Appellant deposited $1050 as estimated just compensation for the property condemned. At trial the appellant's witnesses

testified that the market value of the appellees' property before the taking would range from $1000 per acre to about 5300 per acre. The testimony of the appellees' witnesses placed that value in a range of $340,000 to $420,000 per acre. The jury returned a verdict for the appellees in a total amount of $82,768.30. For reversal, the appellant argues four points. We discuss each point separately but not necessarily in the same sequence argued by appellant.

I.

The first point we discuss is appellant's contention that "the trial court should have struck the landowners' value testimony."

The record shows that this case was tried two times. In the first trial the court granted the improvement district's motion for directed verdict in the amount of its deposit. This resulted from the court's granting the district's motion to exclude the testimony of the landowners' expert witnesses on the basis that their testimony was not admissible on the issue of the amount due for just compensation to the landowners. Afterwards, the court granted the landowners' motion for new trial. This appeal is from the judgment entered after the second trial. The point now under discussion was raised by appellant's motion to strike the testimony of the landowners' two "expert" witnesses who had also testified in the first trial.

One of the expert witnesses was John W. "Jay" DeHaven. The appellant argues the court should have struck Mr. DeHaven's testimony because he did not have a reasonable basis for his testimony. We do not think it would serve any purpose to discuss the testimony of this witness in detail. Suffice it to say that the motion to strike presented a matter largely within the sound discretion of the trial judge. *Arkansas State Highway Commission* v. *Kennedy*, 233 Ark. 844, 849, 349 S.W.2d 133 (1961). *See also Arkansas Louisiana Gas Co.* v. *James*, 15 Ark. App. 184, 692 S.W.2d 761 (1985). We cannot say that the trial judge erred in refusing to strike Mr. DeHaven's testimony.

The landowners' other expert witness was Mary Kay Peyton. We discuss her testimony in some detail in order to explain our holding on this point and because her testimony is also involved in our consideration of appellant's third point for reversal.

Ms. Peyton was an employee of the Maumelle Company. Mr. DeHaven was president of that company. Both he and Ms. Peyton testified that the highest and best use of the appellees' property was for commercial development. Ms. Peyton was not an appraiser but was a licensed real estate broker and was general sales manager at the Maumelle Company, which was a land development and marketing company. This case was Ms. Peyton's first time to give an opinion on value to a jury in a condemnation case.

At the first trial Ms. Peyton's testimony was struck because she "figured" the value of the entire property owned by the appellees at $2.50 per square foot. She then used that figure to determine the value of the portion taken for easement purposes by the appellant. She testified: "But I did not determine separately the fair market value of the actual easement itself, independent of the rest of the property." In sustaining the objection to Ms. Peyton's testimony in the first case, the judge said, "Under Ms. Peyton's method of valuation, one could pick any spot of land out of the entire tract and Ms. Peyton would value it at $2.50 per square foot. And yet, it is obvious that some portions of the tract are worth more than that, some less."

At the second trial, Ms Peyton evaluated the appellees' land separately. Two tracts were still given the value of $2.50 per square foot, but "to be conservative," Ms. Peyton testified, the other tracts "were adjusted" to $2.00 per square foot. She testified that she had changed her "approach" for the second trial, but admitted "I have gone back and recalculated to come up with a different method for establishing basically the same thing." Ms. Peyton did testify that she started with a square-foot valuation based on the market value of comparable property. She said she adjusted the value of the appellees' property based on the information she gathered on the cost of filling appellees' land to where it would be suitable for commercial development. She admitted there was a problem with access to that portion of appellees' property south of the creek, that she had "no idea" what it would cost to build a bridge over the creek, but she thought there were "all kinds of possibilities in dealing with that creek besides building a two million dollar bridge across it." She also testified, using the Williford property as an example, that after his property was filled, brought to grade, and was ready to be built

on, it would be worth $2.50 per square foot; that this would be the average price, the portion north of the creek and fronting on Kanis Road being worth $6.00 per square foot and the portion south of the creek being worth $.50 per square foot.

Because the motion to strike is largely a matter of discretion, we cannot hold that the trial court erred in refusing to strike Ms. Peyton's value testimony, but her testimony impacts on the next point that we discuss.

II.

The second point we discuss is appellant's argument that the trial court applied the wrong measure of damages.

Appellant offered two instructions, which were refused, on the measure of just compensation. Requested Instruction No. 3 was as follows:

> The measure of damages allowed for the taking of land for a right-of-way or easement is the market value of the land so taken and, separately, the damage, if any, resulting from the taking to the owner's remaining lands.

The other instruction offered by appellant on the measure of just compensation was requested Instruction No. 4, which stated:

> You are instructed that the measure of compensation to be paid for the temporary easement is the fair rental value of the property within the temporary easement for the period of construction which, in this case, was one year.

The court refused each of the above requested instructions, and over appellant's objection that it was the wrong measure of damage, the court gave the jury the following instruction:

> You are to assess the damages to the property of Doug Williford, Juanita Starks, Ron and Diana Hopper and Tom Starks and you must then fix the amount of money which will reasonably and fairly compensate each of them for the difference in the fair market value of the lands of each immediately before and immediately after the taking.

The appellant contends that the correct measure of damages in a condemnation case involving a partial taking by a nonsovereign condemnor is the value of the land taken plus any damage to the remainder, but if the taking is by the sovereign, the correct

measure is the difference in the fair market of the entire tract immediately before and immediately after the taking. Our decision in *Arkansas Louisiana Gas Co.* v. *James*, 15 Ark. App. 184, 692 S.W.2d 761 (1985), is cited in support of appellant's contention. In that case we acknowledged that the rule in the two situations is different. We explained that this results from the right of the sovereign to have any special benefits offset against the damages sustained by the landowner, while no such right exists where the condemnor is a private corporation. Cited in support of our explanation where the cases of *Arkansas Louisiana Gas Co.* v. *Howell*, 244 Ark. 86, 423 S.W.2d 867 (1968), and *Ozark Gas Transmission System* v. *Hill*, 10 Ark. App. 415, 664 S.W.2d 892 (1984).

As we stated in *James*, the Arkansas Constitution permits the state to authorize private corporations to condemn property but Article 12, § 9 provides that full compensation must be paid by the corporation "irrespective of any benefit from any improvement proposed by such corporation." What this means was summed up by the Arkansas Supreme Court in *Howell*:

> Consequently, we hold that, when a private corporation takes property through the process of eminent domain, damages are properly awarded on the basis of the full fair market value for the easement taken, plus any damage occurring to the remainder of the property.

244 Ark. at 90.

Although the appellees contend that the appellant improvement district should be accorded the status of sovereign for the purpose of determining the proper measure of damages when the district exercises its power of eminent domain, we do not agree. Appellant is a property owners' improvement district formed under the provisions of Ark. Code Ann. §§ 14-93-101 — 14-93-133 (1987 and Supp. 1991). Ark. Code Ann. § 14-93-113(a) (Supp. 1991) provides:

> (1) All districts organized under this chapter shall have the right of eminent domain in order that they may carry out the purposes of their creation.
>
> (2) This right shall be exercised in the same manner as in the case of railroad, telegraph, and telephone compa-

> nies, but without the necessity of making a deposit of money before entering into possession of the property condemned.

The right of eminent domain granted to railroad, telegraph, and telephone companies is controlled by Ark. Code Ann. §§ 18-15-1201—18-15-1207 (1987). Section 18-15-1204(b) provides:

> The amount of damages to be paid the owner of the lands for the right-of-way for the use of the company shall be determined and assessed irrespective of any benefit the owner may receive from any improvement proposed by the company.

It is clear that the explicit statutory provisions governing the exercise of the appellant improvement district's right of eminent domain require payment for the market value of the land taken without offset for any benefit the landowner may receive from the construction of the improvement.

Thus we have two methods to arrive at just compensation in eminent domain cases. When the sovereign exercises its right to take a portion of a tract of land, the proper way to measure just compensation is by the difference in the fair market value of the entire tract immediately before the taking and the fair market value immediately after the taking. In this way any special benefit resulting from the public use of the land taken by the sovereign which increases the value of the land not taken will offset the amount the sovereign will have to pay. This is proper because the owner of the land has received his just compensation, although partly by the increase in value of the land he has left.

On the other hand, where railroad, telegraph and telephone companies (or improvement districts) exercise the right of eminent domain, the just compensation to the owner of the land taken is properly measured by the value of the portion of the land taken plus any damage to the portion left. In this way, the owner of the land receives payment "irrespective of any benefit" the owner may receive from the construction of the improvement. This is proper because it is what the statutes enacted by the legislature of this state, in keeping with our constitution, provide.

Our case of *Arkansas Louisiana Gas Co.* v. *James, supra*, which thoroughly discussed these two measure of just

compensation, and the reasons for them, also discussed another point argued by the appellees in the instant case:

> While testimony as to the before and after values might be prejudicial to the landowner as permitting the trier of fact to consider special damages, it prejudices no right of the appellant corporation. If there was technical error in admitting this testimony of appellee it was harmless.

15 Ark. App. at 189. While there was no prejudice to the appellant in *James*, we think there was prejudice in the instant case. Here, the easement taken for the sewer line was within the Rock Creek floodway. Neither of the appellees' expert witnesses testified to the value of the easement actually taken. Their testimony focused upon the difference in the value of the appellees' property before and after the taking. This is also how the trial court's instruction told the jury to arrive at the amount of just compensation to be awarded to the appellees. This case, however, is not like the *James* case where only the testimony was at issue. There is nothing in that opinion which suggests that the court instructed the jury that the way to measure just compensation was to take the difference in the before and after values. Under the peculiar circumstances here, including the vast difference in the appellant's and appellees' value testimony, we think it was error for the court to instruct the jury to award the appellees the difference in the before and after value of their property instead of the value of the property taken and the damage, if any, to the land remaining. The appellant has expressed the point as follows:

> [B]y applying the before and after measure, the Court enabled the Appellees' value witnesses to establish an "across the board" average value per square foot of each of the tracts involved which had the effect of increasing the value of the floodway lands because they were averaged with the Kanis Road frontage.

As the appellant points out, Ms. Peyton testified that two tracts were worth $2.50 per square foot and the other tracts were worth $2.00 per square foot. She did not, however, testify as to the value of the property *taken* for the easement. We think the failure of the trial court to correctly instruct the jury to base compensation on the value of the easement taken, plus any damage to the

property remaining, constituted reversible error. We also think the court should have given appellant's requested Instruction No. 4, which pertained to the temporary easement.

III.

We now discuss appellant's argument that the trial court should have allowed the landowners to be questioned concerning the purchase price paid for their properties. We think the court did err in not allowing appellant to cross-examine appellee Williford about this matter since Williford said on direct examination that he "certainly paid more" for his property than the appellant offered to pay for the taking of Williford's property. However, this point may not arise on retrial. As to the other appellees, the considerations on retrial will involve how recent the purchase was, whether the transaction was voluntary, whether there has been marked fluctuation in values since the purchase, and various other factors. *See Arkansas State Highway Commission* v. *Hubach*, 257 Ark. 117, 514 S.W.2d 386 (1974); *Arkansas Power and Light Co.* v. *Llewellyn*, 268 Ark. 839, 595 S.W.2d 712 (Ark. App. 1980).

IV.

Finally, we discuss the appellant's contention that the trial court erred in refusing to instruct the jury that the landowners has the burden of proving that the amount deposited by the appellant was not sufficient as just compensation for the property taken. Instruction No. 6, offered by appellant and refused by the court, was as follows:

> The defendants contend that the plaintiff has not offered just compensation for the easement right taken for the sewer line. The defendants have the burden of proving this contention.

The court also refused appellant's requested instruction No. 7, which is AMI Instruction 202. This instruction would have told the jury that the party who has the burden of proof on an issue must establish it by a preponderance of the evidence and would have defined the meaning of preponderance of the evidence.

It has long been recognized in Arkansas that the burden of

proof on the issue of just compensation is upon the landowner. In *Springfield and Memphis Railway* v. *Rhea*, 44 Ark. 258 (1884), the court said:

> To the defendant were justly accorded the opening and conclusion of the argument. The landowner is, in such cases, the real actor, no matter which party initiates the proceedings. No issue can be raised as to the right of the railroad corporation to condemnation, or as to his right to compensation. The law confers these rights, and the filing of the petition by the railroad company is an admission that he is entitled to some damages. The extent of the damage is the object of the inquiry. *And here the burden of proof is upon him.*

Id. at 264 (emphasis added). We do not find where this point has been questioned since the above case was decided; however, the Arkansas Supreme Court has occasionally repeated the rule. In *Arkansas State Highway Commission* v. *Hambuchen*, 243 Ark. 832, 833, 422 S.W.2d 688 (1968), the court said, "The landowners, having the burden of proof on the issue of value, rested their case after having produced only two witnesses." In *Arkansas State Highway Commission* v. *Southern Development Corporation*, 250 Ark. 1016, 1020, 468 S.W.2d 102 (1971), the court said, "Market value is a factual issue peculiarly within the province of the jury and to be proved by the owner as a fact." And in *Arkansas State Highway Commission* v. *First Pyramid Life Insurance Company*, 265 Ark. 417, 579 S.W.2d 587 (1979), Justice Fogleman, dissenting in part, said, "In this case, the ultimate power of the sovereign is pitted against the private citizen-subject who bears the burden of proving by a preponderance of the evidence the amount of 'just compensation' due him for his property taken by the sovereign," 265 Ark. at 427.

Moreover, Ark. Code Ann. § 16-64-110 (1987), in pertinent part, states:

> (3)(A) The party on whom rests the burden of proof in the whole action must first produce his evidence;
>
> (B) The adverse party will then produce his evidence;

. . . .

> (6) The parties may then submit or argue the case to the jury. In the argument the party having the burden of proof shall have the opening and conclusion; and if, upon the demand of his adversary, he refuses to open and fully state the grounds upon which he claims a verdict, he shall be refused the conclusion.

In keeping with the above statutory provisions, the appellees in this case first produced their evidence, and in the arguments to the jury the appellees opened and closed.

■ We think it is clear that in Arkansas in a condemnation case where the issue is just compensation the landowners have the burden of proof on that issue. While the appellees cite some authority in other jurisdictions which hold that neither party has the burden on this issue — that it is simply a question of going forward with the evidence — we think the rule is different in this state and that this case was subject to our well-established rule that places the burden of proving just compensation on the landowner and gives him the right to open and close in producing evidence and arguing the case to the jury.

The appellees suggest, however, that even if they had the burden of proof, it was not reversible error for the trial court to refuse to give appellant's requested jury instruction on that point. We cannot agree.

■ The just compensation evidence in this case varied tremendously. Appellees' witness, Jay DeHaven, fixed their just compensation at more than $260,000. The highest amount fixed by the appellant's witnesses was $3890. The per-acre value of the land owned by appellees ranged between $340,000 to $420,000 according to appellees' evidence and from $1000 to $5300 according to appellant's evidence. We believe the jury should have been told who had the burden of establishing the amount of just compensation to which the appellees were entitled. Moreover, by refusing to give appellants' requested instruction No. 7, there was no instruction by the court that gave the jury any guidance on the amount, degree, or weight of the evidence upon which it should base its verdict. In addition to telling the jury that the party who has the burden of proof on an issue must establish it

by a preponderance of the evidence, instruction No. 7 would have told the jury that "it, upon any issue in the case, the evidence appears to be equally balanced,of if you cannot say upon which side it weighs heavier, you must resolve that question against the party who has the burden of proving it."

Both requested instructions No. 6 and 7 would have given crucial guidance to the jury which had the task of making a decision based upon enormously conflicting evidence. However, we are not satisfied that appellant's requested instruction No. 6 was totally correct, and it is the general rule that a party entitled to an instruction on an issue may not complain of the failure of the court to instruct on the matter if the requested instruction is erroneous or incomplete. *Pineview Farms, Inc.* v. *Smith Harvestore, Inc.*, 298 Ark. 78, 90, 765 S.W.2d 924, 931 (1989). And if appellant's requested instruction No. 6 should not have been given, requested instruction No. 7 would have been abstract and could not have been given. Nevertheless, we are reversing this case on another point, and in view of another trial we discuss the problem presented by appellant's requested instruction No. 6.

That instruction would have told the jury that the landowners contend the improvement district has not *offered* just compensation and the landowners have the burden of proving this contention. We are aware of the case of *Arkansas State Highway Commission* v. *Johnson*, 300 Ark. 454, 780 S.W.2d 326 (1989), and its holding that Ark. Code Ann. § 27-67-312 (1987) requires an estimate of just compensation to be annexed to the declaration of taking of property for public highway purposes and that this estimate is not a negotiation or settlement figure excluded as evidence by Ark. R. Evid. 408. See 300 Ark. at 462, 780 S.W.2d at 330. That statute, however, applies to eminent domain actions brought by the State Highway Commission. The statutes applicable to such actions brought by improvement districts do not make the same provision. Even more important is the tendency of appellant's requested instruction No. 6 to focus the jury's attention on the landowners' burden to prove that the appellant *had not offered* just compensation rather than the *amount* of just compensation to which the landowners were entitled.

On retrial, we think the issues in this case can be properly submitted to the jury by the usual instructional format which

would tell the jury that this is an eminent domain action whereby the improvement district is taking the permanent and temporary easements necessary to construct and maintain a sewer system. The instructions should then tell the jury that "you have the duty to determine from a preponderance of the evidence, and from the rules set out in the court's instruction, the amount of just compensation to be awarded the defendants." That instruction should be followed by the instruction on the measure of damages applicable to the case as set out in appellant's requested instructions No. 3 and 4. Those instructions should be followed with one which tells the jury that the burden of proof is on the landowners to prove their claims for just compensation by a preponderance of the evidence. That phrase should then be defined as set out in appellant's requested instruction No. 7, which is AMI Instruction 202.

Of course, other specific instructions would be given as needed, but the instructions outlined above will, in our opinion, present the basic elements to the jury on retrial.

Reversed and remanded.

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

JENNINGS, J., dissents.

ROGERS, J., joins in the dissent.

JOHN E. JENNINGS, Judge, dissenting. The circuit judge's instructions to the jury were entirely correct and afford no ground for reversal.

Appellant's proffered instruction number seven was AMI 202, the general instruction on burden of proof:

> A party who has the burden of proof on a proposition must establish it by a preponderance of the evidence, unless the proposition is so established by other proof in the case. "Preponderance of the evidence" means the greater weight of evidence. The greater weight of evidence is not necessarily established by the greater number of witnesses testifying to any fact or state of facts. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any issue in the case, the evidence appears to be

> equally balanced, or if you cannot say upon which side it weights heavier, you must resolve that question against the party who has the burden of proving it.

The Arkansas Supreme Court has said on a number of occasions that the landowner has the burden of proof on the issue of the value of the land. *Springfield & M. Ry.* v. *Rhea*, 44 Ark. 258 (1884); *Arkansas State Highway Comm'n* v. *Hambuchen*, 243 Ark. 832, 422 S.W.2d 688 (1968); *Arkansas State Highway Comm'n* v. *Southern Dev. Corp.*, 250 Ark. 1016, 468 S.W.2d 102 (1971). If the landowner has the burden of proving value, why then would the condemnor not be entitled to have AMI 202 given? The answer lies in the fact that the term "burden of proof" is used in the law to mean two quite different things. It may refer to the "burden of persuasion" (or "risk of non-persuasion"), or it may refer to the burden of going forward with the evidence ("the production burden"). This distinction was made at least as early as 1898 by Professor James B. Thayer and is explained in elementary text books on civil procedure. *See* Fleming James, Jr. & Geoffrey C. Hazard, Jr., *Civil Procedure* § 7.5 et. seq. (3d ed. 1985). We have recognized the distinction in another context. *See Reese* v. *State*, 26 Ark. App. 42, 759 S.W.2d 576 (1988).

The landowner in an eminent domain proceeding has the burden of going forward with the evidence. He is entitled to open and close the argument. *Rhea*, *supra*, at 264. He must put on his evidence first and should he offer no evidence at all he would no doubt be subject to the entry of a directed verdict and would have judgment only for the amount deposited in the registry of the court by the condemnor. These are matters addressed to the court not the jury. James & Hazard, *supra*, § 7.7. It is in this sense that the landowner has the burden of proof.

The burden of persuasion, however, is dealt with in instructions to the jury such as AMI 202 which tell the jury how to resolve an issue if the evidence on that issue is equally balanced. *See* James & Hazard, *supra*, at § 7.6. To put the burden of persuasion on the landowner on the issue of damages in an eminent domain case would be to tell the jury to set damages at the amount testified to by the condemnor's witness when the evidence on each side weighs equally. Surely in such a case the jury may set the damages somewhere in between the value

testified to by the opposing experts. *See L.R. Junction Ry.* v. *Woodruff*, 49 Ark. 381, 5 S.W. 792 (1887).

The failure to observe the distinction between the two meanings of "the burden of proof" has aptly been said to lead to "hopeless confusion." *See* James & Hazard, *supra*, at 314.

Nichols says that the majority rule is that the landowner has the burden of proof.

> From the rule that an award is [vacated] by appeal and cannot be considered by the jury in determining damages, it follows that the burden of proof of establishing his right to substantial compensation is upon the owner, even if he is defendant or respondent in the proceeding, since it is clear . . . that if no evidence were introduced by either party, the jury would have no basis upon which to fix the compensation and would be bound to award nominal damages only. [Footnotes omitted.]

5 Julius L. Sackman, *Nichols' Law of Eminent Domain* § 18.5 (rev. 3d ed. 1985). Although the distinction is not expressly made, it is clear enough that Nichols uses the term "burden of proof" in the sense of the burden of going forward with the evidence.

The Conference of Commissioners on Uniform State Laws also explicitly recognized this distinction in drafting the Model Eminent Domain Code (1984). Section 903(a), addressing the burden of production, states "The defendant shall make the first opening statement, proceed first in the presentation of evidence on the issue of the amount of compensation, and make final closing argument." As the comment to section 903 notes, "Subsection (1) is consistent with the majority view in the United States that the property owner, in an eminent domain action, has the right to open and close, and may proceed first with the presentation of evidence on the issue of the amount of compensation."

In contrast, § 904 of the Model Code, regarding the burden of persuasion, provides that, "No party has the burden of proof on the issue of the amount of compensation." The comment to that section states:

> It seems difficult to assign an intelligible meaning to

> the concept of "burden of proof" in the eminent domain context, since the pleadings are not required to allege or deny the amount of compensation claimed, and the ultimate standard of decision is the constitutional rule of "just compensation." The amount of compensation that is "just" is essentially an objective market-established fact, although the practical difficulties of marshalling persuasive evidence of that fact are often formidable. From a realistic view, the trier of fact ordinarly is presented with varying and inconsistent opinions as to value, together with disparate supporting data; the ultimate determination necessarily reflects the weight and degree of credibility accorded to these estimates. Under these circumstances, no rational policy basis exists for assigning presumptive validity to the amount specified either in the condemnor's offer or in the property owner's demand, thereby requiring the adverse party to assume the burden of controverting that figure.

The Supreme Court of Ohio has said the same thing: "You might as well undertake to fit a hat to a headless man as to fit the doctrine of burden of proof to a proceeding of this character [eminent domain], which is absolutely wanting an issue to which such doctrine can be applied." *Martin* v. *City of Columbus*, 101 Ohio St. 1, 127 N.E. 411 (1920).

Recent cases have recognized the distinction between the two meanings or aspects of "the burden of proof" and have declined to place the burden of persuasion on the landowner. In *State* v. *45,621 Square Feet of Land*, 475 P.2d 553 (Alaska 1970), the Supreme Court of Alaska hit the nail on the head:

> In a condemnation proceeding such as the case at bar where the sole issue is determination of just compensation, procedural rules involving the concept of risk of failure to persuade are inapposite.Here the focal point of the trier of fact's inquiry is the ascertainment of just compensation. Thus, regardless of whether the condemning agency or the property owner meets a given burden of persuasion, Alaska's constitutional mandate requires that the owner be awarded just compensation for the property he has lost. In the usual condemnation case, the jury is confronted with

> conflicting opinions as to value. The jury is not faced with the necessity of finding a particular value or no value at all. As to the issue of fair market value, both the condemning agency and the property owners may produce competent evidence of the fair market value of the condemned property. Absent the production of such evidence by either party, the triers of fact will determine fair market value solely from the other party's evidence. The burden of production facet of burden of proof, rather than the risk of non-persuasion aspect, is the more meaningful concept in the trial of a condemnation proceeding.

See also Solko v. *State Roads Comm'n*, 82 Md. App. 137, 570 A.2d 373 (1990) ("Condemnation cases are fundamentally different from other kinds of cases where value is concerned."); *Hamer* v. *School Bd.*, 240 Va. 66, 393 S.E.2d 623 (1990) (No ultimate risk of non-persuasion on the issue of just compensation in a condemnation proceeding); *Ellis* v. *Ohio Turnpike Comm'n*, 124 N.E.2d 424 (1955), *rev'd on other grounds*, 164 Ohio St. 377, 131 N.E.2d 397 (1955) (jury acts as an assessing or appraising board, determining the fair-market value of the property from all the evidence submitted); *Morrissey* v. *Commonwealth Dep't of Highways*, 424 Pa. 87, 225 A.2d 895 (1967) (instructing jury that condemnees had burden of proving that their damages were greater than damages testified to by condemnor usurped power and function of jury); *Unified Sewerage Agency* v. *Duyck*, 33 Or. App. 375, 576 P.2d 816 (1978) ("Either party may provide evidence of factors which contribute to an assessment of just compensation, but neither has the burden of proof").

The circuit court was right not to give appellant's proffered instruction number seven and the judge's ruling does not violate or conflict with any decision of our supreme court.

Appellant's proposed instruction number 6 would have told the jury that the landowners had the burden of proving that they had "not [been] offered just compensation." If the instruction is construed to mean that the landowner has the burden of persuasion, it was wrong for the reasons just stated. On the other hand, if the instruction means only that the landowners had the burden of going forward with the evidence, it may be a correct statement of law but relates to a matter addressed solely to the trial judge and

is not a matter for instruction to the jury. *See* James & Hazard, *supra*, § 7.7.

The majority also holds that the trial judge committed reversible error in telling the jury that the measure of damages was the difference between the value of their land before the taking and after the taking. According to the majority the circuit court should have told the jury to award the landowners the value of the land actually taken *plus* the damage, if any, to their remaining lands.

Our opinion in *Arkansas Louisiana Gas Co.* v. *James*, 15 Ark. App. 184, 692 S.W.2d 761 (1985), adequately explains why appellant, the condemnor, could not possibly be prejudiced by the failure to give an instruction which draws the jury's attention to severance damages as a separate element of damages. But apart from *James*, the supreme court has made it fairly clear that in a "partial taking case" the two instructions at issue here are merely different versions of the same rule; they offer "alternative formulas" to arrive at just compensation. *See Young* v. *Arkansas State Highway Comm'n*, 242 Ark. 812, 415 S.W.2d 575 (1967); *Arkansas State Highway Comm'n* v. *Morris*, 244 Ark. 1152, 1155, 429 S.W.2d 114, 116 (1968) (Brown, J., concurring). The court should not give both instructions. *Young; Morris, supra.* But the instruction given by the judge here has been approved expressly or impliedly by the supreme court in partial taking cases. *Arkansas Louisiana Gas Co.* v. *McGaughey Bros.*, 250 Ark. 1083, 468 S.W.2d 754 (1971); *Arkansas State Highway Comm'n* v. *Delaughter*, 250 Ark. 990, 468 S.W.2d 242 (1971); *Arkansas State Highway Comm'n* v. *Stallings*, 248 Ark. 1207, 455 S.W.2d 874 (1970); *Clark County* v. *Mitchell*, 223 Ark. 404, 266 S.W.2d 831 (1954); *St. Louis, A. & T. R.R.* v. *Anderson*, 39 Ark. 167 (1882). The drafters of the Model Code, as well as Nichols and Orgel, not only recognize the two formulas as essentially equivalent but also prefer the "before and after" rule followed by the circuit judge in the case at bar. Model Eminent Domain Code § 1002 comment (1984); 4A Julius L. Sackman, *Nichols' the Law of Eminent Domain* § 14.05 (rev. 3d ed. 1985); 1 Lewis Orgel, *Valuation Under the Law of Eminent Domain* § 65 (2d ed. 1953). I see neither error nor prejudice in the court's instruction on the measure of damages.

If the question were whether the landowners received more money for their property than should reasonably been awarded, I could perhaps agree. But that is neither an issue on appeal nor a stated basis for our reversal.

For the reasons stated, I respectfully dissent.

ROGERS, J., joins in this dissent.

OSMOSE WOOD PRESERVING *v.* Buddy L. JONES

CA 91-472 843 S.W.2d 875

Court of Appeals of Arkansas
En Banc
Opinion delivered December 23, 1992

Shaw, Ledbetter, Hornberger, Cogbill & Arnold, by: *E. Diane Graham*, for appellant.

Jay N. Tolley, for appellee.

JUDITH ROGERS, Judge. This is an appeal from the Workers' Compensation Commission's order affirming and adopting the administrative law judge's decision finding that appellee had contracted an occupational disease, histoplasmosis, during the course and scope of his employment with appellant and that he had become totally disabled as a result. On appeal, appellant contends that the Workers' Compensation Commission's decision is not supported by substantial evidence. We disagree and affirm.

In reviewing the Commission's decision, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Deffenbaugh Industries* v. *Angus*, 39 Ark. App. 24, 832 S.W.2d 869 (1992). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. We do not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached. *Willmon* v. *Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992).

Appellee worked for Osmose Wood Preserving, appellant, from February 1990 until July 1990. Appellant engages in the manufacturing of utility poles and inspection of existing power line utility poles to determine if the poles need to be replaced. To determine if the poles needed to be replaced or treated, an 18 by 24 inch hole was dug around the base of the pole. If the pole needed to be treated, it was coated with creosote, wrapped with material and the ground restored. Appellee's job consisted of digging around the poles and treating the poles if necessary. About June 21, 1990, appellee became ill. Dr. Robin J. McAlister determined that appellee was suffering from histoplasmosis after eliciting a positive histoplasmosis serology.

The applicable statute in this case is Ark. Code Ann. § 11-9-601 (1987). Specifically under § 11-9-601(e), an occupational disease is one that results in disability or death and arises out of and in the course of the occupation. However, no compensa-

tion shall be payable for any ordinary disease of life to which the general public is exposed. § 11-9-601(e)(3). Also, under § 11-9-601(e)(2), no compensation shall be payable for any contagious or infectious disease unless contracted in the course of employment in a hospital or sanitorium.

The administrative law judge found that appellee was exposed to the histoplasma capsulatum; that histoplasmosis is peculiar to the occupation in which appellee was engaged; and that histoplasmosis is not a disease common to the general public. The administrative law judge also noted that histoplasmosis is not the kind of infectious disease which the statutory exclusion addresses.

First, appellant argues that the record is void of any proof that appellee actually came into contact with the fungus which caused his histoplasmosis while working for appellant. However, the record discloses that appellee was working in Northwest Arkansas which is saturated with poultry production houses and that histoplasma capsulatum is endemic to this area. The appellee testified that the poles which he inspected and treated were located in rural areas, and that the lines ran through bushy areas, creek bottoms, farms, chicken houses and in fields treated with chicken feces. Appellee testified that he had on occasion dug through chicken feces to gain access to the poles. Dr. Robin McAlister's notes concerning appellee stated that appellee denied any camping trips, hunting, fishing or exposure to wild animals. Dr. McAlister also noted that "in light of all of this, as well as positive serologies confirming histoplasmosis and positive mediastinal lymph node biopsies, it must be assumed that this patient had significant exposure to histoplasma capsulatum through his work. I am unable to elicit any other method of exposure." Dr. Eileen Taft stated "[i]t seems logical to me that systemic illness with this organism may have well resulted from the activities which the patient performs in his line of work." Also, Dr. Taft notes that appellee's work certainly predisposes him to exposure to a relatively high inoculum of the organism.

In workers' compensation cases, medical opinions need not be expressed in terms of reasonable medical certainty in speaking of causal connection when there is supplemental evidence supporting the causal connection. *Hope Brick Works* v.

Welch, 33 Ark. App. 103, 802 S.W.2d 476 (1991). Causal connection is generally a matter of inference, and possibilities may play a proper and important role in establishing that relationship. *Id.* Given the evidence that appellee was exposed to the fungus at work and the medical opinions offered on this subject, we cannot say there is no substantial evidence to support the Commission's finding that appellee's condition was causally related to his employment.

Second, appellant argues, with reference to Ark. Code Ann. § 11-9-601(e)(3), that 80% of the people in Arkansas are exposed to the fungus and that no other employee contracted the fungus. The fact that the general public may contract the disease, however, is not controlling; the test of compensability is whether the nature of employment exposes the worker to a greater risk of that disease than the risk experienced by the general public or workers in other employments. *Sanyo Mfg. Corp.* v. *Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984). In this case, there was testimony that appellee was exposed to chicken feces and areas with the histoplasmosis fungus on a daily basis due to his employment. Consequently, we cannot say there is no substantial evidence to support the finding that appellee was placed at a greater risk of acquiring the fungus than the general public.

Also, appellant contends that histoplasmosis is an "infectious disease" which bars a workers' compensation claim. This argument is based on Dr. McAlister's testimony that histoplasmosis was a fungus that was "infectious" and the provision of Ark. Code Ann. § 11-9-601(e)(2), which states:

> (2) No compensation shall be payable for any contagious or infectious disease unless contracted in the course of employment in, or immediate connection with, a hospital or sanitorium in which persons suffering from that disease are cared for or treated.

However, just as the ALJ pointed out in his decision, we are of the opinion that appellee's histoplasmosis is not excluded under Ark. Code Ann. § 11-9-601(e)(2) (1987).

Provisions of the Workers' Compensation Act are to be construed liberally in favor of the claimant. In interpreting a

statute and attempting to construe legislative intent, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, legislative history, and other appropriate matters that throw light on the matter. *City of Fort Smith* v. *Tate*, 38 Ark. App. 172, 832 S.W.2d 262 (1992).

The original Arkansas Workers' Compensation law, enacted in 1939, provided coverage for occupational disease and included a schedule of compensable diseases and included a schedule of compensable disease under Ark. Code Ann. § 81-1314(a)(5). Listed in the category of compensable diseases was:

> 12. Infectious or contagious disease contracted in the course of employment in, or in immediate connection with, a hospital or sanatorium in which persons suffering from such disease are cared for or treated.

In 1976, section 14, the occupational disease section, was amended by Act 1227. The listing of compensable diseases was discarded; however, a provision was maintained to protect hospital or sanatorium workers under § 81-1314(a)(5)(ii), which is now codified at Ark. Code Ann. § 11-9-601. When reviewing the statutory history of this provision, we observe that the category set out in § 81-1314(5)(12) (1948) was inclusive in nature and provided coverage for contagious or infectious diseases which hospital or sanatorium workers contracted through their employment. Section 11-9-601(e)(2) was not meant to exclude coverage for employees who contract an infection in the course of their employment because they do not work in a hospital or sanatorium, but rather was to protect hospital and sanatorium workers. We have repeatedly held that the Workers' Compensation Act is to be liberally construed in favor of the claimant in accordance with the Act's remedial purpose. *Deffenbaugh Industries* v. *Angus*, 39 Ark. App. 24, 832 S.W.2d 869 (1992). We cannot say that the Commission's conclusion that appellee's histoplasmosis is the type of infection which is compensable under § 11-9-601 was in error. Based on the evidence that appellee acquired histoplasmosis through his exposure to the fungus in connection with his employment; that appellee was placed at a greater degree of risk of contracting this fungus due to his work; and that histoplasmosis is peculiar to appellee's job, we also cannot say

that there is no substantial evidence to support the Commission's decision.

Affirmed.

Rhonda KIMBLE *v.* Robert GRAY, Sr.

CA 92-1154 842 S.W.2d 473

Court of Appeals of Arkansas
Opinion delivered December 23, 1992

Kimberly D. Burnette, for appellant.

Dale E. Adams, for appellee.

PER CURIAM. The appellee, Robert Gray, Sr., moves to dismiss the appeal filed by the appellant, Rhonda Kimble, on the grounds that Ms. Kimble did not timely file a notice of appeal in accordance with Arkansas Rule of Appellate Procedure 4(c). We agree with the appellee and dismiss the appeal.

Both parties agree that the order upon which this appeal is based was entered on June 15, 1992, and that the appellant filed a Motion for a New Trial on June 16, 1992, in accordance with Arkansas Rule of Civil Procedure 59(b). The trial court did not act on the motion within thirty days and thus, it was deemed denied on July 16, 1992, the thirtieth day after its filing. On that same day, July 16, the appellant filed her Notice of Appeal. The appellee, by his motion, contends that the Notice of Appeal was filed within the thirty-day jurisdiction of the lower court; there-

fore, it is not timely and should be dismissed.

We refer to Rule 4 to determine whether filing an appeal on the thirtieth day after the filing of a post-trial motion which was neither granted nor denied is timely. Rule 4(c) of the Rules of Appellate Procedure provides:

> (c) Disposition of post-trial motion. If a timely motion listed in section (b) of this rule is filed in the trial court by any party the time for appeal for all parties shall run from the entry of the order granting or denying a new trial or granting or denying any other such motion. Provided, that if the trial court neither grants nor denies the motion within thirty (30) days of its filing, the motion will be deemed denied as of the thirtieth day. A motion of appeal filed before the *expiration of the thirty-day period* shall have no affect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion or from the expiration of the thirty-day period. No additional fees shall be required for such filing. [Emphasis added.]

A part of the reporter's notes to the foregoing rule provides:

> Under Rule 4(c), a motion is deemed denied if the trial court neither grants nor denies the motion within thirty days of its filing, and, under Rule 4(d), the time for filing the notice of appeal begins to run *at the end of that thirty-day period*. If, however, an order granting or denying the motion is acted upon within the thirty-day period, the time for filing the notice of appeal begins to run upon entry of the order. [Emphasis added.]

In the appellant's response to the motion to dismiss, she states that her Notice of Appeal was timely as it was filed on the day that the trial court lost jurisdiction, and *Kelly* v. *Kelly*, 310 Ark. 244, 247, 835 S.W.2d 869 (1992) would appear to support her argument. That case states:

> Subsection (c) now explicitly provides that a notice of appeal is ineffective if it is filed prior to the date of the disposition of the post-trial motion, or, if no order is entered, *prior to the date* that the motion is deemed denied. [Emphasis ours.]

Nevertheless, the wording of the rule, and the reporter's notes, make clear that when the trial court rules on the post-trial motion, a notice of appeal is timely when filed "upon entry" of that order. When the trial court fails to rule on the post-trial motion, the trial court retains jurisdiction of the matter until "the end," or "expiration," of the thirtieth day.

Because the appellant's notice of appeal was filed on the thirtieth day, it is untimely and ineffective. The appellee's motion is granted; the appeal is dismissed.

MAYFIELD, J., dissents.

MELVIN MAYFIELD, Judge, dissenting. The majority of this court has dismissed the appeal of this case because the notice of appeal was filed on the same day appellant's motion for new trial was deemed denied. I dissent.

Rule 4 of our Rules of Appellate Procedure provides in section (a) that, except as otherwise provided in subsequent sections of the rule, a notice of appeal must be filed "within thirty days" from the entry of the judgment, decree, or order appealed from, and section (c) provides that, if certain motions are filed, the time of appeal shall run from the entry of the order granting or denying the motion—or if the motion is not granted or denied within thirty days of filing, "the motion will be deemed denied as of the 30th day." It goes on to say that a notice of appeal filed "prior to the expiration of the 30-day period shall have no effect" and that "a new notice of appeal must be filed within the prescribed time measured . . . from the expiration of the 30-day period." Section (d) of Rule 4 states that upon disposition of a motion listed in section (b), any party desiring to appeal "shall have thirty days from . . . the expiration of the 30-day period provided in section (c) of this rule within which to give notice of appeal."

Looking back at the above provisions, we see that notice of appeal must be filed "within thirty days," or "within the prescribed time . . . from the expiration of the 30-day period" and that a party "shall have thirty days from" the expiration of the 30-day period.

Rule 4 simply does not provide that a notice of appeal filed on the "day of" is not "within" or "from the expiration of." Cases

cited by the appellant hold that a notice of appeal filed on the day that triggers the start of the 30-day period is within that period. *See Edmonds* v. *State*, 282 Ark. 79, 665 S.W.2d 882 (1984) (notice of appeal must be filed "within 30 days from" certain events.) And appellant cites a case where we said "since the trial court did not act on appellant's motion within thirty days, it was deemed denied as of the thirtieth day, or May 10, 1990. . . . Consequently . . . notice of appeal filed *before* May 10 . . . would be untimely under Rule 4(c)." (Emphasis added.) *Phillips Construction Co.* v. *Cook*, 34 Ark. App. 224, 226, 808 S.W.2d 792 (1991).

The majority opinion relies upon *Kelly* v. *Kelly*, 310 Ark. 244, 247, 835 S.W.2d 869 (1992), but that case simply holds that a notice of appeal filed *prior* to the date of disposition of the post-trial motion is no longer effective under the present language of Appellate Procedure Rule 4. However, that is not the point in the instant case. Here, the notice of appeal was filed on the same day the post-trial motion was deemed denied. We said in *Phillips Construction Co.* v. *Cook*, *supra*, that a notice of appeal filed *before* the disposition of the post-trial motion is ineffective, and *Kelly* v. *Kelly*, *supra*, said a notice of appeal filed *prior* to the disposition of the post-trial motion is ineffective. However, neither case said that a notice of appeal *filed on the same day* of the disposition of the post-trial motion is ineffective.

I would construe Rule 4 liberally and allow this appeal. I do not believe the Arkansas Supreme Court has, or will, do otherwise. Therefore, I dissent from the dismissal of this appeal.

OAKLAWN BANK *v.* Spencer D. ALFORD

CA 92-729 845 S.W.2d 22

Court of Appeals of Arkansas
Division I
Opinion delivered January 20, 1993

Friedman & Hooper, by: *Donald B. Friedman*, for appellant.

No response.

MELVIN MAYFIELD, Judge. This appeal follows the successful assertion of the statute of limitations by appellee, Spencer

Alford, in an action brought against him by appellant, Oaklawn Bank, for a deficiency judgment following the repossession and sale of collateral securing a promissory note.

On July 1, 1985, appellee signed a note in the amount of $11,655.36 to Oaklawn Bank in order to finance the purchase of a 1985 Jeep. The note provided that appellee would make forty-eight monthly payments of $242.82 beginning August 16, 1985, and that appellee would be in default if he failed to make a payment when due. It also provided that, in the event of default, appellant could accelerate the due date of the note, making all sums immediately due. The security agreement appellee gave to appellant provided remedies in the event of default, which included the right to take immediate possession of the property, with or without legal process, to sell it, and to apply the proceeds as provided by law toward payment of repossession expenses and satisfaction of the debt. The security agreement stated: "You will be entitled to a deficiency judgment if the proceeds of sale do not pay all the secured obligations (except where prohibited by law)."

Appellee defaulted in payments on the note, and appellant repossessed the vehicle. On August 11, 1986, appellant sent the following notice to appellee:

> As you know on August 9, 1986, we repossessed the motor vehicle described below which we were financing for you. The vehicle is being held in storage for Oaklawn Bank, where it will remain until August 21, 1986. If you pay your account in full the amount of $13,847.42 on or before that date[,] [w]e will release the certificate of title to the vehicle to you. You will also need to pick up any personal belonging[s] on or before August 21, 1986 or we will dispose of the property.
>
> If you do not pay your account in full on or before that date, it is our intention to offer the vehicle at private sale on the next succeeding business day. We will apply the net proceeds of the sale to your account. If the amount of the proceeds is less than the amount due us, we will notify you of the amount and will expect you to pay the deficiency.

On September 18, 1986, appellant sent a letter to appellee stating that the Jeep had been sold, leaving a balance of $2,108.75, and

requesting payment. This letter was returned to appellant with a notation of "Returned to Sender Moved Left No Address."

On September 6, 1991, appellant filed a complaint in the Clark County Circuit Court for the amount of the deficiency plus interest, attorney's fees, and costs and attached a copy of the note and security agreement to the complaint. In response, appellee answered that the five-year statute of limitations had run and asserted the same defense at trial. *See* Ark. Code Ann. § 16-56-111(b) (1987). In an order entered March 6, 1992, the circuit judge found that appellant had accelerated the note by repossessing appellee's vehicle on August 9, 1986, and by writing a letter to appellee dated August 11, 1986, demanding full payment of the note; that the statute of limitations began to run when appellant accelerated the note; and that the statute of limitations expired on August 10, 1991, barring appellant's complaint.

On appeal, appellant argues that the statute of limitations, at least with regard to the deficiency, had not run before it filed its complaint. Appellant asserts that it had two potential causes of action when appellee defaulted on the note: it could either (1) accelerate the note, forego repossession and sale of the collateral, and institute legal action for collection of the entire balance due under the note; or (2) repossess the collateral, dispose of it in a commercially reasonable manner, apply the proceeds of the sale to appellee's indebtedness, and if a deficiency remained, take legal action for its collection. Appellant asserts that it could not have maintained a successful action for the collection of a deficiency balance until the amount was established by the sale of the collateral on September 18, 1986; the statute of limitations, therefore, did not begin to run until September 18, 1986, and did not expire before the filing of the complaint. We disagree.

A statute of limitations does not begin to run until the plaintiff has a complete and present cause of action. *Corning Bank v. Rice*, 278 Ark. 295, 300, 645 S.W.2d 675, 678 (1983). The period of limitations for contracts runs from the point at which the cause of action accrues. *Eckels v. Arkansas Real Estate Comm'n*, 30 Ark. App. 69, 79, 783 S.W.2d 864, 870 (1990). For breach of contract, the true test in determining when a cause of action arises or accrues is to establish the time when the plaintiff could have first maintained the action to a successful

conclusion. *Dupree v. Twin City Bank*, 300 Ark. 188, 191, 777 S.W.2d 856, 858 (1989); *Davenport v. Pack*, 35 Ark. App. 40, 45-46, 812 S.W.2d 487, 490 (1991). A cause of action for breach of contract accrues the moment the right to commence an action comes into existence, *Dupree v. Twin City Bank*, 300 Ark. at 191, 777 S.W.2d at 858, and occurs when one party has, by words or conduct, indicated to the other that the agreement is being repudiated or breached. *Eckels v. Arkansas Real Estate Comm'n*, 30 Ark. App. at 80, 783 S.W.2d at 870. In ordinary contract actions, the statute of limitations begins to run upon the occurrence of the last element essential to the cause of action. *Chapman v. Alexander*, 307 Ark. 87, 88, 817 S.W.2d 425, 426 (1991).

Appellant is correct in asserting that, if the right of action depends upon some contingency or a condition precedent, the cause of action accrues and the statute of limitations begins to run when the contingency occurs or the condition precedent is complied with. *Dupree v. Twin City Bank*, 300 Ark. at 191, 777 S.W.2d at 858; *Rice v. McKinley*, 267 Ark. 659, 664, 590 S.W.2d 305, 308 (Ark. App. 1979). Appellant, however, confuses its remedy of repossession, sale, and an action for any deficiency with its cause of action on the debt owed by appellee to appellant. In fact, appellant fundamentally errs in characterizing this remedy as a cause of action. The basis for appellant's cause of action against appellee was the debt evidenced by the promissory note and secured by the Jeep; the note and the security agreement provided remedies for the satisfaction of this debt in the event of default.

After appellee defaulted and appellant accelerated the debt, appellant's cause of action on the debt evidenced by the note did not depend upon any further contingency or condition precedent. Appellant's right to a deficiency judgment was simply part of a remedial process appellant initiated by accelerating the debt and cannot be treated as a separate cause of action. We, therefore, agree with the circuit judge in his finding that the statute of limitations began to run with appellant accelerated the debt and that it barred appellant's complaint.

Affirmed.

JENNINGS, C.J., and ROGERS, J., agree.

Eric WOODS *v.* STATE of Arkansas

CA CR 92-497 846 S.W.2d 186

Court of Appeals of Arkansas
Division II
Opinion delivered January 27, 1993

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

Winston Bryant, Att'y. Gen., by: *Kent G. Holt*, Asst. Att'y Gen., for appellee.

JOHN B. ROBBINS, Judge. Appellant, Eric J. Woods, was convicted of battery in the first degree and sentenced to a term of ten years in the Arkansas Department of Correction. Appellant contends on appeal that the trial court erred in requiring his alibi witness, Ray Lewis, to be handcuffed when he was introduced to the jury and when he testified. We find no error and affirm.

The appellant was charged with violation of Ark. Code Ann. § 5-13-201, and a jury trial was held on January 15, 1992. Just prior to commencement of the trial, while the court was disposing of some pretrial matters, appellant's attorney brought to the court's attention the fact that his witness, Ray Lewis, was presently in the custody of the Pulaski County jail. He also reported that he had taken the liberty of having Lewis dressed in civilian street clothes for the trial and requested that he not be brought into the courtroom in handcuffs. He further informed the court that Lewis had two prior convictions and was currently charged with two counts of armed robbery. The trial court initially stated that the matter would be decided by the court's bailiff, who was of the opinion that Lewis was a security risk. Upon further protest by appellant, the court allowed counsel to call witnesses to discover the basis for believing Lewis was a security risk.

The court's chief probation officer and bailiff, G. L. Smith, was called and testified that because the last two prisoners who escaped from court did so in civilian clothes the rule was adopted that prisoner-witnesses could not come to court in civilian clothes unless the prisoner was being tried in a jury trial. The trial court indicated it would make the same ruling, and stated that it was not convinced that appellant would suffer any prejudice by having Lewis handcuffed while testifying.

The trial court noted that it would allow appellant to voir dire potential jurors for possible prejudice due to the handcuffs and allow challenges for cause. The trial court also noted appellant's continuing objection to the ruling on the handcuffs.

When the witness, Lewis, was introduced before the jury in handcuffs, the trial court stated that its policy was to introduce witnesses and it was not the intention of the trial court to draw attention to this witness. Lewis was again brought before the jury in handcuffs during the appellant's presentation of his case.

The trial court has discretion to use physical restraints on a defendant for security purposes and to maintain order in the courtroom. *Terry* v. *State*, 303 Ark. 270, 796 S.W.2d 332 (1990). The United States Supreme Court has said that where it is essential to maintain dignity, order, and decorum in the courtroom restraints may be used. *Illinois* v. *Allen*, 397 U.S. 337 (1970). Rule 33.1 of the Arkansas Rules of Criminal Procedure addresses the matter as follows:

> Defendants and *witnesses* shall not be subjected to physical restraints while in the court *unless* the trial judge has found such restraint reasonably necessary to maintain order. If the trial judge orders such restraint, he shall enter into the record of the case the reasons therefor. Whenever physical restraint of a defendant or *witness* occurs in the presence of jurors trying the case, the judge shall *upon request of the defendant or his attorney instruct the jury that such restraint is not to be considered in assessing the proof and determining the guilt.*

(Emphasis added.) The rule leaves the issue of whether to subject a defendant or a witness to physical restraints while in the courtroom to the discretion of the trial judge.

As clearly reflected in the record, restraint was reasonable because of the witness's prior felony convictions and the two pending charges of aggravated robbery for which he was being held in jail. The testimony of Chief Smith explained the security risks involved when a prisoner in the courthouse wears street clothes. The pending charges against Lewis and his exposure to increased punishment due to his prior felony convictions added to Lewis's risk of flight. The trial judge is in a better position to evaluate the potential for danger and disruptions than this court on appeal.

Under Rule 33.1 of the Arkansas Rules of Criminal Procedure, "the judge shall upon request of the defendant or his attorney instruct the jury that such restraint is not to be considered in assessing the proof and determining guilt." Although appellant made a continuing objection to his witness being seen by the jury in handcuffs, he never requested an admonition pursuant to Ark. R. Crim. P. 33.1.

Appellant contends on appeal that the trial court erred in requiring his witness to be handcuffed while testifying and during his introduction to the jury, because this resulted in prejudice to him and his right to a fair trial. It is not prejudicial, per se, when the defendant is brought into a courtroom handcuffed. *Townsend* v. *State*, 308 Ark. 266, 824 S.W.2d 821 (1992); *Hill* v. *State*, 285 Ark. 77, 685 S.W.2d 495 (1985). In *Williams* v. *State*, 304 Ark. 218, 800 S.W.2d 713 (1990), the Arkansas Supreme Court said "we have held that it is not prejudicial, per se, when a defendant [witness] is brought into court handcuffed and that the defendant must affirmatively demonstrate prejudice." The Arkansas Supreme Court has also stated that it "would not presume prejudice when there was nothing in the record to indicate what impression may have been made on the jurors . . . where the appellant did not offer any proof of prejudice." *Hill* v. *State, supra* at 79, citing *Gregory* v. *United States*, 365 F.2d 203 (8th Cir. 1966). The appellant has offered no proof of prejudice and the record and abstract do not reflect any voir dire of the jury to substantiate his allegations that prejudice resulted from use of the handcuffs. *See* Ark. Sup. Ct. R. 9(d) and *Johnson* v. *State*, 261 Ark. 183, 546 S.W.2d 719 (1977).

Counsel for the appellant offered an alternative to handcuffing by suggesting that bailiffs be placed at the exits to the courtroom, and that they escort the witness to the witness stand. As pointed out in *Townsend* v. *State, supra*, this also would have been obtrusive and would put the jurors on alert that something is different about this witness.

In close cases regarding security in the courtroom, the trial judge is in a better position to evaluate the potential security risks involved with a witness or defendant. Here, the witness's dress, his felony record, his pending aggravated robbery charges, and the risk to innocent people in the courtroom, gave the trial judge adequate justification for the use of restraints in this case. The judgment of the Pulaski County Circuit Court is therefore affirmed.

Affirmed.

COOPER and ROGERS, JJ., agree.

Lester BROOKS *v.* STATE of Arkansas

CA CR 92-542 845 S.W.2d 530

Court of Appeals of Arkansas
Division I
Opinion delivered January 27, 1993

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

Winston Bryant, Att'y Gen., by: *Clementine Infante*, Asst. Att'y Gen., for appellee.

MELVIN MAYFIELD, Judge. Lester Brooks was a passenger in an automobile stopped by Little Rock police after a tip that the occupants of the car were "doing dope." A search of the car produced rock cocaine, drug paraphernalia, and a pistol. As a result appellant was charged with possession of a controlled substance, possession of a firearm, possession of drug paraphernalia, and being a habitual criminal. Appellant was convicted in a bench trial only of possession of drug paraphernalia, and he was

sentenced as a habitual offender to ten years in the Arkansas Department of Correction with four years suspended. Appellant filed a pretrial motion to suppress all the physical evidence seized from the car alleging that the officers did not have "reasonable suspicion" to stop it. The motion was denied.

Little Rock police officer Sammy Gately testified that on May 29, 1991, at approximately 8:30 p.m., he was flagged down by a citizen and informed of criminal drug activity associated with a car. Specifically, the citizen told the officer that there were three people in the car and that all of them were smoking crack cocaine. The citizen gave a description of the people in the car, and while this was being told to the officer, the vehicle drove by. The officer followed it to Roosevelt and Wolfe where a "uniform police car" stopped the vehicle. According to Officer Gately, when the driver got out, a small rock that appeared to be crack cocaine was lying on the driver's seat, and a plastic baggie containing a white powder residue believed to be cocaine was visible on the floorboard. As appellant exited the vehicle on the passenger's side, Officer Gately said he observed the grip of a pistol and a clear "crack smoking pipe" partially under the passenger seat. The officer said he retrieved both items and that the gun had five live rounds in it. He also related that a female passenger in the back seat had her feet on a "metal crack smoking pipe" and that a check of the serial number of the gun showed it to be stolen.

The following dialogue then took place:

> Q. So, you stopped and you talked to this citizen. Did you get a name of this citizen?
>
> A. No, ma'am.
>
> Q. Had you ever talked with the citizen before?
>
> A. No.
>
> Q. Did you know whether the citizen was a reliable informant?
>
> A. No.
>
> . . . .
>
> Q. Okay. And you didn't know the citizen from anybody

else?

A. Unh un.

Q. Okay. When you pulled this vehicle over - You said you followed it and you pulled it over at Roosevelt and Wolfe Street. You pulled it over based on that information. Is that correct?

A. Yes, ma'am.

Q. You didn't pull it over based on anything that you saw in that vehicle?

A. No.

Q. So, at the time that you pulled that vehicle over you had not seen any kind of suspicious activity going on in the vehicle. Had not seen any criminal activity.

A. No, ma'am.

Q. Nothing to make you believe or cause you reasonable suspicion to believe that there was any criminal activity going on in that vehicle?

A. I did not witness any criminal activity in the vehicle.

Q. Is that citizen here today to testify in this case?

A. Not to my knowledge.

Based on the citizen's information and on his observation that the vehicle was driving back through a neighborhood it had just left, Officer Gately said he radioed a patrol car to pull the vehicle over. Officer Gately elaborated on redirect:

A. The citizen described the vehicle, gave us a license number off the vehicle, described the occupants of the vehicle. When the vehicle came back through, he said, "There is the vehicle." When I saw the vehicle, there was three occupants just like he described. The license number was the same as he gave us.

Q. Okay. So, he actually pointed it out?

A. Yes, ma'am.

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), the United States

Supreme Court held that the police can briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity "may be afoot." This policy has been adopted in this state as Arkansas Criminal Procedure Rule 3.1 which provides in pertinent part as follows:

> A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person he reasonably suspects is committing, has committed, or is about to commit (1) a felony or (2) a misdemeanor involving danger or forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or determine the lawfulness of his conduct.

Rule 2.1 of the Arkansas Rules of Criminal Procedure defines "reasonable suspicion" as follows:

> "Reasonable suspicion" means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

We think the trial court was correct in refusing to suppress the evidence seized from the car in which the appellant was riding. Criminal Procedure Rule 3.1 permits an officer to stop and detain a person the officer "reasonably suspects" may be engaged in criminal conduct, and we think under "a consideration of the total circumstances" there were "particularized, specific reasons for a belief" that appellant might be engaged in criminal activity. *See Stout* v. *State*, 304 Ark. 610, 804 S.W.2d 686 (1991).

Appellant argues that the physical evidence should have been suppressed based on *Lambert* v. *State*, 34 Ark. App. 227, 808 S.W.2d 788 (1991), which he interprets as holding that "an anonymous tip in and of itself was not sufficient reasonable suspicion" to warrant the stop. In *Lambert* the Arkansas State Police received a tip on July 27, 1989, on their "Drug Hot Line"

that at approximately 3:00 p.m. a vehicle would be leaving Hot Springs headed for Little Rock, carrying about ten pounds of marijuana. The vehicle was described by the tipster as being a truck with a black tractor with "Woodline Motor Freight" in orange letters on the side carrying a short-bed trailer and would be driven by a man named Jerry. Surveillance was set up, and at 3:50 p.m. a truck identical to the description was spotted and was pulled over by a state trooper. The driver's name was Jerry Lambert. Appellant was asked if there was marijuana in the truck. He replied that there was and got a large bag of marijuana out of the truck and gave it to the officer.

This court held:

> [W]e cannot hold that the facts corroborating the tip in the case at bar are sufficient in quality or quantity, under the totality of the circumstances test, to give rise to reasonable suspicion.

34 Ark. App. at 230.

We do not consider *Lambert* to be controlling in the instant case. Here a citizen was speaking face to face with the officer, relating criminal activity that he had observed. He supplied the officer with the description of the vehicle, its occupants and its license number. Furthermore, as they were speaking the car passed and the citizen pointed it out to the officer. Under these circumstances we think there was "reasonable suspicion" for the officer to stop the car. We think the "indicia of reliability" to justify the investigatory stop in this case was as great as that approved in *Alabama* v. *White*, 496 U.S. 325 (1990).

Affirmed.

JENNINGS, C.J., and PITTMAN, J., agree.

[redacted]

[redacted]